

The Perimeter Guidance manual

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Chapter 1

Introduction to the Perimeter Guidance manual

1.1 Application and purpose

Application

1.1.1

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This manual applies to:

- (1) a *person* who is considering carrying on activities in the *United Kingdom* which may fall within the scope of the *Act* and is seeking *guidance* on whether he needs to be an *authorised person*;
- (2) a *person* who seeks to become an *authorised person* under the *Act* and who is, or is considering, applying for *Part 4A permission* to carry on *regulated activities* in the *United Kingdom*;
- (3) a *person* who is seeking *guidance* on whether any communication he may be seeking to make or cause to be made will be a *financial promotion* and be subject to the restriction in section 21 of the *Act*; and
- (4) *persons* generally.

Purpose

1.1.2

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The purpose of this manual is to give *guidance* about the circumstances in which *authorisation* is required, or *exempt person* status is available, including *guidance* on the activities which are regulated under the *Act* and the exclusions which are available.

1.2 Introduction

1.2.1

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- (1) The Financial Services and Markets Act 2000 (the *Act*) is the *UK* legislation under which *bodies corporate, partnerships*, individuals and unincorporated associations are permitted by the *FCA* or *PRA* to carry on various financial activities which are subject to regulation (referred to as *regulated activities*).
- (2) The activities which are *regulated activities* are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*): for example, *accepting deposits, managing investments, effecting contracts of insurance, dealing in investments as agent*. In general terms, a *regulated activity* is an activity, specified in the *Regulated Activities Order*, carried on by way of business in relation to one or more of the *investments* specified in the *Regulated Activities Order*. ■ PERG 2 gives further general *guidance on regulated activities and specified investments*.

1.2.2

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- (1) The *Act*, and the secondary legislation made under the *Act*, is complex. Although *PERG* gives *guidance about regulated activities and financial promotions*, it does not aim to, nor can it, be exhaustive.
- (2) References have been made to relevant provisions in the *Act* or secondary legislation. However, since reproducing an entire statutory provision would sometimes require a lengthy quotation, or considerable further explanation, many provisions of the *Act*, or secondary legislation made under the *Act*, are summarised. For the precise details of the legislation, readers of the manual should, therefore, refer to the *Act* and the secondary legislation itself, as well as the manual.
- (3) The *Act* and the secondary legislation made under it can be obtained from HMSO at <http://www.legislation.hmsso.gov.uk/legislation/uk.htm> or can be accessed through the Treasury's website (www.hm-treasury.gov.uk).

1.2.3

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PERG uses words and phrases that have specific meanings in the *Handbook* or in legislation; these may be different from, or more precise than, their usual dictionary meanings. Defined terms used in the text of the *Handbook* are shown in italics (see Chapter 7 of the Reader's Guide to the *Handbook* at <http://www.fca.org.uk/your-fca/documents/handbook/handbook-readers-guide>). For the meanings of defined terms used in *PERG*, see the *Glossary*. It is essential that readers refer to these definitions. In the case of those parts of *PERG* which take the form of Q&A, however, to ensure greater

accessibility of the text we have only italicised *Handbook* terms in those places where we think that it would be helpful to the majority of readers.

1.2.3A **G** Except in ■ PERG 2 and ■ PERG 7, where *PERG* uses the defined term of *advising on investments*, this term refers only to the *regulated activity* (in article 53(1) of the *Regulated Activities Order*) of *advising on investments (except P2P agreements)* and related text should be read and construed accordingly.

1.2.4 **G** ■ PERG 1.4.1 G (General guidance to be found in PERG) summarises the general *guidance* contained in *PERG*. Readers should note that in a cross-reference, as explained in paragraph 40 of the Readers' Guide, the code letters of the manual or sourcebook immediately precede the chapter number. For example, ■ PERG 1 is the first chapter of the Perimeter Guidance manual. ■ PERG 1.5 provides details of and links to other general *guidance* on perimeter issues that is available on the *FCA* website.

1.3 Status of guidance

1.3.1

G This *guidance* is issued under section 139A of the *Act* (Guidance). It represents the *FCA's* views and does not bind the courts. For example, it would not bind the courts in an action for damages brought by a *private person* for breach of a *rule* (see section 138D of the *Act* (Actions for damages)), or in relation to the enforceability of a contract where there has been a breach of sections 19 (The general prohibition) or 21 (Restrictions on financial promotion) of the *Act* (see sections 26 to 30 of the *Act* (Enforceability of agreements)). Although the *guidance* does not bind the courts, it may be of persuasive effect for a court considering whether it would be just and equitable to allow a contract to be enforced (see sections 28(3) and 30(4) of the *Act*). Anyone reading this *guidance* should refer to the *Act* and to the relevant secondary legislation to find out the precise scope and effect of any particular provision referred to in the *guidance* and any reader should consider seeking legal advice if doubt remains. If a *person* acts in line with the *guidance* in the circumstances mentioned by it, the *FCA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

1.4 General guidance to be found in PERG

1.4.1 **G** ■ PERG 1.4.2 G has a table setting out the general *guidance* to be found in *PERG*.

1.4.2 **G** Table: list of general guidance to be found in *PERG*.

Chapter:	Applicable to:	About:
PERG 2: Authorisation and regulated activities	<ul style="list-style-type: none"> an <i>unauthorised person</i> wishing to find out whether he needs to be <i>authorised</i> or <i>exempt</i> an <i>authorised person</i> wishing to know whether he needs to vary his <i>Part 4A permission</i> 	<ul style="list-style-type: none"> the regulatory scope of the <i>Act</i> the <i>Regulated Activities Order</i> the <i>Exemption Order</i> the <i>Business Order</i>
PERG 3A: Guidance on the scope of the <i>Electronic Money Regulations</i>	a <i>person</i> who needs to know <ul style="list-style-type: none"> whether a particular electronic payment product is <i>electronic money</i> and whether the <i>person</i> issuing it needs to be authorised or registered under the <i>Electronic Money Regulations</i> 	<ul style="list-style-type: none"> the scope of the <i>Electronic Money Regulations</i>
PERG 4: Regulated activities connected with mortgages	any <i>person</i> who needs to know whether the activities he conducts in relation to mortgages are subject to <i>FCA</i> regulation. This is likely to include: <ul style="list-style-type: none"> lenders administration service providers mortgage brokers and advisers 	the scope of relevant orders (in particular, the <i>Regulated Activities Order</i>) as respects activities concerned with mortgages
PERG 5: Insurance distribution activities	any <i>person</i> who needs to know whether they carry on <i>insurance distribution activities</i> and are, thereby, subject to <i>FCA</i>	the scope of relevant orders (in particular, the <i>Regulated Activities Order</i>) as respects activities concerned with the sale or administra-

Chapter:	Applicable to:	About:
	<p>regulation. This is likely to include:</p> <ul style="list-style-type: none"> • insurance brokers • insurance advisers • <i>insurance undertakings</i> • other <i>persons</i> involved in the sale or administration of <i>contracts of insurance</i>, where these activities are secondary to their main business. 	<p>tion of insurance</p>
<p>PERG 6: Identification of contracts of insurance</p>	<p>any <i>person</i> who needs to know whether a contract with which he is involved is a <i>contract of insurance</i></p>	<p>the general principles and range of specific factors that the <i>FCA</i> regards as relevant in deciding whether any arrangement is a <i>contract of insurance</i></p>
<p>PERG 7: Periodical publications, news services and broadcasts: application for certification</p>	<p>any <i>person</i> who needs to know whether he will be regulated for providing advice about investments through the medium of a periodical publication, a broadcast or a news service</p>	<ul style="list-style-type: none"> • the circumstances in which such <i>persons</i> will be carrying on the <i>regulated activities</i> of <i>advising on investments</i> or <i>advising on regulated mortgage contracts</i> (including where a request for a certificate may be appropriate) • how the <i>FCA</i> will exercise its power to grant certificates
<p>PERG 8: Financial promotion and related activities</p>	<p>any <i>person</i> who needs to know</p> <ul style="list-style-type: none"> • whether his communications are <i>financial promotions</i> or are subject to the restriction in section 21 of the <i>Act</i> or both • whether his activities in making or helping others to make <i>financial promotions</i> are <i>regulated activities</i>. • whether he is <i>marketing</i> an <i>AIF</i>. 	<ul style="list-style-type: none"> • the scope of the restriction on <i>financial promotion</i> under section 21 of the <i>Act</i> and the main exemptions provided • the circumstances in which <i>persons</i> who are primarily involved in making or helping others to make <i>financial promotions</i> may themselves be conducting <i>regulated activities</i> requiring <i>authorisation</i> or exemption • the <i>marketing</i> of an <i>AIF</i>.
<p>PERG 9: Meaning of open-ended investment company</p>	<p>any <i>person</i> who needs to know whether a <i>body corporate</i> is an <i>open-ended investment company</i> as defined in section 236 of the <i>Act</i> (Open-ended investment companies) and is</p>	<p>the circumstances in which a <i>body corporate</i> will be an <i>open-ended investment company</i></p>

Chapter:	Applicable to:	About:
<p>PERG 10: Activities related to pension schemes</p>	<p>therefore a <i>collective investment scheme</i>.</p> <p>Any <i>person</i> who needs to know whether his activities in relation to pension schemes will amount to <i>regulated activities</i> or whether the restriction in section 21 of the <i>Act</i> will apply to any <i>financial promotions</i> he may make.</p>	<ul style="list-style-type: none"> • the <i>regulated activities</i> that arise in connection with the establishment and operation of pension schemes and any exclusions that may be relevant • the circumstances in which <i>financial promotions</i> about pension schemes may be exempt from the restriction in section 21 of the <i>Act</i>
<p>PERG 11: Property investment clubs and land investment schemes</p>	<p>Any <i>person</i> who needs to know whether his activities in relation to property investment clubs and land investment schemes will amount to <i>regulated activities</i> or whether the restriction in section 21 of the <i>Act</i> will apply to any <i>financial promotions</i> he may make.</p>	<ul style="list-style-type: none"> • the <i>regulated activities</i> that may arise in connection with the establishment and operation of property investment clubs and land investment schemes and any exclusions that may be relevant • the extent to which the <i>financial promotion</i> restriction in section 21 of the <i>Act</i> applies
<p>PERG 12: Running or advising on personal pension schemes</p>	<p>any <i>person</i> who needs to know whether his activities in relation to establishing, running, advising on or marketing personal pension schemes will amount to <i>regulated activities</i></p>	<p>the <i>regulated activities</i> that arise in connection with establishing, running, advising on or marketing personal pension schemes and any exclusions that may be relevant</p>
<p>PERG 13: Guidance on the scope of the <i>UK</i> provisions which implemented MiFID</p>	<p>Any <i>UK person</i> who needs to know whether <i>MiFID</i> applies to them</p>	<p>the scope of the <i>UK</i> provisions which implemented <i>MiFID</i></p>
<p>PERG 14: Home reversion, home finance and regulated sale and rent back activities</p>	<p>Any <i>person</i> who needs to know whether his activities in relation to <i>home reversion plans</i>, <i>home purchase plans</i> or <i>regulated sale and rent back agreements</i> will amount to <i>regulated activities</i> or whether the restriction in section 21 of the <i>Act</i> will apply to</p>	<ul style="list-style-type: none"> • the <i>regulated activities</i> that arise in connection with <i>home reversion plans</i>, <i>home purchase plans</i> and <i>regulated sale and rent back agreements</i> and any exclusions that may be relevant • the circumstances in which <i>financial promo-</i>

Chapter:	Applicable to:	About:
	any <i>financial promotions</i> he may make.	<i>tions</i> about <i>home reversion plans, home purchase plans</i> and <i>regulated sale and rent back agreements</i> may be made without breaching the restriction in section 21 of the Act
PERG 15: Guidance on the scope of the Payment Services Regulations 2009	Any person with an establishment in the UK who needs to know whether the Payment Services Directive, as transposed in UK legislation by the Payment Services Regulations 2009, applies to him. Q46 applies specifically to persons providing payment services from an establishment outside the EEA to persons located in the UK.	the scope of the PSD Regulations 2009.
PERG 16: Scope of the Alternative Investment Fund Managers Directive	any <i>person</i> who needs to know whether a collective investment undertaking is an <i>AIF</i> .	the scope of the <i>regulated activities</i> of <i>managing an AIF</i> and <i>acting as trustee or depositary of an AIF</i> .
PERG 17: Consumer credit debt counselling	Any <i>person</i> who needs to know whether his activities in relation to debts will amount to <i>debt counselling</i> .	The scope of the <i>regulated activities</i> relating to consumer credit debt counselling.

1.5 What other guidance about the perimeter is available from the FCA?

1.5.1

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General *guidance* on the perimeter is also contained in various *FCA* documents (mainly fact sheets and frequently asked questions) that are available on the *FCA* website at www.fca.org.uk. These documents, and the URL on which they may be accessed, include:

- (1) [deleted]
- (2) [deleted]
- (3) [deleted]
- (4) [deleted]
- (5) [deleted]
- (6) [deleted]
- (7) *guidance* about the position under the *Insurance Mediation Directive* and the *Regulated Activities Order* of the company appointed to manage a PPP or similar construction and operation project - <http://www.fca.org.uk/your-fca/documents/fsa-ppp-forum-letter> ;
- (8) [deleted]
- (9) *guidance* for employers about how to provide advice and information to their employees on pension matters without contravening the *Act* - <http://www.fca.org.uk/your-fca/documents/fsa-promoting-pensions-employees> ;
- (10) *FCA* "Factsheet for Broker-arranged premium finance plans: General insurance brokers acting for commercial customers" which includes, discussion about whether arranging premium finance is a *regulated activity* (www.fca.org.uk/your-fca/documents/broker-arranged-premium-finance-plans);
- (11) joint guidance by the *FSA* and the Office of Fair Trading titled "Payment protection products" (January 2013) which includes discussion whether debt freezes and debt waivers are *contracts of*

insurance (<https://www.fca.org.uk/publication/finalised-guidance/fsa-fg13-02.pdf>);

(12) the *FSA's* views on whether members of the NHBC who provide insurance to buyers of properties in accordance with the Buildmark scheme carry out *insurance mediation*, contained in a letter to NHBC's solicitors and put onto the *FSA's* Freedom of Information Act register in December 2012 (<https://www.fca.org.uk/publication/foi/fsa-foi2707-info.pdf>).

1.5.1A **G** The *guidance* under ■ PERG 1.5.1G(7) and ■ (12) relates to the *Insurance Mediation Directive*, which has been repealed and replaced by the *Insurance Distribution Directive (IDD)*. The *guidance* relates to whether the *regulated activities* in question are carried on for remuneration and by way of business under the *Insurance Mediation Directive*. The *FCA* does not view the changes under the *IDD* as having affected the analysis of remuneration and the 'by way of business' test set out in this *guidance* and so it continues to be relevant (see also ■ PERG 5.4).

1.5.2 **G** Any *person* who, having read relevant general *guidance* and, where appropriate, taken legal advice, remains uncertain about whether his activities amount to *regulated activities* or his communications will be subject to the restriction in section 21 of the *Act*, may seek individual *guidance* from the *FCA*. Requests for individual *guidance* should be made in line with ■ SUP 9.

1.5.3 **G** In addition, the *FCA* has established a team to provide general assistance and guidance to persons generally about the scope of the *Act*. Enquiries of this kind may be made:

(1) by authorised firms, to either the Contact Centre (email firm.queries@fca.org.uk , Tel 0300 500 0597) or their normal supervisory contact; or

(2) by individuals or non-authorised firms, to the Consumer Contact Centre (email ccc@fca.org.uk , Tel 0800 111 6768).

1.5.4 **G** The *FCA* will review its general *guidance* from time to time and may need to amend or withdraw published or written *guidance* in the light of changing circumstances, developing business practices, or case law. For the status of *guidance* issued by the *FCA*, see ■ PERG 1.3.1 G.

Chapter 2

Authorisation and regulated activities

2.1 Application and purpose

Application

- 2.1.1 **G** This chapter is relevant to any *person* who needs to know what activities fall within the scope of the *Act*.

Purpose

- 2.1.2 **G** The purpose of this chapter is to provide *guidance*:
- (1) to *unauthorised persons* who wish to find out whether they need to be *authorised* and, if so, what *regulated activities* their *permission* needs to include; and
 - (2) to *authorised persons* who may have questions about the scope of their existing *permission*.



2.2 Introduction

- 2.2.1** **G** Under section 23 of the Act (Contravention of the general prohibition or section 20 (1) or (1A)), a *person* commits a criminal offence if he carries on activities in breach of the *general prohibition* in section 19 of the Act (The general prohibition) . An *authorised person* also commits a criminal offence if he carries on a credit-related regulated activity in the UK, or purports to do so, otherwise than in accordance with his *permission* (unless the *person* is an *appointed representative* carrying on the activity in circumstances where, as a result of section 39 (1D) of the Act, sections 20(1) and (1A) and 23(1A) of the Act do not apply). For these purposes, *entering into a regulated credit agreement as lender*, exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement and *debt collecting* are credit-related regulated activities, except in so far as the activity relates to an agreement under which the obligation of the *borrower* to repay is secured on land. Although a *person* who commits the criminal offence is subject to a maximum of two years imprisonment and an unlimited fine, it is a defence for a *person* to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.
- 2.2.1A** **G** A *regulated credit agreement* that is made by an *authorised person* who does not have *permission* to do so, in contravention of section 20 of the Act, could be unenforceable against the *borrower* (see section 26A of the Act).
- 2.2.2** **G** Another consequence of a breach of the *general prohibition* is that certain agreements could be unenforceable (see sections 26 to 29 of the Act). This applies to agreements entered into by *persons* who are in breach of the *general prohibition*. It also applies to any agreement entered into by an *authorised person* if the agreement is made as a result of the activities of a *person* who is in breach of the *general prohibition*.
- 2.2.3** **G** Any *person* who is concerned that his proposed activities may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form in the decision tree in ■ PERG 2 Annex 1 G):
- (1) Will I be carrying on my activities by way of business (see ■ PERG 2.3)?
 - (2) Will I be managing the assets of an *occupational pension scheme* (see ■ PERG 2.3.2G (3))?
 - (3) If the answer is 'Yes' to (1) or (2), will my activities relate to *specified investments* (see ■ PERG 2.6)?

- (3A) Are my activities specified for the purposes of section 22(1)(b) of the Act (and, accordingly, when carried on by way of business, are a *regulated activity* when carried on in relation to property of any kind) or related to a *specified benchmark* (see ■ PERG 2.5.1A G)?
- (3B) Are my activities related to information about a *person's* financial standing (see ■ PERG 2.7.20K G)?
- (4) If the answer is 'Yes' to (3), (3A) or (3B), will my activities be, or include, *regulated activities* (see ■ PERG 2.7)?
- (5) If so, will I be carrying them on in the *United Kingdom* (see ■ PERG 2.4)?
- (6) If so, will my activities be excluded (see ■ PERG 2.8 and ■ PERG 2.9)?
- (7) If not, will I be exempt (see ■ PERG 2.10.5 G to ■ PERG 2.10.8 G)?
- (8) If not, am I allowed to carry on *regulated activities* without *authorisation* (see ■ PERG 2.10.9 G to ■ PERG 2.10.16 G)?
- (9) If not, do I benefit from the few provisions of the Act that *authorise* me without a *permission* under Part 4A of the Act (see ■ PERG 2.10.10 G (Members of Lloyds))?
- (10) If not, what is the scope of the *Part 4A permission* that I need to seek (see ■ PERG 2 Annex 2 G)?

2.2.4

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The rest of this chapter provides a high level guide through the questions set out in ■ PERG 2.2.3 G. It aims to give an overall picture but in doing so it necessarily relies on the reader referring to UK statutory provisions to fill in the detail (which can be extensive).

2.2.5

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The process of applying for *Part 4A permission* is available on the FCA website Apply for authorisation: www.fca.org.uk/firms/authorisation/apply-authorisation. But a list of the activities for which *permission* may be given is annexed to this chapter (see ■ PERG 2 Annex 2 G). You may find this helpful in providing an overview of the activities that are regulated. The list is included here because, with some exceptions, the *investments* and activities for which *permission* may be given are the same as the investments and activities specified in the *Regulated Activities Order*. This creates a few additional categories for which *permission* must be sought.

2.3 The business element

2.3.1 **G** Under section 22 of the *Act (Regulated activities)*, for an activity to be a *regulated activity* it must be carried on 'by way of business'.

2.3.2 **G** There is power in the *Act* for the Treasury to change the meaning of the business element by including or excluding certain things. They have exercised this power (see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177), as amended from time to time). The result is that the business element differs depending on the activity in question. This in part reflects certain differences in the nature of the activities:

- (1) The activity of *accepting deposits* will not be regarded as carried on by way of business by a *person* if he does not hold himself out as *accepting deposits* on a day-to-day basis and if the *deposits* he accepts are accepted only on particular occasions. In determining whether *deposits* are accepted only on particular occasions, the frequency of the occasions and any distinguishing characteristics must be taken into account.
- (2) Except as stated in ■ PERG 2.3.2G (2A) and ■ PERG 2.3.2G (3), the business element is not to be regarded as satisfied for any of the following *regulated activities* unless a *person* carries on the business of engaging in one or more of them:
 - (a) *regulated activities* carried on in relation to *securities* or *contractually based investments*;
 - (b) *regulated activities* carried on in relation to 'any property'
 - (c) the *regulated activities* listed in ■ PERG 2.7.2-BG (Accepting deposits and other regulated activities applying to deposits) so far as they relate to *structured deposits*;
 - (d) the *regulated activities* of *advising on P2P agreements*, *advising on a home finance transaction* and *arranging a home finance transaction*.

This is a narrower test than that of carrying on *regulated activities* by way of business (as required by section 22 of the *Act*), as it requires the *regulated activities* to represent the carrying on of a business in their own right.

- (2A) A *person* who carries on an *insurance distribution activity* will not be regarded as doing so by way of business unless that activity is taken up or pursued for remuneration. ■ PERG 2.3.3 G gives *guidance* on the factors that are relevant to the meaning of 'by way of business' in section 22 of the *Act*. ■ PERG 5.4 (The business test) gives further *guidance* on the business element as applied to *insurance distribution activity*.

- (3) A *person* managing assets on a discretionary basis while acting as trustee of an *occupational pension scheme* may in certain circumstances be regarded as acting by way of business even if he would not, in the ordinary meaning of the phrase, be regarded as doing so. The Financial Services and Markets Act (Carrying on Regulated Activities by Way of Business) Order 2001 (as amended) contains some exceptions from this (see article 4).
- (3A) A *person* who enters into a *regulated sale and rent back agreement* as *SRB agreement provider* is to be regarded as carrying on that activity by way of business except where that *person* is a *related party* in relation to the *SRB agreement seller*.
- (3B) If a *not-for-profit body* is carrying on *debt adjusting, debt counselling or providing credit information services* (or agreeing to carry on a *regulated activity* so far as relevant to any of those activities), it is to be regarded as doing so by way of business. It is immaterial whether the *not-for-profit body* also carries on other activities. This change to the business element does not apply, however, if the *not-for-profit body* carries on that activity only on an occasional basis.
- (3C) No provision in relation to the business element is made in respect of *not-for-profit bodies* carrying on *regulated claims management activity*; but article 89O of the *Regulated Activities Order* provides an exclusion for such bodies (see ■ PERG 2.8.14DG(2)).
- (4) The business element for all other *regulated activities* is that the activities are carried on by way of business. This applies to the activities of *effecting or carrying out contracts of insurance*, certain activities relating to the Lloyd's market, *entering as provider into a funeral plan contract, carrying out a funeral plan contract as provider, entering into a home finance transaction or administering a home finance transaction, operating a dormant account fund, credit-related regulated activities* (subject to the modification for *not-for-profit bodies* in (3B)) and *operating an electronic system in relation to lending*.

2.3.3 G Whether or not an activity is carried on by way of business is ultimately a question of judgement that takes account of several factors (none of which is likely to be conclusive). These include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same *person* but which are not regulated. The nature of the particular *regulated activity* that is carried on will also be relevant to the factual analysis.

2.3.4 G A *person* carrying out the activity of *administering a specified benchmark or providing information in relation to a specified benchmark* will always be carrying out these activities by way of business.

2.3.4A G A *person* carrying out the activity of *administering a benchmark* will always be carrying out that activity by way of business.

2.3.4B

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- (1) The *funeral plan* sector gives an example of how the 'by way of business' requirement referred to in ■ PERG 2.3.1G should be interpreted.
- (2) A burial society or other religious organisation operating within a particular religion and serving a defined religious community of members of that religion may provide a *funeral plan* to its members to facilitate their burial in a manner which complies with the teachings of that religion. In doing that, it may be carrying on *funeral plan provision activity*. However, if the provider does so on a not-for-profit basis, it is unlikely to do so by way of business.
- (3) One should look at whether the provider carries on its activities on a not-for-profit basis in a realistic way. So one should take into account:
 - (a) whether the services benefit, or are provided as part of, wider commercial activities carried on by the provider or by an affiliate or by their members; and
 - (b) any benefits an affiliate may get as well as those the provider gets.
- (4) If the provider's *funeral plan* activities generate a profit, that does not mean that it acts by way of business as long as the surplus is used for the purposes of its funeral activities, for example to buy new land for burials or to maintain its graveyards.
- (5) An important factor in this example is that the overall context is clearly non-commercial. The recipients of the services are not acting commercially. The funerals and the *funeral plan* activities take place within a religious community whose activities cover a much broader range of non-commercial activities. The funerals and the *funeral plan* activities are an integral part of those wider religious activities.
- (6) This non-commercial context means that the burial society or other religious organisation does not carry on the *funeral plan* activities by way of business just because:
 - (a) it carries on the *funeral plan* activities on a continuing basis;
 - (b) it carries on the *funeral plan* activities on an extensive scale; or
 - (c) (in the case of a burial society) the *funeral plan* activities are a major part of what the society does.

Whether someone is carrying on his or her own business

2.3.5

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Another aspect of the *general prohibition* is that an employee will not breach the *general prohibition* by carrying on a *regulated activity* on behalf of his employer. The reason for that is that it is the employer who is carrying on that activity. The employee is simply carrying on the employer's business.

2.3.6

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This principle potentially also applies to agents and others who assist another to carry on that other's business. That does not mean however that agents and other such *persons* can never carry on a *regulated activity*. Apart from anything else it is clear that some *regulated activities* are meant to be carried on by such *persons*, such as *dealing in investments as agent*.

2.3.7

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In the *FCA's* view the following factors are relevant in deciding whether a *person* (referred to in this paragraph as "an individual") is to be treated as carrying on his own business (in which case he may require *authorisation* unless an exemption or exclusion is available) or whether he is carrying on the business of the *person* for whom he works (in which case he will not require *authorisation*). In this paragraph, the *person* for whom the individual works is referred to as the principal *firm*.

- (1) The degree of control the principal *firm* has over the individual (the greater the control the more likely it is that the *general prohibition* does not apply). This takes into account the power of deciding the tasks to be carried out, the way in which the tasks are to be done, the means to be employed in doing them and the time when and the place where they are to be done. For example, at one end of the spectrum the individual may merely agree to achieve an end result without that end result being specified in detail. At the other end of the spectrum, the individual may be controlled in every detail of how things are to be done.
- (2) The degree to which the individual is integrated into the principal *firm's* business (the greater the integration the more likely it is that the *general prohibition* does not apply). One may look at how much the individual is subject to the managerial procedures of the principal *firm* in relation to such matters as quality of work and performance.
- (3) The degree to which the individual takes on the financial risks and rewards of an independent business (the more the individual takes on such risks the more likely it is that the *general prohibition* applies). For example, one might take into account whether the individual provides his own equipment; whether he hires his own helpers; what degree of financial risk he takes; what degree of responsibility for investment and management he has; whether and how far he has an opportunity of profiting from sound management in the performance of his task.
- (4) For example, if the individual is tasked with finding customers it may be relevant whether he is paid a commission for each customer gained. However, commission is not a particularly strong factor as many conventional employees are paid by commission.
- (5) The degree to which the individual deals with the principal *firm's* customers in his own name (if the individual deals with customers in his own name that points towards the *general prohibition* applying). For example, it may be relevant whether the individual receives monies from the principal *firm's* customers into a bank account in the individual's name.
- (6) The degree to which the services supplied by the individual to the principal *firm* are ones that the individual supplies to other clients as well. If the individual supplies services to more than one clients, it is very likely that the individual is in the business of providing those services generally and that, as a result, he is carrying on his own business and hence needs *authorisation* or an exemption from the *general prohibition*.
- (7) Whether the individual is a natural *person*. It is unlikely that a company or a partnership will fall outside the *general prohibition* on the grounds in ■ PERG 2.3.6 G.

- 2.3.8 **G** In practice, a *person* is only likely to fall outside the *general prohibition* on the grounds that he is not carrying on his own business if he is an employee or performing a role very similar to an employee.
- 2.3.9 **G** Even though working for more than one *firm* is likely to mean that the *person* will not be able to rely on the grounds in ■ PERG 2.3.6 G to escape the *general prohibition* (see ■ PERG 2.3.7G (6)), that will not always be the case. In particular, say that a *person* is acting as an employee of one *firm* (Firm A) and as a self-employed agent of another *firm* (Firm B). In his capacity as an employee of Firm A, the *person* would not be carrying on his own business. Thus, the *general prohibition* does not apply in relation to his work for Firm A. If the only *firm* for which that *person* acts on a self-employed basis is Firm B, he could still fall outside the *general prohibition* in relation to Firm B too. The situation would be different if he was providing services to, or on behalf of, more than one client *firm* on a self-employed basis as under such circumstances he would be likely to be carrying on his own business.
- 2.3.10 **G** One example in the consumer credit industry of how the factors in ■ PERG 2.3.7 G might apply can be found in the home collected credit sector. Home collected credit *firms* supply small, short-term, unsecured loans direct to customers in their homes. It is common practice in this sector for some of the larger *firms*, in particular, to deal with their customers via self-employed agents. Self-employed agents are not paid a salary by an employer. These agents call on customers in their homes to provide loans and/or collect repayments due on loans, on behalf of the home collected credit providers they represent, and they receive commission on the repayments they collect. Agents of home collected credit firms may:
- introduce new clients to the credit provider;
 - arrange for the completion of the relevant credit agreements by new clients; and
 - collect repayments.
- 2.3.11 **G** Although the overall relationship between a home collected credit provider (the principal *firm*) and a *person* providing the services described in ■ PERG 2.3.10 G (the individual) will need to be taken into account, meeting the following criteria is likely to mean that the individual is carrying on the business of the principal *firm* (as its agent) and not his own, meaning that the individual does not require *authorisation* or to be exempt:
- (1) the principal *firm* appoints the individual as an agent;
 - (2) the individual only works for one principal *firm*;
 - (3) the principal *firm* has a *permission* from the FCA for every activity the individual is carrying on for which the principal *firm* would need *permission* if it was carrying on the activity itself;
 - (4) the contract sets out effective measures for the principal *firm* to control the individual;
 - (5) (in the case of collecting debts) receipt of repayment by the individual is treated as receipt by the principal *firm* so that the debtor is not disadvantaged if the individual becomes insolvent before the money is passed to the principal *firm*;

- (6) the principal *firm* accepts full responsibility for the conduct of the individual when the individual is acting on the principal *firm's* behalf in the course of its business; and
- (7) the individual makes clear to customers that it is representing a principal *firm* as its agent and the name of that principal *firm*.



2.4 Link between activities and the United Kingdom

- 2.4.1** **G** Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to activities that are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a client is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on.
- 2.4.2** **G** Even with a cross-border element a *person* may still be carrying on an activity 'in the *United Kingdom*'. For example, a *person* who is situated in the *United Kingdom* and who is *safeguarding and administering investments* will be carrying on activities in the *United Kingdom* even though his *client* may be overseas.
- 2.4.2A** **G** The *regulated funeral plan activities* only apply if the contract is for a funeral in the *United Kingdom*.
- 2.4.3** **G** Section 418 of the *Act* (Carrying on regulated activities in the United Kingdom) takes this one step further. It extends the meaning that 'in the *United Kingdom*' would ordinarily have by setting out additional cases. The *Act* states that, in these cases, a *person* who is carrying on a *regulated activity* but who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.
- (1) [deleted]
 - (2) [deleted]
 - (3) The case is where a *regulated activity* is carried on by a *UK-based person* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
 - (4) The case is where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment in the *United Kingdom*. This might occur when each of the stages that make up a *regulated activity* (such as *managing investments*) takes place in different countries. For example, a *person's* management is in country A, the assets are held by a nominee in country B, all transactions take place in country B or

country C but all decisions about what to do with the investments are taken from an office in the *United Kingdom*. Given that the investments are held, and all dealings in them take place, outside the *United Kingdom* there may otherwise be a question as to where the *regulated activity of managing investments* is taking place. For the purposes of the *Act*, it is carried on in the *United Kingdom*.

(5) [deleted]

2.4.4 **G** The application of the third and fourth cases will depend on how the activities carried on from the *UK* establishment are set up and operated.

2.4.5 **G** A *person* who is based outside the *United Kingdom* but who sets up an establishment in the *United Kingdom* must therefore consider the following matters. First, he must not, unless he is *authorised*, carry on *regulated activities* in the *United Kingdom*. Second, unless he is *authorised*, the day-to-day management of the carrying on of the *regulated activity* must not be the responsibility of the *UK* establishment. This may, for example, affect those *UK* establishments that in the context of *deposit-taking* activities were, before the *commencement* of the *Act*, treated as representative offices of overseas institutions. Such institutions will need to seek *authorisation* if the responsibility for the day-to-day management of the accepting of *deposits* by them outside the *United Kingdom* is nevertheless effectively that of their *UK* establishment. Third, such a *person* will need to ensure that he does not contravene other provisions of the *Act* that apply to *persons* who are not *authorised*. These include the controls on *financial promotion* (section 21 of the *Act* (Financial promotion)), and on giving the impression that a *person* is *authorised* (section 24).

2.4.6 **G** A *person* based outside the *United Kingdom* may also be carrying on activities in the *United Kingdom* even if he does not have a place of business maintained by him in the *United Kingdom* (for example, by means of the internet or other telecommunications system or by occasional visits). In that case, it will be relevant to consider whether what he is doing satisfies the business test as it applies in relation to the activities in question. In addition, he may be able to rely on the exclusions from certain *regulated activities* that apply in relation to *overseas persons* (see ■ PERG 2.9.15 G).

2.4.7 **G** [deleted]

2.4.8 **G** [deleted]

2.4.9 **G** Whether a *credit agreement* or *consumer hire agreement* is subject to the law of a country outside the *United Kingdom* is immaterial to whether an activity is *credit broking*, see ■ PERG 2.7.7E G.

2.4.10 **G** (1) The requirement to be authorised to carry on the *regulated activity of administering a benchmark* gives effect to the authorisation and registration regime under article 34 of the *benchmarks regulation*.

- (2) Article 34 only requires a *person* to be authorised or registered in the UK if that *person* is *located* in the UK.
- (3) Accordingly, the FCA considers that where a *person* (P) *administers a benchmark* in the UK but P is not *located* in the UK:
 - (a) P does not carry on the *regulated activity of administering a benchmark* from an establishment maintained by P in the UK for the purposes of section 418 of the Act; and
 - (b) P would not otherwise be regarded as carrying on that *regulated activity* in the UK.
- (4) *Located* is defined in the *Glossary* and has the same meaning as it does in the *benchmarks regulation*.

2.4A Link between regulated claims management activities and Great Britain

2.4A.1 **G** Under section 22(1B) of the *Act*, a claims management activity specified in the *Regulated Activities Order* is only a *regulated activity* if it is carried on by way of business in *Great Britain*.

2.4A.2 **G**

- (1) Article 89F(3) of the *Regulated Activities Order* provides that a *person* is to be treated as carrying on a *regulated claims management activity* when either or both of the conditions in (2) and (3) are met.
- (2) The condition in this paragraph is that the activity is carried on by a *person* who is:
 - (a) a natural person who is ordinarily resident in *Great Britain*; or
 - (b) a *person*, other than a natural person, who is constituted under the law of a part of *Great Britain*.
- (3) The condition in this paragraph is that the activity is carried on in respect of a *claimant* or potential *claimant* who is:
 - (a) a natural person who is ordinarily resident in *Great Britain*; or
 - (b) a *person*, other than a natural person, who is constituted under the law of a part of *Great Britain*.

2.4A.3 **G** Ordinary residence is to be determined for these purposes by reference to the Statutory Residence Test set out in Schedule 45 to the Finance Act 2013:

at the time of the facts giving rise to the *claim* or potential *claim*; or

at the time when the activity is carried out in respect of that *claimant* or potential *claimant*.

2.4A.4 **G** Accordingly, the following list gives examples of activity which would be *regulated claims management activity* if carried on by way of business and where no exemption or exclusion applies:

- (1) a sole trader in England and Wales advising a natural person who is ordinarily resident in Northern Ireland in relation to a financial services or financial product *claim*;

- (2) a company incorporated in Northern Ireland advising a natural person who is ordinarily resident in Scotland in relation to a *personal injury claim*;
- (3) a company incorporated in France advising a natural person who is ordinarily resident in England in relation to a financial services or financial product *claim*;
- (4) a company incorporated in Scotland investigating a *personal injury claim* for a natural person who is ordinarily resident in Germany; and
- (5) a company incorporated in India seeking out details of claimants with *personal injury claims* who are ordinarily resident in Great Britain.

2.5 Investments and activities: general

2.5.1 **G** In addition to the requirements as to the business test and the link to the *United Kingdom*, two other essential elements must be present before a *person* needs *authorisation* under the *Act*. The first is that the *investments* must come within the scope of the system of regulation under the *Act* (see ■ PERG 2.6). The second is that the activities, carried on in relation to those *specified investments*, are regulated under the *Act* (see ■ PERG 2.7). Both *investments* and activities are defined in the *Regulated Activities Order* made by the Treasury under section 22 of the *Act*.

2.5.1-A **G** The following *regulated activities* may be carried on in relation to property of any kind:

- (1) *managing a UK UCITS*;
- (2) *acting as trustee or depositary of a UK UCITS*;
- (3) *managing an AIF*;
- (4) *acting as trustee or depositary of an AIF*;
- (5) *establishing, operating and winding up a collective investment scheme*;
- (6) *establishing, operating and winding up a stakeholder pension scheme*;
- (7) *establishing, operating and winding up a personal pension scheme*;
- (8) *meeting of repayment claims*;
- (9) *managing dormant asset funds (including the investment of such funds)*; and
- (10) *dealing with unwanted asset money*.

2.5.1A **G** The *regulated activity* of *administering a benchmark* does not require the involvement of a *specified investment* in any way.

2.5.1B **G** The activities of *providing credit information services* and *providing credit references* are not required to relate to a *specified investment* to be *regulated activities*, but rather relate to information about a *person's* financial standing.

2.5.2 **G** The *Regulated Activities Order* contains exclusions. Exclusions may exist in relation to both the element of investment and the element of activity. Each should therefore be checked carefully. The exclusions that relate to *specified investments* are considered in ■ PERG 2.6, together with the outline of the *specified investments*. The exclusions that relate to activities are considered separately from the outline of activities (see ■ PERG 2.8 and ■ PERG 2.9).

Modification of certain exclusions as a result of MiFID, the IDD and the Mortgage Credit Directive

2.5.3 **G** The application of certain of the exclusions considered in ■ PERG 2.8 (Exclusions applicable to certain regulated activities) and ■ PERG 2.9 (Regulated activities: exclusions applicable to certain circumstances) is modified in relation to *persons* who are subject to the UK provisions which implemented *MiFID*, the *IDD* and the *MCD*. The reasons for this and the consequences of it are explained in ■ PERG 2.5.4 G for *MiFID*, ■ PERG 5 (Guidance on insurance distribution activities) for the *IDD*, and ■ PERG 4.10A for the *MCD*.

Investment services and activities

2.5.4 **G** Certain *persons* subject to the requirements of the UK provisions which implemented *MiFID* must be brought within the scope of regulation under the *Act*. A core element of *MiFID* is the concept of investment firm. An *investment firm* is any *person* whose regular occupation or business is the provision of one or more *investment services* to third parties or the performance of one or more *investment activities* on a professional basis. An *investment firm* is not subject to the UK provisions which implemented *MiFID* requirements if it falls within one or more of the exemptions in Part 1 of Schedule 3 of the *Regulated Activities Order*. Further information about these exemptions is contained in PERG 13.5. To the extent that an *investment firm* falls within one of these exemptions, it will not be a *MiFID investment firm*. Where a *firm* is not a *MiFID investment firm* because one or more of the exemptions in Part 1 of Schedule 3 of the *Regulated Activities Order* apply, it may still be carrying on *regulated activities* and therefore require *authorisation* unless it is an *exempt person*.

2.5.4A **G** Prior to *IP completion day*, the UK exercised part of the optional exemption in article 3 of *MiFID*. This is now set out in regulation 8 of the *MiFI Regulations*. Further information about this exemption is contained in Q48 to 53 in PERG 13.5. The investment services to which regulation 8 of the *MiFI Regulation* applies (namely reception and transmission of orders and investment advice in relation to either *transferable securities* or units in collective investment undertakings) correspond to *regulated activities* (see PERG 13 Annex 2 Tables 1 and 2).

2.5.5 **G** For *persons* who are *MiFID investment firms*, the activities that must be caught by the *Regulated Activities Order* are those that are caught by the UK provisions which implemented *MiFID*. To achieve this result, some of the exclusions in the Order (that will apply to *persons* who are not caught by *MiFID*) have been made unavailable to *MiFID investment firms* when they provide or perform *investment services and activities*. A "MiFID investment firm", for these purposes, includes *credit institutions* to which the UK provisions which implemented *MiFID* applies (see ■ PERG 13, Q5 and 9); *collective portfolio management investment firms* providing the services of

portfolio management and *personal recommendations* in relation to *financial instruments* or the ancillary service of safekeeping and administration in relation to *units* of collective investment undertakings; and *AIFM investment firms* providing the ancillary service of reception and transmission of orders in relation to *financial instruments*. The same exclusions are also unavailable to *third country investment firms* when they provide *investment services and activities*. Article 4(4) of the *Regulated Activities Order* (Specified activities: general) lists a number of exclusions that must be disregarded. These relate to the exclusions concerned with:

- (1) the absence of holding out (see ■ PERG 2.8.4G (1));
- (2) transactions or arrangements with or through certain *persons* (see ■ PERG 2.8.4G (2), ■ PERG 2.8.5G (1) and ■ PERG 2.8.6G (4));
- (2A) issuing own securities (see ■ PERG 2.8.4G(4));
- (3) risk management (see ■ PERG 2.8.4G (5) and ■ PERG 2.8.5G (2));
- (3A) arranging for the issue of your own securities ■ PERG 2.8.6AG(11);
- (4) *persons* acting under powers of attorney (see ■ PERG 2.8.7 G);
- (4A) professions or businesses not involving *regulated activities* (see ■ PERG 2.9.5 G);
- (5) sale of goods (see ■ PERG 2.9.7 G);
- (6) groups and joint enterprises (see ■ PERG 2.9.9 G);
- (7) sale of a *body corporate* (see ■ PERG 2.9.11 G); and
- (8) business angel-led enterprise capital funds (see ■ PERG 2.9.20 G to ■ PERG 2.9.22 G).

Insurance distribution or reinsurance distribution

2.5.6

G

The *IDD* was in part implemented through various amendments to the *Regulated Activities Order*. These included article 4(4A) (Specified activities: general) which precluded a *person* who, for remuneration, takes up or pursues *insurance distribution* or *reinsurance distribution*, in relation to a risk or commitment situated in an *EEA State* from making use of certain exclusions. Post *IP completion day*, this provision has been amended to refer to a risk or commitment situated in the *United Kingdom*. In other cases, some of the exclusions provided in relation to particular *regulated activities* are unavailable where the activity involves a *contract of insurance*. This is explained in more detail in ■ PERG 5(Guidance on insurance distribution activities).

Wider definition of certain specified investments when carrying on some kinds of MiFID business

2.5.7

G

Some *specified investments* are defined so that certain products only come within that *specified investment* when a *person* is providing services under certain legislation in relation to that product.

2.5.8 **G** When **■ PERG 2.5.7G** applies, the product is only treated as falling within the definition of the *specified investment* concerned if (in relation to that product):

- (1) one of the following *persons*:
 - (a) a *MiFID investment firm*; or
 - (b) a *third country investment firm*; or
 - (c) a *CRD credit institution*; or
 - (d) a *credit institution* that would qualify to be a *CRD credit institution* if its registered or head office were in the *United Kingdom*;
provides or performs *investment services and/or activities* on a professional basis; or
- (2) a *UCITS investment firm* is providing certain *investment services and/or activities* under the *UK* provisions which implemented article 6.3 of the *UCITS Directive* (provision of services in addition to *UCITS* management); or
- (3) a *market operator* (or someone who would be a *market operator* if it was based in the *United Kingdom*) is providing the *investment services and/or activities* of operating a *multilateral trading facility* or *organised trading facility* (these activities are described in Q24 and Q24A in **■ PERG 13.3**); or
- (4) an *AIFM investment firm* is providing services under the *UK* provisions which implemented article 6.4 of the *AIFMD* (provision of services in addition to *AIF* management).

2.5.9 **G** **■ PERG 2.5.7G** only applies to the following *specified investments*:

- (1) an *emission allowance* (see **■ PERG 2.6.19DG** for more details);
- (2) an *option* (see **■ PERG 2.6.20G** for more details);
- (3) a *future* (see **■ PERG 2.6.22AG** for more details);
- (4) a credit derivative treated as a *contract for differences* (see **■ PERG 2.6.23G** for more details); and
- (5) a binary or fixed outcomes derivative treated as a *contract for differences* (see **■ PERG 2.6.24AG** for more details, which also explains that in certain circumstances **■ PERG 2.5.7G** does not apply to this product).

2.5.10 **G**

- (1) When deciding whether a person is a *MiFID investment firm* or a *third country investment firm* for the purposes of **■ PERG 2.5.8G(1)**, it is necessary to take into account the services that that *person* is providing in relation to the product concerned.
- (2) For example, say that a *UK person* does business in an option product to which **■ PERG 2.5.7G** applies. When deciding whether that product is a regulated *option*, it is not necessary for that *person* already to be:

- (a) a *MiFID investment firm*; or
 - (a) *authorised* under the *Act*;
because of its other activities.
- (3) Therefore, when deciding whether the *UK person* in (2) is a *MiFID investment firm* and whether it needs to be *authorised* under the *Act*, it is necessary to take into account all the business it does, including business in that option product.



2.6 Specified investments: a broad outline

2.6.1 G The following paragraphs describe the various *specified investments*, taking due account of any exclusion that applies.

Deposits

2.6.2 G A *deposit* is defined in article 5(2) of the *Regulated Activities Order*. This focuses on a sum of *money* paid by one *person* to another on terms that it will be repaid when a specified event occurs (for example, a demand is made).

2.6.3 G Certain transactions are excluded. The definition of *deposit* itself excludes money paid in connection with certain transactions such as advance payments for the provision of goods or services and sums paid to secure the performance of a contract. The circumstances in which payments are excluded from the definition itself are exhaustively stated in article 5(3) of the *Regulated Activities Order* (Accepting deposits). In addition, there is a separate exclusion in article 9 of the Order (Sums received in consideration for the issue of debt securities) and another in article 9A (Sums received in exchange for electronic money). ■ PERG 3A Q4 contains guidance on the exclusion relating to *electronic money*.

2.6.4 G In addition, several separate exclusions focus on the identity of the *person* paying the *money* or the *person* receiving it (or both).

- (1) Payments by certain *persons* are excluded if they are made by specified *persons* (such as local authorities or national, or supranational, bodies) or by *persons* acting in the course of a business consisting wholly or partly of lending money.
- (2) Exclusions apply for sums paid between certain *persons* who are linked in a specified way (such as *group companies* or *close relatives*).
- (3) Exclusions apply to sums received by *persons* acting for specified purposes. This covers sums received by a practising solicitor acting in the course of his profession or by *authorised* or *exempt persons* carrying on one of a specified range of *regulated activities* and acting within the scope of their *permission* or exemption.

- 2.6.4-A** G (1) A *structured deposit* is a kind of *deposit*.
- (2) A *structured deposit* is a *deposit* which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as:
- (a) an index or combination of indices; or
 - (b) a *financial instrument* or combination of *financial instruments*; or
 - (c) a *commodity* or combination of *commodities* or other physical or non-physical non-fungible assets; or;
 - (d) a foreign exchange rate or combination of foreign exchange rates.
- (3) A variable rate *deposit* whose return is directly linked to an interest rate index such as SONIA (whether or not adjusted) is not a *structured deposit* under paragraph (2)(a).
- (4) (3) applies whether or not the interest is predetermined and whether it is fixed or variable.
- 2.6.4-B** G The reason why there is a definition of a *structured deposit* is that there are a number of *regulated activities* that apply to *structured deposits* that do not apply to other kinds of *deposit*. See ■ PERG 2.7.2-BG for a list.
- 2.6.4-C** G Although the definition of a *structured deposit* specifically requires that the principal amount be fully repayable, that does not imply that this feature only applies to *structured deposits*. In the FCA’s view, capital certainty is a feature of any kind of *deposit*.
- 2.6.4A** G **Electronic money**
Electronic money is specified as an *investment* in article 74A of the *Regulated Activities Order*, but only when issued by:
- (1) a *full credit institution*, a *credit union* or a municipal bank; or
 - (2) a *person* deemed to have been granted authorisation under regulation 74 of the *Electronic Money Regulations*; or a *person* who falls within regulation 76(1) of the *Electronic Money Regulations* (see ■ PERG 3A, Q30 and 31).
- The authorisation and registration requirements for any other *person* intending to issue *electronic money* are governed by the *Electronic Money Regulations*. Guidance on these regulations is available in ■ PERG 3A.
- 2.6.5** G **Rights under a contract of insurance**
Contract of insurance is defined to include certain things that might not be considered a *contract of insurance* at common law. Examples of such additions include *capital redemption* contracts or contracts to pay annuities on human life. Detailed *guidance* on identifying a *contract of insurance* is in ■ PERG 6 (Guidance on the Identification of Contracts of Insurance).

2.6.6 **G** There are two main sorts of *contracts of insurance*. These are *general insurance contracts* and *long-term insurance contracts*. The *Regulated Activities Order* provides that, in certain specified circumstances, a contract is to be treated as a *long-term insurance contract* notwithstanding that it contains supplementary provisions that might also be regarded as relating to a *general insurance contract* (see article 3(3)).

2.6.7 **G** The *Regulated Activities Order* uses two further terms in relation to *contracts of insurance* to identify those contracts under which rights are treated as *contractually based investments*.

(1) The first term is 'qualifying contracts of insurance' (referred to as *life policies* in the *Handbook*). This identifies those *long-term insurance contracts* under which rights are treated as *contractually based investments*. This term does not cover *long-term insurance contracts* which are contracts of reinsurance or, if specified conditions are met, contracts under which benefits are payable only on death or incapacity.

(2) The second term is '*relevant investments*'. This term applies to:

- (a) *contractually based investments*, which includes rights under *life policies*, and rights to or interests in such *investments* under article 89 of the *Regulated Activities Order* (Rights to or interests in investments); and
- (b) rights under *contracts of insurance* other than *life policies* (but not rights to or interests in such rights).

This term is used in connection with the treatment, under various parts of the *Regulated Activities Order*, of *persons carrying on insurance distribution activities* (see further ■ PERG 5 (Guidance on insurance distribution activities)).

2.6.8 **G** Certain arrangements in relation to funeral plans are specifically excluded from being *contracts of insurance* if they would otherwise be so. The exclusion applies to arrangements that fall within the definition of a *funeral plan contract* (see ■ PERG 2.6.26G).

Shares etc

2.6.9 **G** *Shares* are defined in the *Regulated Activities Order* as shares or stock in a wide range of entities; that is, any *body corporate* wherever incorporated and unincorporated bodies formed under the law of a country other than the *United Kingdom*. They include deferred shares issued by *building societies* as well as transferable shares in *industrial and provident societies*, *credit unions* and equivalent *EEA* bodies. These shares are transferable and negotiable in a way similar to other shares or stock and are treated as such for the purposes of defining *regulated activities*. They are specifically mentioned as being within the *specified investment* category of *shares* because other types of share issued by these mutual bodies are not transferable and are expressly excluded (see ■ PERG 2.6.10 G).

2.6.10 **G** The following are excluded from the *specified investment* category of *shares*. Shares or stock in all *open-ended investment companies* are excluded from being treated in this particular category (but see ■ PERG 2.6.17 G). Exclusions

from this category also apply to shares or stock in the share capital of certain mutuals or in equivalent *EEA* bodies. This takes out *building society* or *credit union* accounts and non-transferable shares in *industrial and provident societies*. These may nevertheless be *specified investments* in another category (such as *deposits* in the case of *building society* accounts).

Debt instruments

2.6.11 **G** Two categories of *specified investments* relating to debt instruments are dealt with under this heading. They broadly split into private debt and public sector debt.

- (1) The first category of 'instruments creating or acknowledging indebtedness' (defined in article 77 of the *Regulated Activities Order* and referred to in the *Handbook* as *debentures*) expressly refers to a range of instruments such as *debentures*, bonds and loan stock and contains a catch-all reference to 'any other instrument creating or acknowledging indebtedness.'
- (2) The second category (defined in article 78 of the *Regulated Activities Order* and referred to in the *Handbook* as *government and public securities*) refers to loan stock, bonds and other instruments creating or acknowledging indebtedness which are issued by or on behalf of any government, the assemblies for Scotland, Wales or Northern Ireland, a local authority or an international organisation.

An instrument cannot fall within both categories of *specified investments* relating to debt instruments. 'Instrument' is defined to include any record whether or not in the form of a document (see article 3(1) of the *Regulated Activities Order*).

Alternative finance investment bonds

2.6.11A **G** Alternative finance investment bonds (defined in article 77A of the *Regulated Activities Order* and referred to in the *Handbook* as *alternative debentures*) are a form of Sharia compliant bond (known as *sukuk* in the plural or *sakk* in the singular) which are intended to be regulated in an equivalent manner to conventional debt securities, where appropriate. *Sukuk* arrangements allow assets to be held for the benefit of investors in certificates issued by a company. The benefits may include the payment of a return that is economically equivalent to interest and redemption of the certificates out of the proceeds from the disposal of the assets. *Alternative debentures* are not limited to those wishing to issue Sharia compliant *sukuk*.

2.6.11B **G** The arrangements which grant rights under *alternative debentures* are similar to the tax definition of arrangements relating to alternative finance investment bonds at section 48A of the Finance Act 2005 (see www.opsi.gov.uk/acts/acts2007/ukpga_20070011_en_5#pt3-pb9-l1g53) . However the purposes of the two provisions are not the same. One of the objectives of the *FCA* under the *Act* is consumer protection. Accordingly, secondary legislation made under the *Act*, like article 77A of the *Regulated Activities Order*, is likely to be interpreted by the *FCA* with consumer protection in mind. This may mean that whilst the arrangements described at section 48A of the Finance Act 2005 and those described at article 77A of the *Regulated Activities Order* are similar, they are likely to be construed differently by the courts. ■ PERG 2.6.11FG and ■ PERG 2.6.11GG explain the

consumer protection features in the definition of *alternative debentures* in more detail.

2.6.11C **G** The arrangements which grant rights under an *alternative debenture* arise where:

- (1) the arrangements provide for a person (the bond-holder) to pay a sum of money (the capital) to another (the bond-issuer);
- (2) the arrangements identify assets, or a class of assets, which the bond-issuer will acquire for the purpose of generating income or gains directly or indirectly (the bond assets);
- (3) the arrangements specify a period at the end of which they cease to have effect (the bond term);
- (4) the bond-issuer undertakes under the arrangements:
 - (a) to make a repayment in respect of the capital (the redemption payment) to the bond-holder during or at the end of the bond term (whether or not in instalments); and
 - (b) to pay to the bond-holder other payments on one or more occasions during or at the end of the bond term (the additional payments);
- (5) the amount of the additional payments does not exceed an amount which would, at the time at which the bond is issued, be a reasonable commercial return on a loan of the capital; and
- (6) the arrangements are a security admitted to:
 - (a) an *official list*; or
 - (b) trading on a *regulated market* or on a *recognised investment exchange*.

2.6.11D **G** Different types of *alternative debentures* are permitted so that, for example:

- (1) the assets of the arrangement may be acquired before or after it commences;
- (2) the bond-holder may (but need not) be entitled under the arrangements to terminate them, or participate in terminating them before the end of the bond term;
- (3) the return may be fixed, floating or determined in some other way;
- (4) the amount of the redemption payment may (but need not) be subject to reduction in the event of a fall in the value of the bond assets or in the rate of income generated by them.

2.6.11E **G** As these arrangements might amount to a collective investment scheme (see **■ PERG 9.4.2 GG** for a broad description) a consequential amendment to the Financial Services and Markets Act 2000 (Collective Investment Scheme) Order 2001 (SI 2001/1062) has been made so that, like conventional bonds,

alternative debentures are excluded from the definition of collective investment scheme.

2.6.11F **G** The range of instruments that are caught by the *alternative debenture* definition have been tightly circumscribed to ensure that only those arrangements that grant, in substance, debt-like returns are captured. This is because arrangements giving rights under an *alternative debenture* cannot amount to a *collective investment scheme* (see ■ PERG 2.6.11EG). If other types of investments were covered by the *alternative debenture* definition this could have the effect of undermining the regime for regulating *collective investment schemes*, which is primarily aimed at protecting the consumer from investing in unsuitable products. For example, under section 238 of the Act (Restrictions on promotion) an *authorised person* cannot *communicate* an invitation or inducement to participate in an *unregulated collective investment scheme*.

2.6.11G **G** The condition set out at ■ PERG 2.6.11CG (6) is also intended to protect consumers. This provides that *alternative debentures* must be listed on an *official list* or traded on a *regulated market* or *recognised investment exchange*. This is because there is a risk that *alternative debentures* could lead to regulatory arbitrage (i.e. the risk that the exclusion from being classified as a *collective investment scheme* is exploited by instruments not intended to be excluded). Mandatory listing is aimed at ensuring an enhanced level of transparency, reducing the likelihood of regulatory arbitrage.

2.6.11H **G** (1) The main provision within the definition of *alternative debenture* arrangements that seeks to ensure that only instruments that display the characteristics of a debt security can be *alternative debentures* is set out at ■ PERG 2.6.11CG (5). It provides that the amount of additional payments under the arrangements must not exceed an amount which would, at the time the bond is issued, be a reasonable commercial return on a loan of capital. Where the return is not fixed at the outset, it is the maximum possible amount of the additional payments that must be considered in deciding this question. The following example demonstrates how this condition should be approached.

Example

ABC Ltd is a property development company. It wishes to increase its portfolio on a short-term basis. It issues 5-year sukuk to investors and uses the proceeds to buy the head lease of a commercial property. The rental income from the lease is distributed to investors in proportion to their holdings without a cap on the level of return. After 5 years, the head lease is sold on at a profit and the proceeds shared between investors.

In this example, the investors participate directly in the success or failure of the underlying property business. The sukuk is not really in the nature of a debt instrument. It is unlikely to be an *alternative debenture* as:

(a) additional payments under the arrangements would exceed a reasonable commercial return on a loan of the capital.

Further, where the return is not fixed at the outset, it is the maximum possible amount of the additional payments that must be considered. Here,

the issue terms of the sukuk impose no upper limit on the amount of the periodic distributions: a sakk holder subscribing 1,000 may, in a year, get back 200 or 2,000 or nothing depending on the rental market. The maximum potential return is clearly in excess of a reasonable commercial return on a loan of 1,000; and

(b) the arrangements have not been admitted to an *official list* or admitted to trading on a *regulated market* or *recognised investment exchange* (see PERG 2.6.11CG (6)).

- (2) If, in the above example, investors returns were capped at 500 per sakk per year, then this is the amount that must be considered in deciding whether the return exceeds a reasonable commercial return on a loan, even where the amounts actually received turn out to be far lower.
- (3) In applying the reasonable commercial return test, the sakk should be compared to a hypothetical loan to the issuer on similar terms and carrying similar risks. For example, a conventional security convertible into shares will normally carry a lower rate of interest because the conversion right has a value. The return on an exchangeable or convertible sakk should be measured against the return on an equivalent exchangeable or convertible debt security.
- (4) The risk to investors in sukuk may vary slightly from that of a conventional bond in some instances. This may be due to the fact that sukuk holders only have recourse to the bond assets or some other structural feature which results in the risk profile being higher. In such instances it may be justifiable for the rate of return to be slightly higher than that of a conventional loan.
- (5) As with any financial instrument, the pricing of sukuk will depend on the issuers view of the market at the time of issue and reasonable commercial return may vary depending on the issuer and the economic circumstances prevalent at the time of issue.

2.6.12 G Certain instruments are excluded from both of the categories of *specified investments* referred to in ■ PERG 2.6.11 G. These include trade bills, specified banking documents (such as cheques and banknotes though not bills of exchange accepted by a banker) and *contracts of insurance*. There is a further exclusion from this category of *specified investment* dealing with public debt for National Savings deposits and products. However, for the purposes of article 78 of the Financial Services and Markets Act (Regulated Activities) Order 2001, this exclusion does not apply to instruments that meet the requirements of ■ PERG 2.6.11CG (1) to ■ (5).

Warrants

2.6.13 G The category of *specified investment* of instruments giving entitlements to investments (referred to in the *Handbook* as *warrants*) covers warrants and other instruments which confer an entitlement to subscribe for *shares*, *alternative debentures*, *debentures* and *government and public securities*. This is one of several categories of *specified investments* that are expressed in terms of the rights they confer in relation to other categories of *specified investment*. The rights conferred must be rights to 'subscribe' for the relevant investments. This means that they are rights to acquire the investments directly from the *issuer* of the *investments* and by way of the

issue of new investments (rather than by purchasing investments that have already been issued).

- 2.6.14 G To keep clear distinctions between the different *specified investment* categories, instruments giving entitlements to investments are not to be regarded as *options, futures or contracts for differences*.

Certificates representing securities

- 2.6.15 G The *specified investment* category of *certificates representing certain securities* covers certificates or other instruments which confer rights in relation to *shares and debt securities*. It includes depositary receipts.

- 2.6.16 G There is an exclusion for any instrument that would otherwise fall within the *specified investment* category of *units* in a *collective investment scheme*. But the exclusion does not apply where the underlying investments covered by the certificate are issued by the same (non-public sector) *issuer* or constitute a single issue of public sector debt (such as a single issue of gilts). Certificates or other instruments conferring rights in respect of investments in these two cases continue to be treated as *certificates representing certain securities*.

Units

- 2.6.17 G The *specified investment* category of *units* in a *collective investment scheme* includes *units* in a *unit trust scheme or authorised contractual scheme, shares in open-ended investment companies* and rights in respect of most limited *partnerships* and all *limited partnership schemes*. *Shares* in or *securities* of an *open-ended investment company* are treated differently from *shares* in other *companies*. They are excluded from the *specified investment* category of *shares*. This does not mean that they are not investments but simply that they are uniformly treated in the same way as *units* in other forms of *collective investment scheme*. The effect is that an *open-ended investment company* will, in issuing its *shares*, be subject to the restrictions on promotion of *collective investment schemes* in section 238 of the *Act* (rather than to restrictions that apply to other forms of body corporate). For exclusions from the restrictions on the provisions of *collective investment schemes*, see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060). *Guidance* on the meaning of *open-ended investment company* is in ■ PERG 9 (Meaning of open-ended investment company).

- 2.6.18 G There are no exclusions in the *Regulated Activities Order* for this *specified investment* category. This is because '*collective investment scheme*' is defined in section 235 of the *Act* (Collective investment schemes) for the purposes of the *Act* generally. But there is a separate power to provide for exemptions from that definition and the Treasury have exercised it (see the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062)). The result is that *units* in certain arrangements are excluded from being *collective investment schemes* (for example, closed-ended *bodies corporate*, franchise arrangements, timeshare schemes).

Rights under a pension scheme

- 2.6.19** **G** Three types of *investment* are specified here:
- (1) rights under a *stakeholder pension scheme*;
 - (2) rights under a *personal pension scheme*; and
 - (3) rights or interests under a pension scheme which provides *safeguarded benefits*.
- 2.6.19A** **G** A *stakeholder pension scheme* is defined in section 1 of the Welfare Reform and Pensions Act 1999. Regulations made under that section set out detailed rules under which such schemes will operate (see the Stakeholder Pension Scheme Regulations 2000). Schemes must be registered with The Pensions Regulator.
- 2.6.19B** **G** A *personal pension scheme* is, broadly speaking, a pension scheme which is not an *occupational pension scheme* or a *stakeholder pension scheme*. That is, a scheme or arrangement that is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people:
- (1) on retirement; or
 - (2) on having reached a particular age; or
 - (3) on termination of service in an employment.
- 2.6.19BA** **G** Under section 48(8) of the Pension Schemes Act 2015 *safeguarded benefits* means benefits other than:
- (1) money purchase benefits (defined in section 181 of the Pension Schemes Act 1993 and section 176 of the Pension Schemes (Northern Ireland) Act 1993); and
 - (2) cash balance benefits (defined in section 75 of the Pension Schemes Act 2015).
- 2.6.19C** **G**
- (1) Rights under *stakeholder pension schemes* and *personal pension schemes* are *specified investments* for the purposes of the entire *Regulated Activities Order*.
 - (2) Rights or interests under a pension scheme which provides *safeguarded benefits* as defined by section 48(8) of the Pension Schemes Act 2015 are only *specified investments* for the purposes of article 53E (Advising on conversion or transfer of pension benefits) and not in relation to any other *regulated activity*.
 - (3) There are no exclusions in the Order.

Emission allowances

- 2.6.19D** G This *specified investment* comprises *emissions allowances* that are auctioned as *financial instruments* or *two-day emissions spots* (together, *emissions auction products*).
- There are two *specified investments* relating to the scheme for *emission allowance* trading within the UK:
- (1) the first kind comprises *emission allowances* that are auctioned as *financial instruments* or *two-day emissions spots* (together, *emissions auction products*); and
 - (2) the second kind is an *emission allowance* itself subject to (2)).
- An *emission allowance* is only a *specified investment* if ■ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of MiFID business) applies.
- An *emission allowance* can also be the underlying for an *option*, *future* or *contract for differences*.
- 2.6.19E** G The *emissions auction product* specified investment relates only to the *regulated activity* of *bidding in emissions auctions* (whereby a bid is received, transmitted and submitted on an *auction platform*) and captures the two forms of allowance products that may be auctioned under regulation 4(2) of the *UK auctioning regulations* or the *EU auction regulation*: a two-day spot or a five-day future.
- 2.6.19F** G See ■ PERG 2.7.6DG for more about:
- (1) how the *RAO* deals with the overlap between *emission allowances* and *emissions auction products*; and
 - (2) whether these products are a *security*, a *contractually based investment* or a *relevant investment*.
- 2.6.19G** G Some other points about *emission allowances* are:
- (1) *Emission allowance* means an allowance as defined in article 3(a) of Directive 2003/87/EC or created under article 18 of the *trading scheme order 2020*. These provisions provide that an allowance is an allowance to emit one tonne of carbon dioxide equivalent during a specified period, only valid for the purpose of meeting the requirements of Directive 2003/87/EC or the *trading scheme order 2020* and only transferable in accordance with the provisions of that directive or order (*emission allowance*).
 - (2) A two-day spot is defined by reference to article 3(3) of the *EU auction regulation* or regulation 2 of the *UK auctioning regulations*. These provisions provide that a two-day spot is an allowance auctioned for delivery at an agreed date no later than the second trading day from the day of the auction (*two-day emissions spot*).
 - (3) A *financial instrument* is defined as any instrument listed in Part 1 of Schedule 2 to the *Regulated Activities Order*.

- (4) The distinction between *emission allowances* that are auctioned as *financial instruments* and those auctioned as two-day spots is no longer relevant as all *emissions auction products* are *financial instruments*.

Options

2.6.20 **G** The *specified investment* category of *options* comprises:

- (1) *options* to acquire or dispose of *securities* or *contractually based investments*, currency and certain precious metals and *options* to acquire or dispose of such *options*. *Options to buy or sell* other types of *commodity* will only fall within this *specified investment* category if they are *options to buy or sell futures*, or *options to buy or sell contracts for differences*, which are based on other *commodities*. But *options to buy or sell* other types of *commodity* may be *contracts for differences* (see ■ PERG 2.6.23 G);
- (2) *options* to acquire or dispose of other property and falling within paragraphs 5, 6, 7 or 10 of Part 1 of Schedule 2 to the *Regulated Activities Order* (see article 83(2) of the *Regulated Activities Order* and ■ PERG 13, Q33A to Q34 for *guidance* about these instruments), but only where they are *options* to which ■ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of MiFID business) applies; and
- (3) *options* to acquire or dispose of an *option* to which (2) applies, but only where ■ PERG 2.5.7G applies (see article 83(1)(e) of the *Regulated Activities Order*).

2.6.20A **G** It follows therefore that *options* not falling within ■ PERG 2.6.20G (1), for example physically settled *options* on non-precious metals, such as copper *options*, will not be *options* unless they meet the conditions in ■ PERG 2.6.20G (2). Moreover, where the *option* in question is one to which ■ PERG 2.6.20G (2) applies, it will be an *option* only in relation to the services referred to in ■ PERG 2.5.8G, provided by that *person*. The same applies in the case of *options* falling within ■ PERG 2.6.20G (3), for example an *option* on a physically settled copper *option* traded on a *regulated market*.

Futures

2.6.21 **G** *Futures* is the name given to rights under a contract for the *sale* of a *commodity*, or of property of any other description, under which delivery is to be made at a future date and at a price agreed on when the contract is made.

2.6.22 **G** The key issue in determining whether something is an investment in this category for the purposes of the *Regulated Activities Order* is whether the contract is made for investment purposes rather than commercial purposes. Contracts which are made for commercial purposes are excluded from this *specified investment* category and the *Regulated Activities Order* contains several tests as to when that is, or is not, the case (some are conclusive, others only indicative).

- 2.6.22A G As with *options*, there is an additional category of instruments which are *futures* only in limited circumstances. These are contracts as described in ■ PERG 2.6.21 G:
- (1) that would not be regarded as having been entered into for investment purposes because they fail one of the tests mentioned in ■ PERG 2.6.22 G;
 - (2) that:
 - fall within paragraph 4 of Part 1 of Schedule 2 to the *Regulated Activities Order* and relate to currencies (see ■ PERG 13, Q31A to Q31S for *guidance* about these derivatives); or
 - fall within paragraphs 5, 6, 7 or 10 of Part 1 of Schedule 2 to the *Regulated Activities Order* (see ■ PERG 13, Q33A to Q34 for *guidance* about these derivatives); and
 - (3) to which ■ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of MiFID business) applies.
- See article 84(1A)-(1D) of the *Regulated Activities Order*
- 2.6.22B G [deleted]
- Contracts for differences**.....
- 2.6.23 G The *specified investment* category of *contracts for differences* covers:
- (1) rights under *contracts for differences*;
 - (2) rights under other contracts whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in certain factors; and
 - (3) derivative contracts for the transfer of credit risk (not within (1) or (2)) falling within paragraph 8 or 9 of Part 1 of Schedule 2 to the *Regulated Activities Order* (see ■ PERG 13, Q31 for *guidance* about these instruments), but only where ■ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of MiFID business) applies.
- The factors mentioned in (2) include the value or price of property of any description or an index or any 'other factor designated in the contract'. This catches a wide range of factors.
- 2.6.23A G All contracts in this category are cash-settled instruments (as opposed to being settled by way of delivering something other than cash). Many would be unenforceable as gaming contracts were it not for section 412 of the *Act* (Gaming contracts). Examples of instruments that count as *specified investments* under this category are *spread bets* and interest rate swaps.
- 2.6.24 G There are a number of exclusions. These include a case where the parties intend that the profit is to be secured or the loss to be avoided by taking delivery of property. This avoids overlap with the *specified investment*

categories of *options* and *futures*. Also excluded are index-linked *deposits* and rights under certain contracts connected with the National Savings Bank or National Savings products. There is also provision to ensure that the *specified investment* category of *contracts for differences* does not include rights under *life policies*.

2.6.24A **G**

- (1) A binary or other fixed outcomes bet is also treated as *contract for differences*. This is defined as something that meets the following conditions:
 - (a) it is a derivative contract of a binary or other fixed outcomes nature;
 - (b) it is not covered by ■ PERG 2.6.23G(1) or (2);
 - (c) it is settled in cash;
 - (d) it is a *financial instrument* that falls within paragraphs 4, 5, 6, 7 or 10 of Part 1 of Schedule 2 to the *Regulated Activities Order* (see ■ PERG 13, Q31A to Q34 for *guidance* about these instruments); and
 - (e) one of the following requirements is met:
 - (i) ■ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of MiFID business) applies; or
 - (ii) a *person is making arrangements with a view to transactions in investments* in relation to it.
- (2) A product is binary (see ■ PERG 2.6.24AG(1) (a)) only if the payout is all or nothing. That is, the overall result will be that one party will pay the other a fixed sum. It is a sort of fixed odds bet.
- (3) The main example of a binary product is a binary or digital option.
- (4) A simple example is a contract between X and Y under which:
 - (a) at the start, X pays Y a fixed sum (equivalent to the stake in a bet);
 - (b) if shares in ABC PLC close above £5.20 per share at close of trading five days later, Y pays X a fixed sum (a multiple of X's original stake), the result being that Y pays X a fixed sum in net terms;
 - (c) if shares in ABC PLC close at or below £5.20 per share at close of trading five days later, X gets nothing, the result being that X pays Y a fixed sum.
- (5) A simple binary sporting bet is not a *contract for differences* as:
 - (a) it is not covered by *MiFID* and so it does not meet the condition in ■ PERG 2.6.24AG(1)(d); and
 - (b) it does not come under any other part of the definition of a *contract for differences*.
- (6) A product that that has fixed outcomes but is not binary (see ■ PERG 2.6.24AG(1)(a)):

- (a) is like a binary product in that there are fixed number of possible payouts and they are all known in advance; but
 - (b) differs from a binary contract in that the number of possible payouts is three or more rather than just two.
- (7) A simple example of a contract in (6) (although it may not be common in practice) is a contract between X and Y under which:
- (a) at the start, X pays Y a fixed sum (equivalent to the stake in a bet);
 - (b) if shares in ABC PLC close above £5.20 per share at close of trading five days later and (c) does not apply, Y pays X a fixed sum (a multiple of X's original stake), the result being that Y pays X a fixed sum in net terms;
 - (c) if shares in ABC PLC close above £5.20 per share at close of trading five days later and the market as a whole rises by more than ten percent, Y pays X a fixed sum that is:
 - (i) a multiple of X's original stake; but
 - (ii) a different (and usually smaller) multiple from the one in (b); the result being that Y pays X a fixed sum in net terms;
 - (d) if shares in ABC PLC close at or below £5.20 per share at close of trading five days later, X gets nothing, the result being that X pays Y a fixed sum.

2.6.24B

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- (1) Any derivative under *MiFID* will be an *option, future or contract for differences* where ■ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies.
- (2) So for example the following contract between X and Y would be a *contract for differences*.
 - (a) At the start, X pays Y a fixed sum (equivalent to a stake in a bet).
 - (b) If the ABC index closes above 6,500 when the contract expires, Y pays X a fixed sum being the stake and an additional pay out (determined on the opening of the contract), the result of the contract being that Y pays X a fixed sum.
 - (c) If the ABC index closes below 6,500 when the contract expires, X gets nothing (and pays Y the stake paid when X opened the contract), the result of the contract being that X pays Y a fixed sum.
 - (d) If the ABC index was trading at 6,500 when the contract was opened and closes at 6,500 when the contract expires, Y pays X a fixed sum (being a proportion of the amount paid by X to Y on opening of the contract), the result of the contract being that X pays Y a fixed sum.

Lloyd's investments

2.6.25

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Two types of *specified investment* are relevant. These are the *underwriting capacity of a Lloyd's syndicate* and a *person's membership of a Lloyd's syndicate*. There are no exclusions from these *specified investment* categories.

Rights under a funeral plan

- 2.6.26 **G**
- (1) Rights under a *funeral plan contract* are the rights to a funeral obtained by a *person* who pays for the funeral before the death of the *person* whose funeral it will be.
 - (2) The definition of *funeral plan contract* excludes those contracts under which the *customer* and the *funeral plan provider* intend or expect that the funeral will be provided within one *month* of the contract being entered into.

Rights under a regulated mortgage contract

- 2.6.27 **G**
- In accordance with article 61(3)(a) of the *Regulated Activities Order*, a *regulated mortgage contract* is a contract which, at the time it is entered into, satisfies the following conditions:
- (1) the contract is one where the lender provides credit to an individual or trustees (the "borrower");
 - (2) the obligation of the borrower to repay is secured by a mortgage on land:
 - (a) in relation to a contract entered into before *IP completion day*, means land in the *United Kingdom* or, if the contract was entered into on or after 21 March 2016, within the territory of an *EEA state*;
 - (b) in relation to a contract entered into on or after *IP completion day*, means land in the *United Kingdom*; and
 - (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling.

Detailed guidance on this is set out in ■ PERG 4.4 (Guidance on regulated activities connected with mortgages). However, generally, the definition of *regulated mortgage contract* does not include certain loans to commercial borrowers, second charge loans by a credit union, exempt consumer buy-to-let mortgage contracts (see ■ PERG 4.4.31G) and second charge bridging loans (see ■ PERG 4.4.1-A G).

Rights under a home reversion plan

- 2.6.27A **G**
- In accordance with article 63B(3)(a) of the *Regulated Activities Order*, a *home reversion plan* is an arrangement under which, at the time it is entered into:
- (1) a *person* (the "reversion purchaser") buys all or part of a qualifying interest in land (other than timeshare accommodation) in the *United Kingdom* from an individual or trustees (the "reversion occupier");
 - (2) the *reversion occupier* (or, where trustees are concerned, an individual who is a beneficiary of the trust), or a related *person* of either, is entitled, and intends, to use at least 40% of that land as or in connection with a dwelling; and
 - (3) the entitlement to occupy ends on the occurrence of any one or more of the following events:
 - (a) the end of a specified period of at least twenty years; or

- (b) the death of the individual; or
- (c) the individual enters a care home.

Detailed *guidance* on this is set out in ■ PERG 14.3 (Guidance on home reversion and home purchase activities).

Rights under a home purchase plan

2.6.27B

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In accordance with article 63F(3)(a) of the *Regulated Activities Order*, a *home purchase plan* is an arrangement under which, at the time it is entered into:

- (1) a *person* (the "*home purchase provider*") buys a qualifying interest in land or an undivided share of a qualifying interest in land (other than timeshare accommodation) in the *United Kingdom*;
- (2) where an undivided share of a qualifying interest is bought, the interest is held on trust for the home purchase provider and the individual or trustee as beneficial tenants in common;
- (3) an individual or trustees (the "*home purchaser*") is obliged to buy the interest bought by the *home purchase provider* over the course of or at the end of a specified period; and
- (4) the *home purchaser* (or, where trustees are concerned, by an individual who is a beneficiary of the trust), or a related *person* of either, is entitled, and intends, to use at least 40% of that land as or in connection with a dwelling.

Detailed *guidance* on this is set out in ■ PERG 14.4 (Guidance on home reversion and home purchase activities).

Rights under a regulated sale and rent back agreement

2.6.27C

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In accordance with Article 63J(3)(a) of the *Regulated Activities Order*, a *regulated sale and rent back agreement* is an arrangement under which, at the time it is entered into:

- (1) a *person* (the *SRB agreement provider*) buys all or part of the qualifying interest in land (other than timeshare accommodation) in the *United Kingdom* from an individual or trustees (the agreement seller); and
- (2) the agreement seller (if he is an individual) or an individual who is the beneficiary of the trust (if the agreement seller is a trustee), or a related *person*, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so;

but excluding any arrangement that is a regulated *home reversion plan*.

Detailed *guidance* on this is set out in ■ PERG 14.4A (Activities relating to regulated sale and rent back agreements).

Rights to or interests in investments

2.6.28 **G** Rights to, or interests in, all the *specified investments* in ■ PERG 2.6 (except rights to, or interests in, rights under a *home finance transaction*) are themselves treated as *specified investments*. The effect is that, in most cases, an activity carried on in relation to rights or interests derived from any of those *investments* is also a *regulated activity* if the activity would be regulated if carried on in relation to the investment itself. The exception is where the rights or interests relate to a *pure protection contract* or a *general insurance contract*.

2.6.29 **G**

(1) There are several things that are not covered by this category (other than rights to, or interests in, rights under a mortgage contract). Anything that is covered by any other *specified investment* category is excluded, as are interests under the trusts of an *occupational pension scheme*.

(2) There are also excluded from this category rights or interests acquired as a result of entering into a *funeral plan contract*. Where the *funeral plan contract* is trust or insurance-backed (see ■ FPCOB 3), the effect of this exclusion is that rights to, or interests in, the *contract of insurance* or interests under trust to which the contract relates are excluded from this *specified investment* category. Rights under the *funeral plan contract* itself which a *person* obtains when they enter into a *funeral plan contract* are covered by the *specified investment* category described in ■ PERG 2.6.26G.

Rights under a credit agreement and an article 36H agreement

2.6.30 **G** In accordance with article 60B (3) of the *Regulated Activities Order*, a *credit agreement* is an agreement between an *individual* ("A") and any other *person* ("B") under which B provides A with *credit* of any amount. In accordance with article 36H (10) of the *Regulated Activities Order*, rights under an article 36H agreement are also *specified investments*. The definition of an article 36H agreement is set out in ■ PERG 2.7.7H G. In addition and in accordance with article 53(5) of the *Regulated Activities Order*, rights under a 'relevant article 36H agreement' (within the meaning of that Order) are also *specified investments*.

Rights under a consumer hire agreement

2.6.31 **G** In accordance with article 60N(3) of the *Regulated Activities Order*, a *consumer hire agreement* is an agreement between a *person* ("the owner") and an *individual* ("the hirer") for the bailment or, in Scotland, the hiring, of *goods* to the hirer which:

(1) is not a *hire-purchase agreement*; and

(2) is capable of subsisting for more than three months.

2.7 Activities: a broad outline

2.7.1 **G** The following paragraphs describe the various specified activities. The exclusions relating to activities are dealt with in ■ PERG 2.8 and ■ PERG 2.9.

Accepting deposits and other regulated activities applying to deposits

2.7.2 **G** Whether or not *accepting deposits* is a *regulated activity* depends on the use to which the money is put. The activity is caught if money received by way of *deposit* is lent to others or if any other activity of the *person* accepting the *deposit* is financed wholly (or to a material extent) out of the capital of, or interest on, money received by way of *deposit*.

2.7.2-A **G** In general, *accepting deposits* is the only *regulated activity* that applies to *deposits*, except for those *regulated activities* that can apply to property or assets that are not *specified investments*. However, *structured deposits* are an exception to this.

2.7.2-B **G** The following *regulated activities* apply to *deposits* that are *structured deposits* in addition to the *regulated activity* of *accepting deposits*:

- (1) *dealing in investments as agent*;
- (2) *arranging (bringing about) deals in investments*;
- (3) *making arrangements with a view to transactions in investments*;
- (4) *managing investments*; and
- (5) *advising on investments*.

2.7.2-C **G** The activities in ■ PERG 2.7.2-BG may be carried out by the *person* accepting the *structured deposit* or another *person*. However the activities in ■ PERG 2.7.2-BG(1) to (3) are unlikely to be relevant to the *person* accepting the *structured deposit* because:

- (1) the dealing activity in ■ PERG 2.7.2-BG(1) only applies to an agent; and
- (2) the exclusion described in ■ PERG 2.8.6AG(3) (arranging transactions to which the arranger is to be a party) may apply to the activities in ■ PERG 2.7.2-BG(2) and (3).

2.7.2A **G** **Issuing electronic money**
 See ■ PERG 2.6.4A G for a description of those *persons* to whom this specified activity applies.

2.7.3 **G** **Effecting or carrying out contracts of insurance as principal**
 The activities of *effecting a contract of insurance* or *carrying out a contract of insurance* are separate *regulated activities*, each requiring *authorisation*. But this only applies where they are carried on by a *person* who is acting as principal. This means that the activities of agents, such as loss adjusters, will not constitute this *regulated activity*. The activities of some agents may, however, be regulated as *insurance distribution activities* (see ■ PERG 5 (Guidance on insurance distribution activities)).

2.7.4 **G** In addition, certain other activities carried on in relation to rights under *contracts of insurance* are *regulated activities*. These are where the activity is carried on in relation to:

- (1) *life policies*, where the *regulated activities* concerned are:
 - (a) *dealing in investments as principal* (see ■ PERG 2.7.5 G);
 - (b) *managing investments* (see ■ PERG 2.7.8 G);
 - (c) *safeguarding and administering investments* (see ■ PERG 2.7.9 G); and
 - (d) agreeing to carry on any of those activities (see ■ PERG 2.7.21 G); and
- (2) rights under any *contract of insurance*, where the *regulated activities* concerned are:
 - (a) *dealing in investments as agent* (see ■ PERG 2.7.5 G);
 - (b) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments* (see ■ PERG 2.7.7A G);
 - (c) *assisting in the administration and performance of a contract of insurance* (see ■ PERG 2.7.8A G);
 - (d) *advising on investments (except P2P agreements)* (see ■ PERG 2.7.15 G); and
 - (e) agreeing to carry on any of those activities (see ■ PERG 2.7.21 G).

■ PERG 5 (Guidance on insurance distribution activities) has more *guidance* on these *regulated activities* where they are *insurance mediation activities*.

2.7.5 **G** **Dealing in investments (as principal or agent)**
 In relation to *securities* or *life policies* (or rights or interests in either), *dealing as principal* is only a *regulated activity* if certain conditions are satisfied (see ■ PERG 2.8.4G (1)).

2.7.6 G Both the activities of *dealing in investments as principal* and *dealing in investments as agent* are defined in terms of 'buying, selling, subscribing for or underwriting' certain *investments*. These *investments* are:

- (1) for *dealing in investments as principal, securities or contractually based investments* (except rights under a *funeral plan contract*); and
- (2) for *dealing in investments as agent, securities, structured deposits and relevant investments*.

2.7.6A G Because of the different nature of the *specified investments* in relation to which these activities are carried on, 'buying' and 'selling' are defined terms that have an extended meaning. For example, some of the *specified investments* listed in ■ PERG 2.6 are particular things that can be bought and sold in the ordinary meaning of the words. Others fall outside the ordinary meaning of 'buy' and 'sell' because their transfer involves an assumption of a potential liability under a bilateral contract (*contracts for differences* are an example of this). To deal with the possible range of circumstances, 'buying' is defined in the *Regulated Activities Order* to include acquiring for valuable consideration. 'Selling' is defined to include disposing for valuable consideration and 'disposing' is itself given a specified meaning that covers a range of possible transactions according to the nature of the investment being transferred (including, for example, surrendering a life insurance contract).

Bidding in emission auctions.....

2.7.6B G The *RAO* and the *UK auctioning regulations* together generate three broad categories of *person* in relation to bidding for *emission allowances* on an *auction platform*:

- (1) The first category consists of a *MiFID investment firm* (other than a *collective portfolio management investment firm*) or a *third country investment firm* (other than one which would be a *collective portfolio management investment firm* if its head office were in the *United Kingdom*).
- (1A) The first category also consists of a *person* that is exempt from *MiFID* under article 2(1) (j), as onshored by Part 1 of Schedule 3 to the *RAO*, where it is bidding on behalf of a client of its main business or bidding on its own account (further information on the article 2(1) (j) exemption from *MiFID* is in ■ PERG 13.5, Q44).
- (1B) A *person* in this first category is entitled to bid on an *auction platform* but requires permission from the *FCA* for *bidding in emissions auctions* to do so.
- (2) The second category consists of operators or aircraft operators bidding on their own account as well as group entities or business groupings of those operators or *UK public bodies* or *UK state-owned entities* that control any of those operators (as set out in regulation 16 of the *UK auctioning regulations*). A *person* or entity in this category is entitled to bid on an *auction platform* but does not require *permission* from the *FCA* to do so as a result of an exclusion from the *regulated activity* of *bidding in emissions auctions* in article 24B of the *RAO*.

(3) The third category consists of all other *persons*. The *UK auctioning regulations* prevent an *auction platform* from granting these *persons* admission to bid. A *person* in this category is not entitled to bid on an *auction platform* and the *FCA* is not able to grant such a *person permission* to do so.

2.7.6C

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A *person* may fall into both the first and the second category. For example, a *person* might be both exempt from *MiFID* under article 2(1)(j) (within the first category) and be a group entity of an operator (within the second category). In this case, that *person* does not require *permission* for activities that cause that *person* to fall into the second category because those activities are excluded from the activity of *bidding in emissions auctions*.

2.7.6D

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- (1) As explained in ■ PERG 2.6.19DG, an *emission allowance* and an *emissions auction product* are both *specified investments*. The *Regulated Activities Order* deals with this as follows.
- (2) A *person* in the first category in ■ PERG 2.7.6BG requires *permission* from the *FCA* for *bidding in emissions auctions* but does not require any other *permission* to do so.
- (3) A *person* in the second category in ■ PERG 2.7.6BG does not require any *permission* from the *FCA* for bidding.
- (4) Article 24A(2) of the *RAO* is the main provision that deals with (2) and (3). It provides that *bidding in emissions auctions* does not form part of any other *regulated activity* and so a *person* seeking to carry on bidding activity will only require *permission for bidding in emissions auctions* to do so and will not require *permission* for any other *regulated activities*. Except for this exclusion, in the *FCA's* view, *bidding in emissions auctions* would broadly equate to the following *regulated activities*:
 - (a) *dealing in investments as principal*;
 - (b) *dealing in investments as agent*;
 - (c) *arranging (bringing about) deals in investments*; or
 - (d) *making arrangements with a view to transactions in investments*.
- (5) An *emission allowance* is a *security*. This means that any *person* wishing to carry out any activity in relation to it will need to consider whether any of the *regulated activities* relating to *securities* apply (subject to (8)).
- (6) A derivative on an *emission allowance* is potentially a *contractually based investment* and a *relevant investment*. Therefore any *person* wishing to carry out any activity in relation to it will need to consider whether any of the *regulated activities* relating to *contractually based investments* and *relevant investments* apply (subject to (8)).
- (7) An *emission allowance* auctioned under the *UK auctioning regulations*, as well as being a *specified investment* in its own right (an *emissions auction product*) may also be included in the *emission allowance* category of *specified investment* (subject to (8)). It is unlikely to be a *contractually based investment* or a *relevant investment*.

- (8) However (as explained in (2) to (4)), for a *firm* that is bidding under the *UK auctioning regulations*:
 - (a) the only *regulated activity* is *bidding in emissions auctions*; and
 - (b) the only *specified investment* is an *emissions auction product*.
- (9) (7) means that a *person* may need *permission* to carry out activities in relation to *emission allowances* that are auctioned under the *UK auctioning regulations* other than bidding activities, such as:
 - (a) buying and selling them in the secondary market; or
 - (b) advising a client about buying or selling them.
- (10) Where (9) applies, the *specified investment* involved will be an *emission allowance* or one of the *contractually based investments*. The *emissions auction product* category of *specified investment* is only relevant to the *regulated activity* of *bidding in emissions auctions*.
- (11) (9) applies to a *person* in (2) or (3) as well as anyone else wanting to carry out such activities.

Arranging deals in investments and arranging a home finance transaction

2.7.7

G [not used]

2.7.7A

G There are ten arranging activities that are *regulated activities* under the *Regulated Activities Order*. These are:

- (1) *arranging (bringing about) deals in investments* which are *securities, relevant investments, structured deposits* or the *underwriting capacity of a Lloyd's syndicate or membership of a Lloyd's syndicate* (article 25(1));
- (2) *making arrangements with a view to transactions in investments* which are *securities, relevant investments, structured deposits* or the *underwriting capacity of a Lloyd's syndicate or membership of a Lloyd's syndicate* (article 25(2));
- (3) *arranging (bringing about) regulated mortgage contracts*, which includes arranging for another *person* to vary the terms of a *regulated mortgage contract* entered into by him as borrower after 31 October 2004 or a *legacy CCA mortgage contract* entered into by him as borrower (article 25A(1) and (2A));
- (4) *making arrangements with a view to regulated mortgage contracts* (article 25A(2));
- (5) *arranging (bringing about) a home reversion plan*, which includes arranging for another *person* to vary the terms of a *home reversion plan* entered into by him as the original reversion provider (and not merely as a *person* to whom the rights or obligations or the interest in land may be transferred) or as *reversion occupier* on or after 6 April 2007 (article 25B(1));

- (6) *making arrangements with a view to a home reversion plan* (article 25B(2));
- (7) *arranging (bringing about) a home purchase plan*, which includes arranging for another person to vary the terms of a *home purchase plan* entered into by him as home purchaser on or after 6 April 2007 (article 25C(1));
- (8) *making arrangements with a view to a home purchase plan* (article 25C(2));
- (9) *arranging (bringing about) a regulated sale and rent back agreement*, which includes arranging for another person (A) to vary the terms of a *regulated sale and rent back agreement* entered into on or after 1 July 2009 by A as agreement seller or agreement provider, in such a way as to vary As obligations under that agreement (article 25E(1)); and
- (10) *making arrangements with a view to a regulated sale and rent back agreement* (article 25E(2)).

2.7.7B

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The activity of *arranging (bringing about) deals in investments* is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, *arrangements* that bring it about). The activity of *making arrangements with a view to transactions in investments* is concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides arrangements of some kind:

- (1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or
- (2) to facilitate the entering into of transactions directly by the parties (such as multilateral trading facilities of any kind other than those excluded under article 25(3) of the *Regulated Activities Order*, exchanges, *clearing houses* and *service companies* (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions)).

2.7.7BA

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It is of note, however, that the *regulated activity of making arrangements with a view to transactions in investments* is not limited to arrangements that are participated in by investors. It is also not necessary that both the buyer and the seller under the transaction that is being arranged should participate in the arrangements. So, arrangements may come within the activity if they are participated in only by product companies with a view to their issuing investments. A person may be carrying on this *regulated activity* even if he is only providing part of the facilities for bringing about a transaction.

2.7.7BB

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It is also the FCA's view that certain arrangements may come within the activity even though the parties may have already committed to the transaction using other arrangements. This would typically apply to a *clearing house* whose clearing and settlement facilities may be seen to be made with a view to the members of the *clearing house*, as participants in its

arrangements, entering into transactions (usually through an investment exchange) which must be cleared through the *clearing house* to be completed. The *clearing house* is providing an essential part of the market infrastructure that is necessary to support trading activities. The same principle applies outside the markets context. So for example if a company that wishes to raise capital from private investors tells the potential investors, in order to increase their confidence, that all aspects of paying for and issuing shares will be handled by a particular firm, that firm may come within article 25(2) when it provides those services.

2.7.7BC

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In the *FCA's* view, it is generally the case that providers of back office administration services do not carry out the *regulated activity* of *making arrangements with a view to transactions in investments*. This is based essentially on the fact that providers of back office administration services aim to assist a broker *firm* to deal with the aftermath of transactions it has entered into on behalf of its clients. The broker *firm* has assumed full responsibility to its clients for completing their transactions, thus enabling the view to be taken that the *firm* to whom it outsources functions is making arrangements to assist the broker to complete transactions rather than with a view to the broker entering into trades as agent for its clients. The provider of back office services does not carry out the *regulated activity* of *making arrangements with a view to transactions in investments* because the transaction has already been entered into by the time of its involvement.

2.7.7BD

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- (1) The scope of article 25(2) of the *Regulated Activities Order* (the subject of ■ PERG 2.7.7B G) was considered by the High Court in the case of *Watersheds Limited v. David Da Costa and Paul Gentlemen*. The judgement suggests that the activity of introducing does not itself constitute a *regulated activity* for the purposes of article 25(2) of the *Regulated Activities Order*. The *FCA* has considered whether the judgement necessitates any change to the views expressed in ■ PERG 2.7.7B G and elsewhere in *PERG*. It appears to the *FCA* that the judgement should be considered in the light of the case to which it relates.
- (2) Also, the court does not seem to have had the benefit of a relevant argument. The *Regulated Activities Order* provides an exclusion which has the effect of removing certain arrangements for making introductions from the scope of article 25(2) of the *Regulated Activities Order*. This exclusions can be found in article 33 of the *Regulated Activities Order* (*guidance* on this can be found in PERG 8.33 and ■ PERG 5.6.17 G to ■ PERG 5.6.21 G). This exclusions would not be necessary if all introductions were outside the scope of article 25(2) of the *Regulated Activities Order*. Support for this can also be found in the fact that article 25A(2) is very similar to article 25(2) and there is an exclusion from it for certain introductions. The exclusion is in article 33A of the *Regulated Activities Order* and *guidance* on it can be found in ■ PERG 4.5.10 G and the following paragraphs. For these reasons, the *FCA* remains of the view that article 25(2) of the *Regulated Activities Order* includes certain types of arrangements for making introductions whilst recognising that the judgement in the *Watersheds* case introduces an element of doubt.

2.7.7BE

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In determining whether particular arrangements fall within the scope of Article 25(2) of the *Regulated Activities Order*, it may be necessary to

consider the purpose of the arrangements. Further guidance on this can be found in ■ PERG 8.32.3G. Although this *guidance* is in relation to the activities of publishers, broadcasters, website operators and telephone marketing services, the principle is not limited to those activities.

2.7.7BF **G** In the FCA's view, a mere passive display of literature advertising investments would not amount to the article 25(2) activity. Further *guidance* on this point can be found in ■ PERG 5.6.4 G. Although this *guidance* is in relation to *contracts of insurance*, the principle is not limited to them.

2.7.7C **G** Further *guidance* on the arranging activities as they relate to *home finance transactions* and *contracts of insurance* is in ■ PERG 4.5 (Arranging regulated mortgage contracts), ■ PERG 14.3 and ■ PERG 14.4 (Guidance on home reversion and home purchase activities) and ■ PERG 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance) respectively.

Operating a UK multilateral trading facility

2.7.7D **G** *Guidance on the MiFID investment service of operating a multilateral trading facility* is given in ■ PERG 13, Q24. An activity that comes within the *regulated activity of operating a multilateral trading facility* does not come within the *regulated activities of dealing in investments as agent, dealing in investments as principal or arranging deals in investments*.

2.7.7DA **G** The definition of a *UK multilateral trading facility* covers:

- (1) a multilateral trading facility as defined by article 2(1)(14A) of MiFIR (see ■ PERG 13, Q24) operated by an *investment firm, a credit institution or a market operator*; or
- (2) a facility which:
 - (a) is operated by an *investment firm, a credit institution or a market operator* that is set up outside the *United Kingdom*; and
 - (b) would come within (1) if its operator was set up in the *United Kingdom*.

Operating a UK organised trading facility

2.7.7DB **G** *Guidance on the MiFID investment service of operating an organised trading facility* is given in ■ PERG 13, Q24A. An activity that comes within the *regulated activity of operating an organised trading facility* does not come within the *regulated activities of dealing in investments as agent, dealing in investments as principal or arranging deals in investments*.

2.7.7DC **G** The definition of an *UK organised trading facility* covers:

- (1) *UK organised trading facility* as defined by article 2(1)(15A) of MiFIR (see ■ PERG 13, Q24A) operated by an *investment firm, a credit institution or a market operator*; or
- (2) a facility which:

2.7.7DD

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- (a) is operated by an *investment firm*, a *credit institution* or a *market operator* that is set up outside the *United Kingdom*; and
 - (b) would come within the *MiFID* definition if its operator was set up in the *United Kingdom*.
- (1) The *regulated activity* of *operating an organised trading facility* only covers a trading facility on which non-equity *MiFID* instruments are traded.
 - (2) Subject to (3), a non-equity *MiFID* instrument means:
 - (a) a *debenture*, an *alternative debenture*, a *government and public security*, a *warrant*, a *certificate representing certain securities*, a *unit*, an *emission allowance*, an *option*, a *future* or a *contract for differences*; or
 - (B) *rights to or interests in investments* relating to anything in (a).
 - (3) However, a product in (2) is only a non-equity *MiFID* investment if it also falls into one of the following categories:
 - (a) a bond; or
 - (b) a *structured finance product*; or
 - (c) an *emission allowance*; or
 - (d) an instrument falling within paragraphs 4 to 10 of Section C of Annex 1 of *MiFID* (these are described in ■ PERG 13.4) if the instrument is a *transferable security*.

Credit broking

2.7.7E

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There are six activities that fall within *credit broking*. These are:

- (1) effecting an introduction of an *individual* who wishes to enter into a *credit agreement* to another *person*, with a view to that *person* entering as *lender* into a *credit agreement* by way of business;
- (2) effecting an introduction of an *individual* who wishes to enter into a *consumer hire agreement* to another *person*, with a view to that *person* entering as *owner* into a *consumer hire agreement* by way of business (except where the exemption relating to the supply of essential services would apply to the *consumer hire agreement*, see ■ PERG 2.7.190 G);
- (3) effecting an introduction of an *individual* who wishes to enter into a *credit agreement* or a *consumer hire agreement* to a *person* who carries on an activity in (1) or (2) by way of business;
- (4) presenting or offering an agreement which would (if entered into) be a *credit agreement*;
- (5) assisting an *individual* by undertaking preparatory work with a view to that *person* entering into a *credit agreement*;
- (6) entering into a *credit agreement* on behalf of a *lender*.

2.7.7F **G** An activity is not *credit broking* within ■ PERG 2.7.7EG (1), ■ PERG 2.7.7EG (4), ■ PERG 2.7.7EG (5) or ■ PERG 2.7.7EG (6) if the exemption relating to the number of repayments to be made would apply to the *credit agreement*, see ■ PERG 2.7.19G G.

2.7.7G **G** An activity is also not *credit broking* within ■ PERG 2.7.7EG (1) to ■ PERG 2.7.7EG (6) in so far as the activity is *operating an electronic system in relation to lending*, see ■ PERG 2.7.7H G.

Operating an electronic system in relation to lending.....

2.7.7H **G**

- (1) This activity is aimed at what are sometimes referred to as peer-to-peer lending platforms. A person ("A") will be *operating an electronic system in relation to lending* if he operates an electronic system which enables him to facilitate *persons* ("B" and "C") becoming the *lender* and *borrower* under an article 36H agreement.
- (2) To be caught, all of the following conditions must be met:
 - (a) the electronic system operated by A must be capable of determining which agreements should be made available to each of B and C (whether in accordance with general instructions provided to A by B or C or otherwise);
 - (b) A, or another *person* ("X") acting under an arrangement with A or at A's direction, undertakes to:
 - (i) receive payments in respect of interest or capital or both due under the article 36H agreement from C; and
 - (ii) make payments in respect of interest or capital or both due under the article 36H agreement to B; and
 - (c) A, or another *person* ("X") acting under an arrangement with A or at A's direction, undertakes to perform, or A undertakes to appoint or direct another *person* to perform either or both of the following activities:
 - (i) taking steps to procure the payment of a debt under the article 36H agreement;
 - (ii) exercising or enforcing rights under the article 36H agreement on behalf of B.
- (3) For the purposes of (2)(b):
 - (a) an agreement by A to appoint X to perform the activities is to be treated as an undertaking by A; and
 - (b) it is immaterial that:
 - (i) payments may be subject to conditions;
 - (ii) A, or X, may be entitled to retain a portion or the entirety of any payment received from C.
- (4) Subject to the condition in (4A), an article 36H agreement is an agreement by which one *person* provides another *person* with *credit* and either of the following conditions is satisfied, or was satisfied at the time the agreement was entered into:
 - (a) the lender is an *individual*; or

- (b) the borrower is an *individual*; and
 - (i) the amount of *credit* provided is less than or equal to £25,000; or
 - (ii) the agreement is not entered into by the *borrower* wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the *borrower*. If the agreement includes a declaration by the borrower that it is entered into by the borrower wholly or predominantly for business purposes, this may create a presumption that this is the case (see ■ PERG 2.7.19D G).
- (4A) It is a condition to be an article 36H agreement that A does not provide *credit*, assume the rights (by *assignment* or operation of law) of a *person* who provided *credit*, or receive *credit* under the agreement.
- (5) An agreement may be an article 36H agreement and not a *credit agreement*, for example if it is an agreement by which an *individual* provides *credit* to a company. An agreement may, equally, be both an article 36H agreement for the purposes of *operating an electronic system in relation to lending* and a *credit agreement* for the purposes of other *credit-related regulated activities* if it is within the relevant definitions.
- (6) It is immaterial whether the *lender* is carrying on a *regulated activity*.
- (6A) A *person operating an electronic system in relation to lending* (A) also carries on a *regulated activity* where they operate an electronic system:
 - (a) that enables A to facilitate a *person* (B) assuming the rights of the *lender* under an article 36H agreement by *assignment* or operation of law; and
 - (b) that meets all of the conditions in ■ PERG 2.7.7HG(2), where C is the *borrower* under the agreement in (a).
- (7) The following activities are also caught by *operating an electronic system in relation to lending* if carried on by the operator in the course of, or in connection with, the activity in (1) or (6A):
 - (a) presenting or offering article 36H agreements to B or C with a view to B becoming the *lender* under the article 36H agreement or C becoming the *borrower* under the article 36H agreement; or
 - (b) furnishing information relevant to the financial standing of a *person* to assist a potential *lender* to determine whether to provide *credit* to that person under an article 36H agreement; or
 - (c) taking steps to procure the payment of a debt due under an article 36H agreement; or
 - (d) taking steps to perform duties or exercise or enforce rights under an article 36H agreement on behalf of the *lender*; or
 - (e) taking steps with a view to ascertaining whether a *credit information agency* holds information relevant to the financial standing of an *individual*; or
 - (f) taking steps with a view to ascertaining the contents of such information; or

- (g) taking steps with a view to securing the correction of, the omission of anything from, or the making of any other kind of modification of, such information; or
- (h) taking steps with a view to securing that a *credit information agency* which holds such information stops holding the information, or does not provide it to any other *person*; or
- (i) giving advice in relation to the taking of any of the steps in (e) to (h).

Managing investments

2.7.8 **G** The *regulated activity of managing investments* includes several elements.

- (1) First, a *person* must exercise discretion. Non-discretionary portfolio management (where the manager *buys* and *sells*, as principal or agent, on the instructions of some other *person*) is not caught by this activity, although it may be caught by a different *regulated activity* such as the activity of *dealing in investments as principal* or *dealing in investments as agent*. The discretion must be exercised in relation to the composition of the portfolio under management and not in relation to some other function (such as proxy voting) carried on by the manager.
- (2) Second, the property that is managed must belong beneficially to another *person*. This excludes from the *regulated activity* the management by a *person* of his own property. But discretionary management of assets by a *person* acting in his capacity as trustee will be caught even though he is the legal owner of the assets.
- (3) Third, the property that is managed must consist of (or include) *securities, structured deposits or contractually based investments*. Alternatively, discretionary management will generally be caught if it is possible that the property could consist of or include such products. This is the case even if there never has been any investment in these products, as long as there have been representations that there would be.

Assisting in the administration and performance of a contract of insurance

2.7.8A **G** The activity of *assisting in the administration and performance of a contract of insurance* is a *regulated activity* that is identified in the *IDD*. Further guidance on this activity is in ■ PERG 5.7 (The regulated activities: assisting in the administration and performance of a contract of insurance).

Debt adjusting

2.7.8B **G** This activity comprises:

- (1) negotiating with the *lender* or *owner*, on behalf of the *borrower* or *hirer*, terms for the discharge of a debt;
- (2) taking over, in return for payments by the *borrower* or *hirer*, that person's obligation to discharge a debt; or

(3) any similar activity concerned with the liquidation of a debt;

when carried on in relation to debts due under a *credit agreement* or *consumer hire agreement*.

Debt-counselling

2.7.8C

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Giving advice to a *borrower* about the liquidation of a debt due under a *credit agreement* is a *regulated activity*. Giving advice to a *hirer* about the liquidation of a debt due under a *consumer hire agreement* is a *regulated activity*. See ■ PERG 17 for further guidance on *debt-counselling*.

Debt-collecting

2.7.8D

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- (1) Taking steps to procure the payment of a debt due under a *credit agreement* or a *consumer hire agreement* is a *regulated activity*.
- (2) Taking steps to procure the payment of a debt due under an article 36H agreement (see ■ PERG 2.7.7HG (3)) which has been entered into with the facilitation of an *operator of an electronic system in relation to lending* is also a *regulated activity*.
- (3) The activity is not a *regulated activity* in so far as the activity is *operating an electronic system in relation to lending* (article 36H of the *Regulated Activities Order*) see ■ PERG 2.7.7H G.

Debt administration

2.7.8E

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- (1) Taking steps to perform duties or to exercise or to enforce rights under a *credit agreement* or a *consumer hire agreement* on behalf of the *lender* or *owner* is a *regulated activity*.
- (2) Taking steps to perform duties or to exercise or to enforce rights under an article 36H agreement (see ■ PERG 2.7.7HG (3)) which has been entered into with the facilitation of an *operator of an electronic system in relation to lending* is also a *regulated activity*.
- (3) In so far as the activity is *operating an electronic system in relation to lending* (article 36H of the *Regulated Activities Order*, see ■ PERG 2.7.7H G) or *debt-collecting* (article 39F of the *Regulated Activities Order*) it is not also *debt administration*.

Safeguarding and administering investments

2.7.9

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The activity of *safeguarding and administering investments* belonging to another is regulated, as is providing a service under which a *person* undertakes to arrange on a continuing basis for others actually to carry out the safeguarding and administering. In each case, both the elements of safeguarding and administering must be present before a *person* will be said to carry on the activity.

- (1) Safeguarding is acting as custodian of the property, for example, holding any documents evidencing the investments such as the share certificate (although it is worth noting that there is express provision that an uncertificated investment may be safeguarded and administered).

(2) Administration covers services provided to the owner or manager of the property, such as settlement of sale transactions relating to an investment, dealing with income arising from the investment and carrying out corporate actions such as voting. The nature of administration services must be such that the custodian has no discretion (otherwise he is likely to be caught by the regulated activity of managing investments (see ■ PERG 2.7.8 G)).

2.7.10 G The property that is safeguarded and administered must belong beneficially to another person. It must consist of (or include) securities or contractually based investments. Alternatively, safeguarding and administration will generally be caught if it is possible that the property could consist of (or include) such securities or investments. This is the case even if the property in question has never consisted of (or included) such securities or investments, as long as there have been representations that it would do.

Sending dematerialised instructions

2.7.11 G The regulated activities relating to sending dematerialised instructions relate to the operation of the system for electronic transfer of title to securities or contractually based investments. This is the CREST settlement system maintained under the Uncertificated Securities Regulations 2001 (SI 2001/3755) (and currently operated by Euroclear UK & Ireland Limited). Sending instructions on behalf of another is a regulated activity, as is causing such instructions to be sent if the person causing the sending is a system-participant, as defined in those Regulations. A system-participant is the person who has the computer and network connection to CREST.

Managing a UK UCITS, managing an AIF, and establishing etc collective investment schemes

2.7.12 G

2.7.13 G

2.7.13A G There are five regulated activities associated with UCITS, AIFs and collective investment schemes:

- (1) managing a UK UCITS;
- (2) acting as trustee or depositary of a UK UCITS;
- (3) managing an AIF;
- (4) acting as trustee or depositary of a UK UCITS; and
- (5) establishing, operating and winding up a collective investment scheme.

2.7.13B G The activity of managing a UK UCITS is derived from the UCITS Directive. A person will manage a UK UCITS where they carry on collective portfolio management of a UK UCITS. A UK UCITS is a type of collective investment

scheme which is authorised by the FCA as meeting the requirements under the UK provisions which implemented UCITS Directive.

2.7.13C **G** A person will carry on the activity of *acting as trustee or depositary of a UCITS* if they act as:

- (1) *trustee of an authorised unit trust scheme; or*
- (2) *depositary of an investment company with variable capital or an authorised contractual scheme;*

where, in either case, the *scheme* or company is a UCITS.

2.7.13D **G** ■ PERG 16 provides *guidance* on the activities of *managing an AIF* (see ■ PERG 16.3) and *acting as trustee or depositary of an AIF* (see ■ PERG 16.4).

2.7.13E **G** Most *collective investment schemes* will also be either a UCITS or an AIF (although not all AIFs are *collective investment schemes*). As a result, there is a potential overlap between the activity of *establishing, operating and winding up a collective investment scheme* and the activities of *managing a UK UCITS* and *managing an AIF*. However, there are exclusions in the RAO which considerably reduce the overlap (see ■ PERG 2.8.10G (2) and ■ PERG 16.5).

2.7.13F **G** An *open-ended investment company* will, once it is authorised under regulations made under section 262 of the Act, become an *authorised person* in its own right under Schedule 5 to the Act (Persons concerned in Collective Investment Schemes). Under ordinary principles, a company operates itself and an *authorised open-ended investment company* will be operating the *collective investment scheme* constituted by the company. It is not required to go through a separate process of *authorisation* as a *person* because it has already undergone the process of product authorisation.

2.7.13G **G** [deleted]

Establishing etc pension schemes

2.7.14 **G** The *regulated activities* carried on in relation to *pension schemes* are *establishing, operating or winding up a stakeholder pension scheme* and *establishing, operating or winding up a personal pension scheme*. The identity of the *operator* of such a pension scheme depends on the facts. However, the scheme administrator will usually be the *operator* of the scheme either on its own or jointly with the scheme trustees. More detailed *guidance* on the scope of this activity is in ■ PERG 12(Q4).

Providing basic advice on stakeholder products

2.7.14A **G** This activity covers advice in the form of a recommendation given to a retail *consumer*. The recommendation must relate to a *stakeholder product* and certain conditions must be met. These conditions are based on the need for the adviser to make an assessment of the *consumer's* needs based on the answers that the *consumer* provides to a series of pre-scripted questions. A

fuller description of the activity is given in ■ PERG 2.7.14B G and explains what is meant by "retail customer". This activity is separate to the *regulated activity of advising on investments (except P2P agreements)* (see ■ PERG 2.7.15 G (Advising on investments)). The existence of this separate advising activity does not prevent a *person* from giving advice on *stakeholder products* in circumstances that do not satisfy the conditions set out in ■ PERG 2.7.14B G. But such advice is likely to amount to *advising on investments (except P2P agreements)* unless the *stakeholder product* is a *deposit*. Neither does the existence of the activity prevent a *person* from selling *stakeholder products* in any other manner provided the *person* has the appropriate *permission*.

2.7.14B G A *person* ('P') carries on the *regulated activity of providing basic advice on a stakeholder product* when:

- (1) P gives the advice:
 - (a) to a *person* ('C') who does not receive the advice in the course of a business that he carries on; and
 - (b) in the course of a business that P carries on;
- (2) the advice is on the merits of C opening or *buying a stakeholder product*;
- (3) the following conditions are met:
 - (a) P asks C questions to enable P to assess whether a *stakeholder product* is appropriate for C;
 - (b) if P, relying solely on the information provided by C in response to the questions referred to in (a), assesses that a *stakeholder product* is appropriate for C, P:
 - (i) describes that product to C; and
 - (ii) gives a recommendation of that product to C; and
- (4) C has indicated to P that he has understood the description and recommendation referred to in (3)(b).

Advising on investments.....

2.7.14C G There are two *regulated activities* which constitute *advising on investments* in article 53 of the *Regulated Activities Order*. These are:

- (1) *advising on investments (except P2P agreements)* (in article 53(1) of the *Regulated Activities Order*); and
- (2) *advising on P2P agreements* (in article 53(2) of the *Regulated Activities Order*).

2.7.15 G The *regulated activity of advising on investments (except P2P agreements)* under article 53(1) of the *Regulated Activities Order* applies to advice on *securities, structured deposits or relevant investments*. It does not, for example, include giving advice about *deposits (except structured deposits)*, or about things that are not *specified investments* for the purposes of the

Regulated Activities Order. Giving advice on certain other *specified investments* is, however, regulated under other parts of the *Regulated Activities Order* (see ■ PERG 2.7.16A G and ■ PERG 2.7.17G (2)). Giving a *person* generic advice about *specified investments* (for example, invest in Japan rather than Europe) is not a *regulated activity* nor is giving information as opposed to advice (for example, listings or company news). However, the context in which something is communicated may affect its character; for example, if a *person* gives information on share price against the background that, when he does so, that will be a good time to sell, then this will constitute *advising on investments (except P2P agreements)*.

2.7.16 G The advice must also be given to someone who holds *specified investments* or is a prospective investor (including trustees, nominees or discretionary fund managers). This requirement excludes advice given to a *person* who receives it in another capacity. An example of this might be a tax professional to whom advice is given to inform the practice of his profession or advice given to an employer for the purposes of setting up a *group personal pension scheme*. Further *guidance* on the meaning of *advising on investments (except P2P agreements)* is in ■ PERG 8.24 (Advising on investments).

2.7.16-A G

- (1) The scope of the *regulated activity of advising on investments (except P2P agreements)* is narrower for a *person* who is authorised for the purposes of the Act to carry on certain *regulated activities* (as set out in (2)) than described in ■ PERG 2.7.15G and ■ PERG 2.7.16G.
- (2) The narrower scope of *advising on investments (except P2P agreements)* referred to in (1) applies to a *person* who is authorised for the purposes of the Act to carry on any *regulated activity* other than (or in addition to):
 - (a) *advising on investments (except P2P agreements)*; or
 - (b) the *regulated activity of agreeing to carry on a regulated activity* in relation to (a).
- (3) A *person* in (2) is not *advising on investments (except P2P agreements)* except to the extent that they are providing a *personal recommendation*.

2.7.16A G In certain circumstances, the activity of *advising on investments (except P2P agreements)* can also amount to *providing basic advice on a stakeholder product* (see ■ PERG 2.7.14A G (Providing basic advice on stakeholder products)).

2.7.16AA G The *regulated activity of advising on P2P agreements* under article 53(2) of the *Regulated Activities Order* applies to advice given to a *person* in their capacity as a *lender* or potential *lender* under a relevant article 36H agreement (defined in article 53(4) of the *Regulated Activities Order*), or as an agent for a *lender* or potential *lender* under such an agreement, where that advice is on the merits of their doing any of the following (whether as principal or agent):

- (1) entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law; or
- (2) providing instructions to a *P2P platform operator* with a view to entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law, where the instructions involve:
 - (a) accepting particular parameters for the terms of the agreement presented by a *P2P platform operator*; or
 - (b) choosing between options governing the parameters of the terms of the agreement presented by a *P2P platform operator*; or
 - (c) specifying the parameters of the terms of the agreement by other means; or
- (3) enforcing or exercising the *lender's* rights under a relevant article 36H agreement; or
- (4) assigning rights under a relevant article 36H agreement.

Advising on regulated mortgage contracts

2.7.16B

G

Under article 53A of the *Regulated Activities Order*, giving advice to a *person* in his capacity as borrower or potential borrower is a *regulated activity* if it is advice on the merits of the *person*:

- (1) entering into a particular *regulated mortgage contract*; or
- (2) varying the terms of a *regulated mortgage contract*.

Advice on varying terms as referred to in (2) comes within article 53A only where the borrower entered into the *regulated mortgage contract* on or after 31 October 2004, or the contract is a *legacy CCA mortgage contract*, and the variation varies the borrower's obligations under the contract. Further *guidance* on the scope of the *regulated activity* under article 53A is in ■ PERG 4.6 (Advising on regulated mortgage contracts).

Advising on home reversion plans

2.7.16C

G

Under article 53B of the *Regulated Activities Order*, giving advice to a *person* in his capacity as *reversion occupier* or *reversion provider* is a *regulated activity* if it is advice on the merits of the *person*:

- (1) entering into a particular *home reversion plan*; or
- (2) varying the terms of a *home reversion plan*.

Advice on varying terms as referred to in (2) only comes within article 53B where the plan was entered into by the *person* on or after 6 April 2007 and the variation varies his obligations under the plan. Where a *person* is entering into the plan as *reversion provider* purely as a result of rights or obligations, or the interest in land, being transferred to him, advice given to him on the merits of the transaction is only regulated where the plan was originally entered into on or after 6 April 2007. Further *guidance* on the

scope of the *regulated activity* under article 53B is in ■ PERG 14.3 (Guidance on home reversion and home purchase activities).

Advising on a home purchase plan

2.7.16D

G

Under article 53C of the *Regulated Activities Order*, giving advice to a *person* in his capacity as *home purchaser* is a *regulated activity* if it is advice on the merits of the *person*:

- (1) entering into a particular *home purchase plan*; or
- (2) varying the terms of a *home purchase plan*.

Advice on varying terms as referred to in (2) only comes within article 53C where the plan is entered into by the *person* on or after 6 April 2007 and the variation varies the *person's* obligations under the plan. Further *guidance* on the scope of the *regulated activity* under article 53C is in ■ PERG 14.4 (Guidance on home reversion and home purchase activities).

Advising on regulated sale and rent back agreements

2.7.16E

G

Under article 53D of the *Regulated Activities Order* giving advice to a *person* in his capacity as an *SRB agreement seller* or an *SRB agreement provider* is a *regulated activity* if it is advice on the merits of the *person*:

- (1) entering into a particular *regulated sale and rent back agreement*; or
- (2) varying the terms of a *regulated sale and rent back agreement*.

Advice on varying terms as referred to in (2) only comes within article 53D where the agreement is entered into by the *person* on or after 1 July 2009 and the variation varies the *person's* obligations under the agreement. Further *guidance* on the scope of the *regulated activity* under article 53D is in ■ PERG 14.4A (Activities relating to regulated sale and rent back agreements).

Advising on regulated credit agreements for the acquisition of land

2.7.16F

G

Under article 53DA of the *Regulated Activities Order*, advising a *person* ("P") is a *regulated activity* if:

- (1) the advice is given to P in P's capacity as a recipient of credit, or potential recipient of credit, under a *regulated credit agreement*;
- (2) P intends to use the credit to acquire or retain property rights in *land* or in an existing or projected building; and
- (3) the advice consists of the provision of personal recommendations to P in respect of one or more transactions relating to *regulated credit agreements* entered into, or to be entered into, on or after 21 March 2016.

Advising on conversion or transfer of pension benefits

2.7.16G **G** Under article 53E of the *Regulated Activities Order* giving advice to a person ("P") who has *subsisting rights* in respect of any *safeguarded benefits* in their capacity as:

- (1) a *member of a pension scheme*; or
- (2) a *survivor of a member of a pension scheme*;

is a *regulated activity* if the advice is on the merits of P requiring the trustee or manager of the pension scheme to carry out any of the transactions listed in ■ PERG 2.7.16HG.

2.7.16H **G** The transactions in ■ PERG 2.7.16GG are:

- (1) converting any of the *safeguarded benefits* into different benefits that are *flexible benefits* under the scheme; or
- (2) making a transfer payment in respect of any of the *safeguarded benefits* with a view to acquiring a right or entitlement to *flexible benefits* for P under another pension scheme; or
- (3) paying a lump sum that would be an *uncrystallised funds pension lump sum* in respect of any of the *safeguarded benefits*.

2.7.16I **G** *Advising on conversion or transfer of pension benefits* can only be carried on in respect of one type of specified investments (see ■ PERG 2.6.19CG(2)).

Lloyd's activities

2.7.17 **G** Certain activities carried on in connection with business at Lloyds will be regulated. In addition to those already mentioned (*arranging deals* in the *underwriting capacity of a Lloyd's syndicate* or *membership of a Lloyd's syndicate*), there are three other *regulated activities* as follows.

- (1) *Managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's* is a *regulated activity*. 'Managing agent' is defined in article 3(1) of the *Regulated Activities Order*.
- (2) *Advising on syndicate participation at Lloyd's*, that is advising a person to become, or continue or cease to be, a member of a particular *syndicate* is also caught. Giving advice about *syndicate* participation (such as how members should use their capital within the market and arrange their *syndicate* participation) is a separate *regulated activity* to that of providing advice in relation to *securities* and *contractually based investments* (see ■ PERG 2.7.15 G). Appropriate *permission* will be needed.
- (3) *Arranging deals in contracts of insurance written at Lloyd's* is also a *regulated activity* for the Society of Lloyd's itself.

Entering into funeral plan contracts

2.7.18 **G** *Entering as provider into a funeral plan contract is a regulated activity. The 'provider', for the purposes of this activity, is the person to whom the pre-payments are made and who undertakes to provide, or secure the provision of, the funeral at some future point. They may be the funeral director or a third party who arranges for another person to provide the funeral.*

2.7.18A **G** *It is the FCA's view that, in the case of a funeral plan contract involving more than one payment (such as an instalment payment funeral plan), the funeral plan provider does not enter as provider into a funeral plan contract on the occasion of each individual payment.*

2.7.19 **G** *In addition, other activities carried on in relation to rights under certain funeral plan contracts are regulated (see ■ PERG 2.7.6G, ■ PERG 2.7.7AG(1) and ■ (2), ■ PERG 2.7.8G, ■ PERG 2.7.9G, ■ PERG 2.7.10G, ■ PERG 2.7.11G and ■ PERG 2.7.14CG to ■ PERG 2.7.16-AG). This is because such rights are classified as contractually based investments.*

Carrying out funeral plan contracts as provider

2.7.19-A **G** *Carrying out a funeral plan contract as provider is a regulated activity. This regulated activity applies in relation to both new funeral plan contracts and those which were entered into by funeral plan providers before 29 July 2022 in reliance on the exclusions for trust and insurance-backed plans which were formerly contained in article 60 of the Regulated Activities Order.*

2.7.19-B **G** *In its consultation on the regulation of pre-paid funeral plans (June 2019), the Treasury indicated that this regulated activity was intended to cover the administration of funeral plan contracts after the point of sale. However, the Treasury's consultation also explained that the regulated activity of carrying out a funeral plan contract as provider was not intended to extend to the activities of the funeral services provider in providing the end service for which pre-payment is made under the funeral plan contract (whether or not the funeral services provider is also the provider of the funeral plan contract).*

2.7.19-C **G** *For the purposes of this regulated activity, the definition of funeral plan provider includes a person who has assumed the undertaking referred to in ■ PERG 2.7.18G to provide, or secure that another person provides, the funeral.*

Regulated credit agreements

2.7.19A **G** (1) *Entering into a regulated credit agreement as lender is a regulated activity.*

(2) *It is also a regulated activity for the lender or another person to exercise, or to have the right to exercise, the lender's rights and duties under a regulated credit agreement.*

Exempt agreements

2.7.19B

G

- (1) A *credit agreement* entered into before 1 April 2014 is a *regulated credit agreement* for the purposes of ■ PERG 2.7.19AG if it was a 'regulated agreement' within the meaning of the CCA when it was entered into, or became such a 'regulated agreement' by virtue of being varied or supplemented by another agreement before 1 April 2014. But a *credit agreement* is not a *regulated credit agreement* for the purposes of ■ PERG 2.7.19AG if it was entered into before 1 April 2014 and, if it had been entered into on 21 March 2016:
- (a) a *person* would have been carrying on the *regulated activity* of *entering into a regulated mortgage contract* or *entering into a home purchase plan* by entering into the agreement; or
 - (b) a *person* would have been carrying on the *regulated activity* of *administering a regulated mortgage contract* by administering the agreement.
- (2) A *credit agreement* entered into on or after 1 April 2014 is not a *regulated credit agreement* for the purposes of ■ PERG 2.7.19AG if it is an exempt agreement. ■ PERG 2.7.19CG to ■ PERG 2.7.19JG describe the categories of exempt agreement. Where part of a *credit agreement* falls within the exemptions in articles 60C to 60H of the *Regulated Activities Order*, only that part of the agreement is an exempt agreement.

Exemptions relating to the nature of the agreement

2.7.19C

G

A *credit agreement* is an exempt agreement in the following cases:

- (1) if:
- (a) by entering into the agreement as *lender*, a *person* is or was carrying on the *regulated activity* of *entering into regulated mortgage contracts*; or
 - (b) by entering into the agreement as *home purchase provider*, a *person* is or was carrying on a *regulated activity* of the kind specified by article 63F(1) of the *Regulated Activities Order* (entering into regulated *home purchase plans*); or
 - (c) by administering the agreement on 21 March 2016, a *person* is carrying on a *regulated activity* of the kind specified by article 61(2) of the *Regulated Activities Order* (administering *regulated mortgage contracts*);
- (2) if:
- (a) the *lender* provides the *borrower* with *credit* exceeding £25,000; and
 - (b) the agreement is entered into by the *borrower* wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the *borrower*;
- (3) if:
- (a) the *lender* provides the *borrower* with *credit* of £25,000 or less; and

- (b) the agreement is entered into by the *borrower* wholly for the purposes of a business carried on, or intended to be carried on, by the *borrower*; and
 - (c) the agreement is a *green deal plan*;
- (4) if it is made in connection with trade in goods or services:
- (a) between the *United Kingdom* and a country outside the *United Kingdom*; or
 - (b) within a country outside the *United Kingdom*; or,
 - (c) between countries outside the *United Kingdom*; and
- the *credit* is provided to the *borrower* in the course of a business carried on by the *borrower*.

2.7.19D

G

If a *credit agreement* includes a declaration which:

- (1) is made by the *borrower*;
- (2) provides that the agreement is entered into by the *borrower* wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the *borrower*; and
- (3) complies with the *rules* in ■ CONC App 1.4;

the *credit agreement* is to be presumed to have been entered into by the *borrower* wholly or predominantly for business purposes. This presumption does not apply, however, if the *lender* or any *person* who has acted on behalf of the *lender* knows or has reasonable cause to suspect that the agreement is not entered into by the *borrower* wholly or predominantly for business purposes. This also applies to the exemption in ■ PERG 2.7.19CG (3), as if the word "predominantly" were omitted.

Exemption relating to the purchase of land for non-residential purposes

2.7.19E

G

A *credit agreement* is an exempt agreement if, at the time it is entered into:

- (1) any sums due under it are secured by a *legal or equitable mortgage on land*;
- (2) less than 40% of the *land* is used, or is intended to be used, as or in connection with a dwelling:
 - (a) by the *borrower* or a related person of the *borrower*; or
 - (b) in the case of *credit* provided to trustees, by an individual who is a beneficiary of the trust or a *related person* of a beneficiary; and
- (2A) the *credit agreement* is not an *article 3(1)(b) credit agreement* which is not one to which section 423A(3) of the *Act* applies, and which is secured on *land* less than 40% of which is intended to be used as or in connection with a dwelling.
- (3) For these purposes, a person is related to a *borrower* or a beneficiary of a trust if they are a spouse or civil partner, or a parent, brother, sister, child, grandparent or grandchild of the *borrower* or beneficiary

or if their relationship with the *borrower* or beneficiary has the characteristics of the relationship between husband and wife.

(4) [deleted]

Exemptions relating to the nature of the lender

2.7.19F **G** A *credit agreement* is an exempt agreement in the following cases:

- (1) if the *credit agreement* is a *relevant credit agreement relating to the purchase of land* and the *lender* is a *local authority*;
- (2) if the *credit agreement* is a *relevant credit agreement relating to the purchase of land* specified in ■ CONC App 1.3 and the *lender* is a person or within a class of persons specified in ■ CONC App 1.3;
- (3) if the *credit agreement* is secured by a *legal or equitable mortgage on land*, that *land* is used or is intended to be used as, or in connection with, a dwelling and the *lender* is a housing authority; or
- (4) If the *lender* is an *investment firm* or a *credit institution* (other than a *credit union* or *friendly society*) and the agreement is entered into for the purpose of allowing the *borrower* to carry out a transaction relating to one or more *financial instruments*.

2.7.19FA **G** The exclusion referred to in ■ PERG 2.7.19FG may not be available to a *firm* that is an *MCD firm* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive)).

2.7.19FB **G**

- (1) In ■ PERG 2.7.19FG(3), ‘housing authority’ has the same meaning as in article 60E(7) of the *Regulated Activities Order*. The definition of ‘housing authority’ in article 60E includes housing associations registered under the relevant housing legislation.
- (2) The effect of the definition of ‘regulated credit agreement’ in the *Regulated Activities Order* is that credit agreements entered into by housing associations and other housing authorities before 1 April 2014 that were *regulated credit agreements* when they were entered into are to be *regulated credit agreements* notwithstanding the introduction of the exemption in article 60E(5) of the *Regulated Activities Order*. Credit agreements entered into on or after 1 April 2014 and that meet the conditions in ■ PERG 2.7.19F(3) are exempt. See also ■ PERG 4.4.28CG.

Exemptions relating to number of repayments to be made

2.7.19G **G** A *credit agreement* is also an exempt agreement in the following cases:

- (1) if (subject to ■ PERG 2.7.19H G):
 - (a) the agreement is a *borrower-lender-supplier agreement for fixed-sum credit*;
 - (b) the number of payments to be made by the *borrower* is not more than 12;

- (c) those payments are required to be made within a period of 12 months or less (beginning on the date of the agreement); and
 - (d) the *credit* is:
 - (i) secured on *land*; or
 - (ii) provided without interest or other charges;
- (2) if (subject to ■ PERG 2.7.19H G):
- (a) the agreement is a *borrower-lender-supplier agreement* for *running-account credit*;
 - (b) the *borrower* is to make payments in relation to specified periods which must be, unless the agreement is secured on *land*, of three months or less;
 - (c) the number of payments to be made by the *borrower* in repayment of the whole amount of *credit* provided in each period is not more than one; and
 - (d) the *credit* is:
 - (i) secured on *land*; or
 - (ii) provided without interest or other significant charges;
- (3) if:
- (a) the agreement is a *borrower-lender-supplier agreement* financing the purchase of *land*;
 - (b) the number of payments to be made by the *borrower* is not more than four; and
 - (c) the *credit* is:
 - (i) secured on *land*; or
 - (ii) provided without interest or other charges;
- (4) if:
- (a) the agreement is a *borrower-lender-supplier agreement* for *fixed-sum credit*;
 - (b) the *credit* is to finance a *premium* under a *contract of insurance* relating to *land* or anything on *land* (for example, house or contents insurance);
 - (c) the *lender* is the *lender* under a *credit agreement* secured by a *legal or equitable mortgage* on that *land*;
 - (d) the *credit* is to be repaid within the period (which must be 12 months or less) to which the *premium* relates;
 - (e) in the case of an agreement secured on *land*, there is no charge forming part of the *total charge for credit* under the agreement (see ■ CONC App 1) other than interest at a rate not exceeding the rate of interest payable under the mortgage loan in (c);
 - (f) in the case of an agreement which is not secured on *land*, the *credit* is provided without interest or other charges; and
 - (g) the number of payments to be made by the *borrower* is not more than 12;

- (5) if:
- (a) the agreement is a *borrower-lender-supplier agreement for fixed-sum credit*;
 - (b) the *lender* is the *lender* under a *credit agreement* secured by a *legal or equitable mortgage on land*;
 - (c) the agreement is to finance a premium under a life insurance policy that meets certain conditions;
 - (d) in the case of an agreement secured on *land*, there is no charge forming part of the *total charge for credit* under the agreement (see ■ CONC App 1) other than interest at a rate not exceeding the rate of interest payable under the mortgage loan in (b);
 - (e) in the case of an agreement which is not secured on *land*, the *credit* is provided without interest or other charges; and
 - (f) the number of payments to be made by the *borrower* is not more than 12.

For the purposes of (1) to (5), “payment” means any payment which comprises or includes a *repayment*, a payment of interest or any other charge which forms part of the *total charge for credit*.

2.7.19GA G The exclusion referred to in ■ PERG 2.7.19G may not be available to a *firm* that is an *MCD firm* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive)).

2.7.19H G The exemptions in ■ PERG 2.7.19GG (1) and ■ PERG 2.7.19GG (2) do not apply to:

- (1) *credit agreements* financing the purchase of *land*;
- (2) *conditional sale agreements* or *hire-purchase agreements*; or
- (3) *credit agreements* secured by a pledge (other than a pledge of documents of title or of bearer bonds).

Exemptions relating to the total charge for credit.....

2.7.19I G A *credit agreement* is also an exempt agreement in the following cases:

- (1) if it is a *borrower-lender agreement*, the *lender* is a *credit union* and the rate of the *total charge for credit* (see ■ CONC App 1) does not exceed 42.6 per cent provided that:
 - (a) the agreement is not an *article 3(1)(b) credit agreement*; or
 - (b) the agreement is an *article 3(1)(b) credit agreement* but:
 - (i) the agreement is of a kind to which section 423A(3) of the *Act* applies (see ■ PERG 4.10A.5G(1) to (6)); or
 - (ii) it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or
 - (iii) it is a *bridging loan* described in ■ PERG 4.13.6G; or
 - (iv) it is a restricted public loan described in ■ PERG 4.13.7G; or

- (c) the agreement was entered into before 21 March 2016;
- (2) if (subject to (5), (6) and (7)):
 - (a) it is a *borrower-lender agreement*;
 - (b) it is offered to a particular class of *individual* and not offered to the public generally;
 - (c) it provides that the only charge included in the *total charge for credit* (see ■ CONC App 1) is interest; and
 - (d) interest under the agreement may not, at any time, be more than the sum of one per cent and the highest of the base rates published by the banks in (4) on the date 28 days before the date on which the interest is charged;
- (3) if (subject to (5), (6) and (7)):
 - (a) it is a *borrower-lender agreement*;
 - (b) it is an agreement of a kind offered to a particular class of *individual* and not offered to the public generally;
 - (c) it does not provide for or permit an increase in the rate or amount of any item which is included in the *total charge for credit* (see ■ CONC App 1); and
 - (d) the *total charge for credit* under the agreement is not more than the sum of one per cent and the highest of the base rates published by the banks in (4) on the date 28 days before the date on which the charge is imposed;
- (4) the banks (referred to in (3)(d)) are:
 - (a) the Bank of England;
 - (b) Bank of Scotland;
 - (c) Barclays Bank plc;
 - (d) Clydesdale Bank plc;
 - (e) Co-operative Bank Public Limited Company;
 - (f) Coutts & Co;
 - (g) National Westminster Bank Public Limited Company;
 - (h) the Royal Bank of Scotland plc;
- (5) the exemptions in (2) and (3) do not apply, however, if the total amount to be repaid by the *borrower* may vary according to a formula which is specified in the agreement and which has effect by reference to movements in the level of any index or other factor;
- (6) unless the agreement:
 - (a) is secured on *land*; or
 - (b) is offered by a *lender* to a *borrower* as an incident of employment with the *lender*, or with an *undertaking* in the same *group* as the *lender*;
 the exemptions in (2) and (3) apply only if:
 - (c) the agreement is offered under an enactment with a general interest purpose; and

- (d) the terms on which the *credit* is provided are more favourable to the *borrower* than those prevailing on the market, either because the rate of interest is lower than that prevailing on the market or because the rate of interest is no higher than that prevailing on the market, but the other terms on which *credit* is provided are more favourable to the *borrower*; and
- (7) if the agreement is an *article 3(1)(b) credit agreement*, the agreement is only an exempt agreement if:
 - (a) it meets the conditions in (6)(c) and (d);
 - (b) the *borrower* receives timely information on the main features, risks and costs of the agreement at the pre-contractual stage; and
 - (c) any advertising of the agreement is fair, clear and not misleading.

High net worth exemption

2.7.19J

G

A *credit agreement* is an exempt agreement if:

- (1) the *borrower* is an individual;
- (2) the agreement is either:
 - (a) secured on *land*; or
 - (b) for credit which exceeds £60,260 and, if entered into on or after 21 March 2016, is for a purpose other the renovation of residential property.
- (3) the agreement includes a declaration, made by the *borrower* which provides that the *borrower* agrees to forgo the protection and remedies that would be available to the borrower if the agreement were a *regulated credit agreement*, which complies with ■ CONC App 1.4;
- (4) a statement has been made in relation to the income or assets of the *borrower* which complies with ■ CONC App 1.4; and
- (5) the connection between that statement and the *credit agreement* complies with ■ CONC App 1.4;
- (6) a copy of that statement was provided to the *lender* before the agreement was entered into; and
 - (where the purpose of the agreement is to acquire or retain property rights in land or in an existing or projected building):
 - (a) a declaration has been made by the *borrower* which provides that either the *borrower* is UK resident or is treated as present in the *United Kingdom*;
 - (b) a copy of that declaration was provided to the *lender* before the agreement was entered into; and
 - (c) the agreement is entered into on or after 21 July 2022.

- 2.7.19J-A** G For the purposes of ■ PERG 2.7.19JG(7)(a), a *borrower*:
- (1) is UK resident if the *borrower* (or the *borrower's* spouse or civil partner, when living with them on the date the agreement is entered into) has been present in the *United Kingdom* for at least 183 days during the continuous period of 365 days ending with the date the agreement is entered into;
 - (2) is treated as present in the *United Kingdom* if, on the date the agreement was entered into, the *borrower*:
 - (a) is in Crown employment (being employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision); and
 - (b) is present in a country or territory outside the *United Kingdom* for the purpose of performing activities in the course of that employment; or
 - (c) is living with their spouse or civil partner who is an individual falling within (a) and (b).
- 2.7.19J-AB** G In ■ PERG 2.7.19J-A(1) and ■ (2)(c) the reference to spouse or civil partner excludes individuals who are separated under an order of a court of competent jurisdiction, are separated by deed of separation, or are otherwise separated in circumstances in which the separation is likely to be permanent.
- 2.7.19JA** G The exclusion referred to in ■ PERG 2.7.19JG may not (unless paragraph (7) of that provision applies) be available to a *firm* that is an *MCD firm* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive)).
- Regulated consumer hire agreements**
- 2.7.19K** G
- (1) Entering into a *regulated consumer hire agreement* as owner is a *regulated activity*.
 - (2) It is also a *regulated activity* for the owner or another person to exercise, or to have the right to exercise, the owner's rights and duties under a *regulated consumer hire agreement*.
- Exempt agreements**
- 2.7.19L** G A *consumer hire agreement* is not a *regulated consumer hire agreement* for the purposes of ■ PERG 2.7.19K G if it is an exempt agreement. ■ PERG 2.7.19M G to ■ PERG 2.7.19P G describe the categories of exempt agreement.
- Exemptions relating to nature of agreement**
- 2.7.19M** G A *consumer hire agreement* is an exempt agreement if the *hirer* is required by the agreement to make payments exceeding £25,000, and the agreement is entered into by the *hirer* wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the *hirer*.

2.7.19N **G** As in the case of a *credit agreement* (see ■ PERG 2.7.19D G), if a *consumer hire agreement* includes a declaration which:

- (1) is made by the *hirer*;
- (2) provides that the agreement is entered into by the *hirer* wholly or predominantly for business purposes; and
- (3) complies with ■ CONC App 1.4;

the *consumer hire agreement* is to be presumed to have been entered into by the *hirer* for business purposes. This presumption does not apply, however, if the *owner* or any *person* who has acted on behalf of the *owner* knows, or has reasonable cause to suspect, that the agreement is not entered into by the *hirer* for business purposes.

Exemption relating to supply of essential services

2.7.19O **G** A *consumer hire agreement* is an exempt agreement if the *owner* is a body corporate which supplies gas, electricity or water under an enactment and the subject of the agreement is a meter or metering equipment which is used in connection with that purpose.

High net worth exemption

2.7.19P **G** This exemption is substantially the same as the one for *credit agreements* in ■ PERG 2.7.19J G.

Entering into and administering a regulated mortgage contract

2.7.20 **G** *Entering into* as lender, and *administering*, a *regulated mortgage contract* are *regulated activities* under article 61 of the *Regulated Activities Order* (Regulated mortgage contracts). *Guidance* on these *regulated activities* is in ■ PERG 4.7 (Entering into a regulated mortgage contract) and ■ PERG 4.8 (Administering a regulated mortgage contract).

Entering into and administering a home reversion plan

2.7.20A **G** *Entering into a home reversion plan* and *administering a home reversion plan* are *regulated activities* under article 63B of the *Regulated Activities Order* (Regulated home reversion plans). *Guidance* on these *regulated activities* is in ■ PERG 14.3 (Guidance on home reversion and home purchase activities).

Entering into and administering a home purchase plan

2.7.20B **G** *Entering into a home purchase plan* and *administering a home purchase plan* are *regulated activities* under article 63F of the *Regulated Activities Order* (Regulated home purchase plans). *Guidance* on these *regulated activities* is in ■ PERG 14.4 (Guidance on home reversion and home purchase activities).

Entering into and administering a regulated sale and rent back agreement

2.7.20BA **G** *Entering into a regulated sale and rent back agreement as an agreement provider and administering a regulated sale and rent back agreement are regulated activities under Article 63J of the Regulated Activities Order (Regulated sale and rent back agreements). Guidance on these regulated activities is in ■ PERG 14.4A (Activities relating to regulated sale and rent back agreements).*

Dormant account funds

2.7.20C **G** *There are three regulated activities associated with the activities of a dormant asset fund operator:*

- (1) the meeting of repayment claims;*
- (2) managing dormant asset funds (including the investment of such funds); and*
- (3) dealing with unwanted asset money.*

2.7.20D **G** [deleted]

2.7.20E **G** [deleted]

2.7.20EA **G** [deleted]

2.7.20F **G** [deleted]

2.7.20G **G** [deleted]

2.7.20GA **G** [deleted]

2.7.20H **G** [deleted]

2.7.20I **G** [deleted]

2.7.20J **G** [deleted]

Providing credit information services

2.7.20K **G** (1) Taking any of the steps in (2) on behalf of an *individual* is a regulated activity.

(2) This activity catches steps taken with a view to:

- (a) ascertaining whether a *credit information agency* holds information relevant to the financial standing of an *individual*;

- (b) ascertaining the contents of such information;
 - (c) securing the correction of, the omission of anything from, or the making of, any other kind of modification of, such information; or
 - (d) securing that a *credit information agency* which holds such information stops holding the information or does not provide it to any other *person*.
- (3) Giving advice to an *individual* in relation to the taking of any of the steps in ■ PERG 2.7.20KG (2)(a) to ■ PERG 2.7.20KG (2)(d) is also a *regulated activity*.
- (4) A *credit information agency* that takes any of the steps in ■ PERG 2.7.20KG (2)(a) to ■ PERG 2.7.20KG (2)(d) in relation to information held by that agency does not *provide credit information services*.
- (5) In so far as taking any of the steps in ■ PERG 2.7.20KG (2)(a) to ■ PERG 2.7.20KG (2)(d) is the activity of *operating an electronic system in relation to lending*, then it is not also *providing credit information services*.

Providing credit references

2.7.20L

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- (1) Furnishing of *persons* with information relevant to the financial standing of *individuals* is a *regulated activity* if the *person* has collected the information for that purpose.
- (2) A *person* requires *authorisation* for this activity only if its business primarily consists of the activities in (1).
- (3) This activity does not include an activity in so far as it is *operating an electronic system in relation to lending*.

Regulated claims management activity

2.7.20M

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- (1) Section 22(1B) of the *Act* provides that an activity is a *regulated activity* if it is an activity of a specified kind which:
 - is, or relates to, *claims management services*; and
 - is carried on in *Great Britain*.
- (2) The activities which have been specified are those set out in articles 89G to 89M of the *Regulated Activities Order*; these are listed in the *Glossary* definition of "*regulated claims management activity*" and set out in ■ PERG 2.7.20N. However, these are subject to the exclusions set out in articles 89N to 89W of the *Regulated Activities Order*: an activity which falls within one of the exclusions is not a *regulated activity* (see ■ PERG 2.8.14D).
- (3) The activity must be or relate to a *claims management service*. The drafting of the *Regulated Activities Order* has the effect that the *regulated claims management activities* all meet this condition.
- (4) The activity must be carried on in *Great Britain*: see ■ PERG 2.4A. A *person* outside *Great Britain* (including a *person* outside the *United Kingdom*) may require *permission* for a *regulated claims management*

2.7.20N G

activity if they deal with *claims* involving *claimants* who are constituted or ordinarily resident in *Great Britain* or handle details of such claimants, even if that *person* has no branch, office or establishment in *Great Britain*.

(1) *Seeking out, referrals and identification of claims or potential claims*, as specified in article 89G of the *Regulated Activities Order*, involves any or all of the following:

- (a) seeking out *persons* who may have a *claim* (unless that activity constitutes a *controlled claims management activity*: see ■ PERG 8.7A.5G);
- (b) referring details of a *claim* or a potential *claim* or a *claimant* or potential *claimant* to another *person*; and
- (c) identifying a *claim* or potential *claim*, or a *claimant*, or potential *claimant*;

when carried on in relation to a *personal injury claim*, a financial services or financial product *claim*, a *housing disrepair claim*, a *claim for a specified benefit*, a *criminal injury claim* or an *employment-related claim*.

(2) The other *regulated claims management activities* are:

- (a) *advice, investigation or representation in relation to a personal injury claim*;
- (b) *advice, investigation or representation in relation to a financial services or financial product claim*;
- (c) *advice, investigation or representation in relation to a housing disrepair claim*;
- (d) *advice, investigation or representation in relation to a claim for a specified benefit*;
- (e) *advice, investigation or representation in relation to a criminal injury claim*; and
- (f) *advice, investigation or representation in relation to an employment-related claim*.

(3) Advice includes any type of advice in relation to a *claim*, including advice on the merits of a *claim*, advice on the procedure for pursuing a *claim*, advice on how best to present a *claim*, and advice on possible means of challenging an unsatisfactory outcome to a *claim*.

(4) Investigation of a *claim* means carrying out an investigation into, or commissioning the investigation of, the circumstances, merits or foundation of a *claim* (see article 89F(2)(i) of the *Regulated Activities Order*).

(5) Representation of a claimant means representation in writing or orally, regardless of the tribunal, body or person before which or to whom the representation is made (see article 89F(2)(j) of the *Regulated Activities Order*).

Agreeing

2.7.21

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Agreeing to carry on most *regulated activities* is itself a *regulated activity*. But this is not the case if the underlying activities to which the agreement relates are those of *accepting deposits, issuing electronic money, effecting or carrying out contracts of insurance, operating a multilateral trading facility, operating an organised trading facility, managing dormant asset funds, the meeting of repayment claims, dealing with unwanted asset money, managing a UK UCITS, acting as trustee or depositary of a UK UCITS, managing an AIF, acting as trustee or depositary of an AIF, establishing, operating or winding up a collective investment scheme, establishing, operating or winding up a stakeholder pension scheme or establishing, operating or winding up a personal pension scheme*. A person will need to make sure that it has appropriate *authorisation* at the stage of agreement and before it actually carries on the underlying activity (such as the *dealing or arranging*).

2.8 Exclusions applicable to particular regulated activities

2.8.1 G Most *regulated activities* are subject to exclusions that are set out in the *Regulated Activities Order* directly following each activity.

Accepting deposits

2.8.2 G Two exclusions apply to the *regulated activity of accepting deposits*. The first relates to a *firm* with a *Part 4A permission to manage an AIF or manage a UK UCITS* (see ■ PERG 2.9.22 G (Managers of UK UCITS and AIFs)). There is also excluded from *accepting deposits* any activity which is carried on by a local authority (see ■ PERG 2.9.23 G). In addition to the situations that are excluded from being '*deposits*' (see ■ PERG 2.6.2 G to ■ PERG 2.6.4 G), several *persons* are *exempt persons* in relation to the *regulated activity of accepting deposits* (see ■ PERG 2.10.8G (2)).

2.8.2A G [deleted]

Effecting and carrying out contracts of insurance

2.8.3 G The following activities are excluded from both the *regulated activities of effecting and carrying out contracts of insurance*.

- (1) In specified circumstances, the activities of an *EEA firm* when participating in a Community co-insurance operation are excluded. A Community co-insurance operation is defined in the *Solvency II Directive*.
- (2) In specified circumstances, activities that are carried out in connection with the provision of on-the-spot accident or breakdown assistance for cars and other vehicles (such as repairs, vehicle retrieval, delivery of parts or fuel) are excluded.
- (3) [deleted]
- (4) Activities carried on by a *firm* with a *Part 4A permission to manage an AIF or manage a UK UCITS*, where they are in connection with, or for the purposes of, *managing an AIF or managing a UK UCITS* (see ■ PERG 2.9.22 G (Managers of UK UCITS and AIFs)).

Dealing in investments as principal

2.8.4

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The *regulated activity of dealing in investments as principal* applies to specified transactions relating to any security or to any *contractually based investment* (apart from rights under *funeral plan contracts* or rights to or interests in such contracts). The activity is cut back by exclusions as follows.

- (1) Of particular significance is the exclusion in article 15 of the *Regulated Activities Order* (Absence of holding out etc). This applies where *dealing in investments as principal* involves entering into transactions relating to any security or assigning rights under a *life policy* (or rights or interests in such a contract). In effect, it superimposes an additional condition that must be met before a *person's* activities become *regulated activities*. The additional condition is that a *person* must hold himself out as making a market in the relevant *specified investments* or as being in the business of dealing in them, or he must regularly solicit members of the public with the purpose of inducing them to deal. This exclusion does not apply to dealing activities that relate to any *contractually based investment* except the assigning of rights under a *life policy*.
- (2) Entering into a transaction relating to a *contractually based investment* is not regulated if the transaction is entered into by an *unauthorised person* and it takes place in either of the following circumstances (a transaction entered into by an *authorised person* would be caught). The first set of circumstances is where the *person* with whom the *unauthorised person* deals is either an *authorised person* or an *exempt person* who is acting in the course of a business comprising a *regulated activity* in relation to which he is exempt. The second set of circumstances is where the *unauthorised person* enters into a transaction through a non-UK office (which could be his own) and he deals with or through a *person* who is based outside the *United Kingdom*. This non-UK *person* must be someone who, as his ordinary business, carries on any of the activities relating to *securities* or *contractually based investments* that are generally treated as *regulated activities*.
- (3) A *person* (for example, a bank) who provides another *person* with finance for any purpose can accept an instrument acknowledging the debt (and as security for it) without risk of *dealing as principal* as a result.
- (4) A *company* does not *deal* as principal by issuing its own *shares* or *share warrants* and a *person* does not *deal* as principal by issuing his own *debentures*, *alternative debentures* or *debenture warrants* or *alternative debenture warrants*.
- (4A) A *company* does not carry on the activity of *dealing in investments as principal* by purchasing its own *shares* where section 162A of the Companies Act 1985 (Treasury shares) applies to the *shares* purchased or by dealing in its own *shares* held as Treasury shares, in accordance with section 162D of that Act (Treasury shares: disposal and cancellation).
- (5) Risk-management activities involving *options*, *futures* and *contracts for differences* will not require *authorisation* if specified conditions are met. The conditions include the *company's* business consisting mainly of *unregulated activities* and the sole or main purpose of the

risk management activities being to limit the impact on that business of certain kinds of identifiable risk.

- (6) A *person* will not be treated as carrying on the activity of *dealing in investments as principal* if, in specified circumstances (outlined in ■ PERG 2.9), he enters as principal into a transaction:
- (a) while acting as bare trustee (or, in Scotland, as nominee);
 - (b) in connection with the sale of goods or supply of services;
 - (c) that takes place between members of a *group* or *joint enterprise*;
 - (d) in connection with the sale of a *body corporate*;
 - (e) in connection with an employee share scheme;
 - (f) as an *overseas person*;
 - (g) [deleted]
 - (h) where it is in connection with or for the purposes of *managing a UK UCITS* or *managing an AIF* and the *person* has a *Part 4A permission to manage a UK UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs));
 - (i) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).
- (7) An activity that might otherwise be both *dealing in investments as principal* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as principal* as a result of article 24A(2) of the RAO which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see ■ PERG 2.7.6DG).

2.8.4A G *Persons* who enter as principal into transactions involving rights under a *contract of insurance* of any kind will need to consider whether they may, as a result, be carrying on the *regulated activity* of:

- (1) *arranging (bringing about) deals in investments*; or
- (2) *making arrangements with a view to transactions in investments*; or
- (3) agreeing to do (1) or (2).

2.8.4B G The possibility referred to in ■ PERG 2.8.4 G will only arise where it is not the case that the *person* who enters into the transaction as principal either:

- (1) is the only *policyholder*; or
- (2) as a result of the transaction, would become the only *policyholder*.

2.8.4C G The exclusions referred to in ■ PERG 2.8.4G (1), (2), (4), (5) and (6)(b), (c) and (d) will not be available to *persons* who, when carrying on the activity of *dealing in investments as principal*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

Dealing in investments as agent

2.8.5

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The *regulated activity of dealing in investments as agent* applies to specified transactions relating to any *security* or to any *relevant investment*. The activity is cut back by exclusions as follows.

- (1) An exclusion applies to certain transactions entered into by an agent who is not an *authorised person* which depend on him dealing with (or through) an *authorised person*. It does not apply if the transaction relates to a *contract of insurance*. There are certain conditions which must be satisfied for the exclusion to apply. These are that the agent must not give any relevant advice on the transaction and that he must not receive any remuneration from the transaction unless account is made to his client.
- (2) There is an exclusion for risk-management transactions where the agent is dealing on behalf of a *group* company or a co-participant in a *joint enterprise*.
- (3) In addition, exclusions apply in specified circumstances (outlined in ■ PERG 2.9 (*Regulated activities: exclusions available in certain circumstances*)) where a *person* enters as agent into a transaction:
 - (a) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see ■ PERG 2.9.5 G);
 - (b) in connection with the sale of goods or supply of services (see ■ PERG 2.9.7 G);
 - (c) that takes place between members of a *group* or *joint enterprise* (see ■ PERG 2.9.9 G);
 - (d) in connection with the sale of a *body corporate* (see ■ PERG 2.9.11 G);
 - (e) in connection with an employee share scheme (see ■ PERG 2.9.13 G);
 - (f) as an *overseas person* (see ■ PERG 2.9.15 G);
 - (g) [deleted]
 - (h) as a provider of non-motor goods or travel services where the transaction involves a *general insurance contract* that satisfies certain conditions (see ■ PERG 2.9.19 G);
 - (i) that involves a *contract of insurance* covering large risks situated outside the *EEA* (see ■ PERG 2.9.19 G);
 - (j) on behalf of the participants of a business angel-led enterprise capital fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*;
 - (k) where it is in connection with or for the purposes of *managing a UK UCITS* or *managing an AIF* and the person has a *Part 4A permission to manage a UK UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs));
 - (l) as a *local authority* in relation to certain *contracts of insurance* (see ■ PERG 2.9.23 G);
 - (m) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).

- (4) An activity that might otherwise be both *dealing in investments as agent* and *bidding in emissions auctions* is specifically excluded from *dealing in investments as agent* as a result of article 24A(2) of the RAO which provides that the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see ■ PERG 2.7.6DG).

More detailed *guidance* on the exclusions that relate to *contracts of insurance* is in ■ PERG 5 (Guidance on insurance distribution activities).

- 2.8.5A G The exclusions referred to in ■ PERG 2.8.5G (1), (2) and (3)(a), (b), (c), (d) and (j) will not be available to *persons* who, when carrying on the activity of *dealing in investments as agent*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

Arranging deals in investments and arranging a home finance transaction

- 2.8.6 G The various activities that involve *arranging* fall into two general types. These are:
- (1) those relating to arranging a particular transaction or a contract, agreement or plan variation (articles 25(1), 25A(1), 25A(2A), 25B(1), 25C(1) , and 25E(1) of the *Regulated Activities Order*); and
 - (2) those relating to making arrangements with a view to persons entering into certain transactions (articles 25(2), 25A(2), 25B(2), 25C(2) , and 25E(2) of the *Regulated Activities Order*).

The exclusions in relation to the *regulated activities* of *arranging* under articles 25(1) and (2) are of particular relevance in the context of raising corporate finance. Some of the exclusions outlined in ■ PERG 2.8.6A G relate to all of the arranging activities but most relate only to certain of those activities as indicated.

- 2.8.6A G The exclusions in the *Regulated Activities Order* that relate to the various *arranging* activities are as follows.
- (-1) Under article 24A(2), an activity that would otherwise be both *arranging* and *bidding in emissions auctions* is specifically excluded from *arranging* because the activity of *bidding in emissions auctions* does not form part of any other *regulated activity* (see ■ PERG 2.7.6DG).
 - (1) Under article 26, arrangements that do not or would not bring about the transaction to which they relate are excluded from the *arranging* activities that relate to a particular transaction (see ■ PERG 2.8.6G (1)) only. A *person* will bring about a transaction or a contract or plan variation only if his involvement in the chain of events leading to a transaction or contract or plan variation is of sufficient importance that, without that involvement, it would not take place. This will require something more than the mere giving of advice (although giving such advice may be the *regulated activity* of *advising on*

investments (except P2P agreements) or advising on home finance transactions).

- (2) Under article 27, simply providing the means by which parties to a transaction (or possible transaction) are able to communicate with each other is excluded from arrangements made with a view to persons entering into certain transactions (see ■ PERG 2.8.6G (2)) only. This will ensure that *persons* such as Internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to be arrangements made with a view to the participants entering into transactions). If a *person* makes arrangements that go beyond providing the means of communication, and add value to what is provided, he will lose the benefit of this exclusion.
- (3) Under article 28, arranging investment transactions to which the *arranger* is to be a party is excluded from both article 25(1) and (2). The main purpose is to ensure that a *person* is not regarded as arranging deals for another when the transaction in question is one to which he intends to be a party. As a result, a *person* cannot both be engaging in a dealing activity (as principal or agent) and arranging *deals* for another as regards any particular transaction. But where the transaction involves a *contract of insurance*, article 28 will not apply if the *person* making the arrangements:
 - (a) is the only *policyholder*; or
 - (b) as a result of the transaction, would become the only *policyholder*.

Under article 28A, a *person* is excluded from any of the *arranging* activities that relate to *home finance transactions* if he is to enter into the contract or plan to which the *arrangements* relate or if he is or is to become a party to a contract or plan that is varied or to be varied.

- (4) Under article 29, an *unauthorised person* who, on behalf of a client, arranges transactions or contract or plan variations, with or through an *authorised person*, is excluded from each of the *arranging* activities if specified conditions as to advice and remuneration are satisfied. For example, the exclusion is dependent on the client not receiving any advice on the transactions or variations from the *unauthorised person* making the arrangements. The exclusion does not apply where the *investment* is a *contract of insurance*.
- (5) Under article 29A, an *unauthorised person* is excluded from the *regulated activity* of arranging for another *person* to vary the terms of a *regulated mortgage contract* entered into on or after 31 October 2004 or a *legacy CCA mortgage contract* (article 25A(1)(b)) or a *home reversion plan* or *home purchase plan* entered into on or after 6 April 2007 (articles 25B(1)(b) and 25C(1)(b)) or a *regulated sale and rent back agreement* entered into on or after 1 July 2009 (article 25E(1)(b)). This is if the *arranging* is the result of:
 - (a) anything done in the course of the administration, by an *authorised person*:
 - (i) of a *regulated mortgage contract* in the way set out in article 62(a);
 - (ii) of a *home reversion plan* in the way set out in article 63C(a);

- (iii) of a *home purchase plan* in the way set out in article 63G(a);
 - (iv) of a *regulated sale and rent back agreement* in the way set out in article 63K(a); or
- (b) anything done by the *unauthorised person* in connection with the administration:
- (i) of a *regulated mortgage contract* in the way set out in article 62(b);
 - (ii) of a *home reversion plan* in the way set out in article 63C(b);
 - (iii) of a *home purchase plan* in the way set out in article 63G(b);
 - (iv) of a *regulated sale and rent back agreement* in the way set out in article 63K(b).
- (6) Under article 30, arranging investment transactions in connection with lending on the security of *contracts of insurance* is excluded, from article 25(1) and (2) but only where a *person* is not carrying on *insurance distribution* or *reinsurance distribution*.
- (7) Under article 31, making arrangements for finance (in whatever form) to be supplied to a *person* by a third party is excluded from article 25(1) and (2) if the finance is given in exchange for an instrument acknowledging the debt. This mirrors the exclusion from *dealing in investments as principal* in similar circumstances (see ■ PERG 2.8.4G (3)).
- (8) Under article 32, arrangements the only purpose of which is to provide finance to enable *persons* to enter into investment transactions are excluded from article 25(2) only. There is no equivalent exemption from article 25(1). But arrangements for the provision of finance will only be caught by that provision if the arrangements actually bring about the transaction.
- (9) Under article 33, making arrangements under which *persons* will be introduced to third parties who will provide independent services (consisting of advice or the exercise of discretion in relation to certain investments) is excluded from articles 25(2), 25A(2), 25B(2), 25C(2) and 25E(2) only. The party to whom the introduction is made must be of a specified standing (including that of an *authorised person*). The exclusion does not apply where the arrangements relate to a *contract of insurance*.
- (10) Under article 33A, making arrangements for introducing *persons* to:
- (a) an *authorised person* who has *permission* to carry on certain *regulated activities* concerned with *home finance transactions*; or
 - (b) an *appointed representative* who is able to carry on any of those activities without breaching the *general prohibition*; or
 - (c) an *overseas person* who carries on any of those activities;
- is excluded from articles 25A(2), 25B(2), 25C(2), and 25E(2) subject to certain conditions related to the receipt of client money and the disclosure of certain information.
- (10A) (1) Under article 33B, the mere provision of certain information is excluded from article 25(1) and (2). The information must be:

- (a) about a potential policyholder, and provided to either a relevant insurer (as defined in article 39B(2) of the *Regulated Activities Order*), an insurance intermediary (as defined in article 2(1)(3) of the *IDD*) or an *IDD reinsurance intermediary*, or
 - (b) about certain insurance products or providers, and provided to a potential policyholder.
- (2) This is on the condition that the provider of the information takes no step other than to provide this information to assist in the conclusion of a *contract of insurance*.
- (11) Under article 34, a *company* is not carrying on a *regulated activity* under article 25(1) or (2) of the *Regulated Activities Order* (Arranging deals in investments) by arranging for the issue of its own *shares* or *share warrants* and a *person* is not doing so by arranging for the issue of his own *debentures* or *alternative debentures* or *debenture warrants* or *alternative debenture warrants*.
- (12) Under article 35, a body carrying out international securities business of a specified type can apply to the Treasury for approval as an international securities self-regulating organisation (ISSRO). Arrangements made in order to carry out the functions of an ISSRO are excluded from article 25(1) and (2). The exclusion applies whether the arrangements are made by the ISSRO or by a *person* acting on its behalf.
- (13) The following exclusions from both article 25(1) and (2) (outlined in ■ PERG 2.9) apply in specified circumstances where a *person* makes arrangements:
- (a) while acting as trustee or personal representative (see ■ PERG 2.9.3 G);
 - (b) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see ■ PERG 2.9.5 G);
 - (c) in connection with the sale of goods or supply of services (see ■ PERG 2.9.7 G);
 - (d) in connection with certain transactions by a *group* member or by a participator in a *joint enterprise* (see ■ PERG 2.9.9 G);
 - (e) in connection with the sale of a *body corporate* (see ■ PERG 2.9.11 G);
 - (f) in connection with an employee share scheme (see ■ PERG 2.9.13 G);
 - (g) as an *overseas person* (see ■ PERG 2.9.15 G);
 - (h) as an *incoming ECA provider* (see ■ PERG 2.9.18 G);
 - (i) as a provider of non-motor goods or services related to travel (see ■ PERG 2.9.19 G);
 - (j) involving the provision, on an incidental basis, of information to *policyholders* or potential *policyholders* about *contracts of insurance* (see ■ PERG 2.9.19 G);
 - (k) that involve a *contract of insurance* covering large risks situated outside the *EEA* (see ■ PERG 2.9.19 G);

- (l) for or with a view to transactions to be entered into by or on behalf of the participants of a business angel-led enterprise capital fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*;
- (m) in connection with or for the purposes of *managing a UK UCITS* or *managing an AIF* and the person has a *Part 4A permission to manage a UK UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs));
- (n) as a *local authority* in relation to certain *contracts of insurance* (see ■ PERG 2.9.23 G);
- (o) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).

The exclusions referred to in (a), (b), (g), (h), (m) and (n) also apply to *arranging* activities related to *home finance transactions* (in that context, the exclusion in (n) covers any activity which is carried on by a *local authority*). More detailed *guidance* on the exclusions that relate to *contracts of insurance* is in ■ PERG 5 Guidance on insurance distribution activities).

- (14) Under article 36(2A), arrangements related to *regulated mortgage contracts* are excluded from article 25A in so far they constitute *CBTL business* (see ■ PERG 4.10B) carried on by a *CBTL firm*.

2.8.6B G The exclusions referred to in ■ PERG 2.8.6AG (4), ■ PERG 2.8.6AG(11) and ■ PERG 2.8.6AG (13)(b), (c), (d), (e) and (l) will not be available to *persons* who, when carrying on an *arranging* activity, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

2.8.6BA G The exclusion referred to in ■ PERG 2.8.6AG (4) will not be available to *persons* who, when carrying on an *arranging* activity, are *MCD firms* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive)).

Credit broking

2.8.6C G The following activities are excluded from the *regulated activity* of *credit broking*:

Introducing by individuals in the course of canvassing off trade premises

- (1) Activities carried on by an individual by *canvassing off trade premises*:
 - (a) a *restricted-use credit agreement* to finance a transaction between the *lender* or a member of the *lender's* group and the *borrower*; or
 - (b) a *regulated consumer hire agreement*;
 are excluded from *credit broking*, as long as the individual does not carry on any other activity in ■ PERG 2.7.7EG (1) to ■ PERG 2.7.7EG (3).

Activities for which no fee is paid

- (2) The activities in ■ PERG 2.7.7EG (4) to ■ PERG 2.7.7EG (6) carried on by a *person* for which that *person* does not receive a fee are excluded from *credit broking*.

- (3) "Fee" includes pecuniary consideration or any other form of financial consideration for the purposes of this paragraph.

Transaction to which the broker is a party

- (3) Activities carried on by a *person* in relation to a *credit agreement* or a *consumer hire agreement* into which that person enters or is to enter as *lender* or *owner* are excluded from *credit broking*.

Activities in relation to certain agreements relating to land (article 36E of the *Regulated Activities Order*)

- (3A) Activities carried on with a view to an *individual* entering into an investment property loan (within the meaning of article 61A of the *Regulated Activities Order*) are excluded from *credit broking*.
- (3B) The *regulated activities* of *arranging (bringing about) regulated mortgage contracts, making arrangements with a view to regulated mortgage contracts, arranging (bringing about) a home purchase plan and making arrangements with a view to a home purchase plan* are excluded from *credit broking*.
- (3C) Also excluded from *credit broking*, when not excluded by (3A) or (3B), are activities which consist of effecting an introduction with a view to an *individual* entering into *regulated mortgage contract* or a *home purchase plan*, if the *person* to whom the introduction is made is an *authorised person* who has *permission* to:
- (a) enter into such an agreement as *lender* or home purchase provider; or
 - (b) make an introduction to an *authorised person* who has *permission* to enter into such an agreement as *lender* or home purchase provider.

(4) [deleted]

(5) [deleted]

Activities carried on by members of the legal profession

- (6) Activities carried on by:
- (a) a barrister or advocate acting in that capacity;
 - (b) a solicitor acting in the course of providing advocacy services or litigation services;
 - (c) a *person* acting in the course of providing advocacy services or litigation services who, for the purposes of the Legal Services Act 2007, is authorised to exercise a right of audience or conduct litigation;
- are excluded from *credit broking*. For these purposes:
- (d) "advocacy services" means any service which it would be reasonable to expect a *person* who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide for the purpose of those proceedings or contemplated proceedings; and

- (e) "litigation services" means any service which it would be reasonable to expect a *person* who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide for the purpose of those proceedings or contemplated proceedings.

Activities carried on by registered social landlords

(6A) Activities carried on by registered social landlords are excluded from *credit broking* where:

- (a) the registered social landlord does not receive a fee, and
- (b) the activities relate to the introduction of an individual who wishes to enter into a *credit agreement* to:
 - (i) a credit union;
 - (ii) a community benefit society;
 - (iii) a community interest company limited by guarantee;
 - (iv) a registered charity, or a subsidiary of a registered charity; or
 - (v) a subsidiary of a registered social landlord.

For these purposes:

- (c) "community benefit society" means a registered society within the meaning of the Co-operative and Community Benefit Societies Act 2014 or a registered society within the meaning of the Co-operative and Community Benefit Societies Act (Northern Ireland) 1969;
- (d) "community interest company limited by guarantee" means a community interest company limited by guarantee within the meaning of section 26 of the Companies (Audit, Investigations and Community Enterprise) Act 2004;
- (e) "credit union" means a credit union within the meaning of the Credit Unions Act 1979 or the Credit Unions (Northern Ireland) Order 1985;
- (f) "registered charity" means:
 - (i) in England and Wales, a charity registered under section 30(1) of the Charities Act 2011;
 - (ii) in Scotland, a charity registered within the meaning of section 13(1) of the Charities and Trustee Investment (Scotland) Act 2005; and
 - (iii) in Northern Ireland, a charity registered under section 16(2) of the Charities Act (Northern Ireland) 2008;
- (g) "registered social landlord" means:
 - (i) in England, a private registered provider within the meaning of section 80(3) of the Housing and Regeneration Act 2008;
 - (ii) in Wales, a registered social landlord within the meaning of Part 1 of the Housing Act 1996;
 - (iii) in Scotland, a registered social landlord within the meaning of the Housing (Scotland) Act 2010; and

(iv) in Northern Ireland, a housing association within the meaning of Part 2 of the Housing (Northern Ireland) Order 1992;

(h) “subsidiary” means a subsidiary as defined by section 1159 of the Companies Act 2006; and

(i) “fee” includes pecuniary consideration or any other form of financial consideration.

Other exclusions

(7) The exclusions for *electronic commerce activities* by an *incoming ECA provider* (see ■ PERG 2.9.18 G), activities carried on by a *CBTL firm* with a view to an individual entering into a *CBTL credit agreement* (see ■ PERG 2.9.28G and ■ PERG 4.10B) and activities carried on by *local authorities* (see ■ PERG 2.9.23 G) also apply to *credit broking*.

Operating an electronic system in relation to lending

2.8.6D

G

(1) An activity of a kind specified below is excluded from the *regulated activity of operating an electronic system in relation to lending*:

- (a) *dealing in investments as principal*;
- (b) *arranging (bringing about) deals in investments*;
- (c) *making arrangements with a view to transactions in investments*;
- (d) *managing investments*; and
- (e) *advising on investments (except P2P agreements)*.

(1A) The *regulated activity of advising on P2P agreements* does not apply where such advice is given in relation to a relevant article 36H agreement (defined in article 53(4) of the *Regulated Activities Order*) which has been facilitated by the *person* giving the advice in the course of carrying on an activity specified by article 36H of the *Regulated Activities Order* and is given by:

- (a) an *authorised person* with *permission* to carry on the *regulated activity of operating an electronic system in relation to lending*; or
- (b) an *appointed representative* in relation to the *regulated activity of operating an electronic system in relation to lending*; or
- (c) an *exempt person* in relation to the *regulated activity of operating an electronic system in relation to lending*; or
- (d) a *person* to whom, as a result of Part 20 of the *Act*, the *general prohibition* does not apply in relation to the *regulated activity of operating an electronic system in relation to lending*.

(2) [deleted]

Managing investments

2.8.7

G

The activities of *persons* appointed under a power of attorney are excluded under article 38 of the *Regulated Activities Order*, from the *regulated activity of managing investments*, if specified conditions are satisfied. The exclusion only applies where a *person* is not carrying on *insurance distribution* or *reinsurance distribution* and is subject to further limitations discussed below.

In addition, the following exclusions (outlined in ■ PERG 2.9) apply in specified circumstances where a *person* manages assets:

- (1) While acting as trustee or personal representative; or
- (2) in connection with the sale of goods or supply of services; or
- (3) that belong to a *group* member or participator in a *joint enterprise*; or
- (4) [deleted]
- (5) belonging to the participants of a business angel-led enterprise capital fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*; or
- (6) in connection with or for the purposes of *managing a UK UCITS* or *managing an AIF* and the *person* has a *Part 4A permission to manage a UK UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs)); or
- (7) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).

The exclusion in article 38 of the *Regulated Activities Order* and the exclusions referred to in ■ PERG 2.8.7G (2), ■ PERG 2.8.7G (3) and ■ PERG 2.8.7G (5) will not be available to *persons* who, when carrying on the activity of *managing investments*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

Assisting in the administration and performance of a contract of insurance

2.8.7A G *Assisting in the administration and performance of a contract of insurance* is excluded under article 39B where it is carried on by a *person* acting in the capacity of:

- (1) an expert appraiser; or
- (2) a loss adjuster acting for a relevant insurer; or
- (3) a claims manager acting for a relevant insurer.

The term 'relevant insurer' is defined in article 39B(2).

2.8.7B G The following exclusions from *assisting in the administration and performance of a contract of insurance* also apply to a *person* in specified circumstances:

- (1) while acting as trustee or personal representative (see ■ PERG 2.9.3 G); or
- (2) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see ■ PERG 2.9.5 G); or
- (3) [deleted]

- (4) as a provider of non-motor goods or services related to travel (see ■ PERG 2.9.19 G); or
- (5) that involve the provision, on an incidental basis, of information to *policyholders* or potential *policyholders* about *contracts of insurance* (see ■ PERG 2.9.19G (2));
- (6) that involve a *contract of insurance* covering large risks situated outside the *United Kingdom* (see ■ PERG 2.9.19 G); or
- (7) where it is in connection with, or for the purposes of, *managing a UK UCITS* or *managing an AIF* and the *person* has a *Part 4A permission to manage a UK UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs)); or
- (8) as a *local authority* in relation to certain *contracts of insurance* (see ■ PERG 2.9.23 G); or
- (9) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).

Debt adjusting, debt counselling, debt collecting and debt administration

2.8.7C

G

- (1) Activities carried on by:
 - (a) the *lender* or *owner* under the agreement;
 - (b) the *supplier* in relation to the *credit agreement*;
 - (c) a *credit broker* who has acquired the business of the *person* who was the *supplier* in relation to the *credit agreement*; or
 - (d) a *person* who would be a *credit broker* but for the exclusion in ■ PERG 2.8.6CG (1) where the agreement was made in consequence of an introduction (by that *person* or another *person*) to which that exclusion applies;

are excluded from the *regulated activities* of *debt adjusting*, *debt counselling* and *debt collecting*.
- (2) Steps taken under, or in relation to, an agreement by any of the *persons* in (1) are excluded from being *debt administration*.
- (3) Activities carried on by a relevant energy supplier in relation to debts due under a *green deal plan* associated with the supplier are excluded from being *debt adjusting*, *debt counselling*, *debt collecting* or *debt administration*. A *green deal plan* is associated with a supplier if the payments under the plan are to be made to the supplier.
- (4) There is also an exclusion from *debt adjusting*, *debt counselling*, *debt collecting* and *debt administration* for any activity that relates to a *regulated mortgage contract* or a *home purchase plan* to the extent that the activity constitutes a *regulated activity* (other than only *debt adjusting*, *debt counselling*, *debt collecting* and *debt administration*), where entering into that contract as *lender* constitutes *entering into a regulated mortgage contract* or entering into that *home purchase plan* as provider constitutes *entering into a home purchase plan*.
- (5) Activities carried on by:

- (a) a barrister or advocate acting in that capacity;
- (b) a solicitor acting in the course of providing advocacy services or litigation services;
- (c) a *person* acting in the course of providing advocacy services or litigation services who, for the purposes of the Legal Services Act 2007, is authorised to exercise a right of audience or conduct litigation;

are excluded from *debt adjusting, debt counselling, debt collecting and debt administration*. For these purposes:

- (d) "advocacy services" means any service which it would be reasonable to expect a *person* who is exercising, or contemplating exercising, a right of audience in relation to any proceedings, or contemplated proceedings, to provide for the purpose of those proceedings or contemplated proceedings; and
- (e) "litigation services" means any service which it would be reasonable to expect a *person* who is exercising, or contemplating exercising, a right to conduct litigation in relation to any proceedings, or contemplated proceedings, to provide for the purpose of those proceedings or contemplated proceedings.

(6) The exclusions relating to activities carried on by a *local authority* (see ■ PERG 2.9.23 G) or an insolvency practitioner (see ■ PERG 2.9.25 G) also apply to these *regulated activities*.

2.8.7D G The *regulated activity of advising on P2P agreements* does not apply in so far as the advice is given in the course of carrying on an activity of a kind specified by:

- (1) article 39F of the *Regulated Activities Order* (debt collecting); or
- (2) article 39G of the *Regulated Activities Order* (debt administration);

by a *person* carrying on that activity not in contravention of the *general prohibition*.

Safeguarding and administering investments

2.8.8 G The exclusions from the *regulated activity of safeguarding and administering investments* are as follows.

- (1) Safeguarding and administration activities carried on by one *person* are excluded if a specified third party undertakes a responsibility for the assets which is no less onerous than it would have been if he were doing the safeguarding and administration himself. The effect of this is that an *authorised person* with *permission* to carry on this *regulated activity* (or in certain circumstances an *exempt person*) can delegate all or part of the activities without the delegate needing to be *authorised* and without loss of protection to the owner of the assets.
- (2) Introductions to an *authorised person*, or to an *exempt person* acting within the scope of his exemption and in the course of a business, are excluded from that aspect of this *regulated activity* which consists of

arranging safeguarding and administration of assets by another person (see ■ PERG 2.7.9 G).

- (2A) Trustees are excluded from arranging for another *person* to safeguard and administer assets where that other *person* is either:
 - (a) an *authorised person* who has *permission to safeguard and administer investments*; or
 - (b) an *exempt person* whose exemption permits him to *safeguard and administer investments*; or
 - (c) a *person* to whom (1) applies.

- (3) Certain specified activities (such as currency conversion and document handling) are excluded from being the administration of investments. A *person* who safeguards and administers assets will not be carrying on *regulated activities* if these are the only administration activities in which he engages. This is because a *person* must be carrying on both the activity of safeguarding and that of administration, or be arranging for both to be carried on by another, before he requires *authorisation* (see ■ PERG 2.7.9 G).

- (3A) A *person* with a *Part 4A permission to act as trustee or depositary of an AIF or act as trustee or depositary of an UCITS* will not carry on the activity of *safeguarding and administering investments* in respect of their activities for an *AIF* or *UCITS* for which they are acting as *trustee or depositary*.

- (4) The following exclusions apply in specified circumstances where a *person* safeguards and administers assets (or arranges for another to do so):
 - (a) while acting as trustee or personal representative (see ■ PERG 2.9.3 G);
 - (b) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see ■ PERG 2.9.5 G);
 - (c) in connection with the sale of goods or supply of services (see ■ PERG 2.9.7 G);
 - (d) which belong to a *group* member or participator in a *joint enterprise* (see ■ PERG 2.9.9 G);
 - (e) in connection with an employee share scheme (see ■ PERG 2.9.13 G);
 - (f) [deleted]
 - (g) that are *contracts of insurance* and, in so doing, provides information to *policyholders* or potential *policyholders* on an incidental basis in the course of his carrying on a business or profession not otherwise consisting of *regulated activities* (see ■ PERG 2.9.19G (2));
 - (h) belonging to the participants in a business angel-led enterprise capital fund, but only where such safeguarding and administration is carried on by a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*;
 - (i) in connection with or for the purposes of *managing a UK UCITS* or *managing an AIF* and the *person* has a *Part 4A permission* to

- manage a UK UCITS or manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs)); and
- (j) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).

Sending dematerialised instructions

2.8.9

G

Exclusions from the *regulated activity* of *sending dematerialised instructions* apply in relation to certain types of instructions sent in the operation of the system maintained under the Uncertificated Securities Regulations 2001 (SI 2001/3755). The various exclusions relate to the roles played by participating issuers, settlement *banks* and network providers (such as Internet service providers) and to instructions sent in connection with takeover offers (as long as specified conditions are met). In addition, the following exclusions (outlined in ■ PERG 2.9) apply in specified circumstances where a *person* sends dematerialised instructions:

- (1) while acting as trustee or personal representative (see ■ PERG 2.9.3 G);
- (2) on behalf of a *group* member (see ■ PERG 2.9.3 G);
- (3) [deleted]
- (4) where it is in connection with, or for the purposes of, *managing a UK UCITS or managing an AIF* and the *person* has a *Part 4A permission to manage a UK UCITS or manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs));
- (5) while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).

Managing a UK UCITS, managing an AIF and establishing etc collective investment schemes

2.8.10

G

- (1) The exclusion for business angel-led capital funds (see ■ PERG 2.9.20 G) applies to the activities of *managing an AIF, managing a UK UCITS and establishing, operating and winding up a collective investment scheme*. There is a third exclusion for insolvency practitioners (see ■ PERG 2.9.25 G).
- (2) In addition, there are two further exclusions which apply to the activity of *establishing, operating or winding up a collective investment scheme*:
 - (a) the exclusion in ■ PERG 2.9.22 G (Managers of UCITS and AIFs); and
 - (b) a *person* (A) does not carry on the *regulated activity* of *establishing, operating or winding up a collective investment scheme* if:
 - (i) in relation to a *UCITS*, at the time A carries on the activity, the *UCITS* is managed by a *person* with a *Part 4A permission to manage a UK UCITS* or, no more than 30 days have passed since the *UCITS* was managed by a *person* with that *permission* (this 30-day period can be extended in certain circumstances, as set out in article 51ZG(2) of the *RAO*); or
 - (ii) in relation to an *AIF*, the exclusion described in ■ PERG 16.5, question 5.2(2) applies.

(3) In other cases, the key issue is whether or not what is being done relates to something that is a *collective investment scheme* (see ■ PERG 2.6.18 G) or an *AIF* (see ■ PERG 16.6).

Establishing etc pension schemes

2.8.11 **G** Two exclusions apply to the range of activities specified as being regulated in relation to *stakeholder pension schemes* and *personal pension schemes*. The first relates to *firms* with a *Part 4A permission to manage an AIF or manage a UK UCITS* (see ■ PERG 2.9.22 G (Managers of UK UCITS and AIFs)). The second relates to insolvency practitioners (see ■ PERG 2.9.25 G).

Advising on investments

2.8.12 **G** In certain circumstances, advice that takes the form of a regularly updated news or information service and advice which is given in one of a range of different media (for example, newspaper or television) is excluded from the *regulated activities* of:

- (1) *advising on investments;*
- (2) *advising on regulated mortgage contracts;*
- (3) *advising on a home reversion plan;*
- (4) *advising on a home purchase plan;*
- (5) *advising on a regulated sale and rent back agreement; and*
- (6) [text to follow]
- (7) *advising on conversion or transfer of pension benefits.*

See ■ PERG 7 (Periodical publications: news services and broadcasts: applications for certification) for further *guidance* on this exclusion.

2.8.12A **G** Advice given by an *unauthorised person* in relation to a *home finance transaction* or *advising on regulated credit agreements for the acquisition of land* in the circumstances referred to in ■ PERG 2.8.6AG (5)(a) or (b) (Arranging deals in investments and arranging a home finance transaction) is also excluded. In addition:

- (1) the following exclusions apply in specified circumstances where a *person is advising on investments, advising on regulated credit agreements for the acquisition of land or advising on a home finance transaction*:
 - (a) while acting as trustee or personal representative (see ■ PERG 2.9.3 G);
 - (b) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see ■ PERG 2.9.5 G);
 - (c) [deleted]
 - (d) where it is in connection with, or for the purposes of, *managing a UK UCITS or managing an AIF* and the *person* has a *Part 4A*

permission to manage a UK UCITS or manage an AIF (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs));

- (e) *as a local authority (in the case of advising on investments, in relation to certain contracts of insurance) (see ■ PERG 2.9.23 G); and*
- (f) *as a CBTL firm in the course of CBTL business (see ■ PERG 4.10B) (in the case of advising on regulated credit agreements the purpose of which is to acquire land);*

(2) the following exclusions apply in specified circumstances where a person is *advising on investments*:

- (a) *in connection with the sale of goods or supply of services (see ■ PERG 2.9.7 G);*
- (b) *to a group member or participator in a joint enterprise (see ■ PERG 2.9.9 G);*
- (c) *in connection with the sale of a body corporate (see ■ PERG 2.9.11 G);*
- (d) *as an overseas person (see ■ PERG 2.9.15 G);*
- (e) *that are limited to certain covering risks to non-motor goods or related to travel (see);*
- (f) *that are covering large risks situated outside the (see)*
- (g) *to be made by or on behalf of the participants of a business angel-led enterprise capital fund, when the advice is given to the participants in that fund and that person is a as specified in article 72E(7) of the ;*
- (h) *while acting as an insolvency practitioner (see ■ PERG 2.9.25 G).*

More detailed *guidance* on certain of these exclusions is in ■ PERG 4 (Guidance on regulated activities connected with mortgages), ■ PERG 5 (Guidance on insurance distribution activities), ■ PERG 14.3 (Activities relating to home reversion plans), ■ PERG 14.4 (Activities relating to home purchase plans) and ■ PERG 14.4A (Activities relating to regulated sale and rent back agreements).

2.8.12B

G

The exclusions referred to in ■ PERG 2.8.12AG (1)(b) and (2)(a), (b), (c) and (g) will not be available to persons who, when carrying on the activity of *advising on investments* are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

Lloyd's activities

2.8.13

G

A *firm* with a *Part 4A permission to manage an AIF or manage a UK UCITS* is also excluded from carrying on a *regulated activity* if the person carries on that activity in connection with, or for the purposes of, *managing an AIF or managing a UK UCITS* (see ■ PERG 2.9.22 G). Otherwise the only exclusions that apply concern the *regulated activity of arranging deals* in its application to business carried on at Lloyd's.

Entering into funeral plan contracts and carrying out funeral plan contracts as provider

- 2.8.14** **G**
- (1) The definition of *funeral plan contract* excludes those contracts under which the *customer* and the *funeral plan provider* intend or expect that the funeral will be provided within one *month* of the contract being entered into.
 - (2) The exclusion relating to activities carried on by a *local authority* (see ■ PERG 2.9.23G) applies to the *funeral plan provision activities*.
 - (3) [deleted]
 - (4) The *funeral plan provision activities* are subject to the exclusion for *firms* with a *Part 4A permission to manage an AIF or manage a UK UCITS* for activities carried on in connection with, or for the purposes of, *managing a UK UCITS or managing an AIF*.

Administering regulated mortgage contracts

- 2.8.14A** **G**
- Exclusions from the *regulated activities* that involve *administering a home finance transaction* are provided where an *unauthorised person*:
- (1) arranges for administration by an *authorised person* who has *permission* for carrying on that *regulated activity*;
 - (2) carries out the administration for up to one month after an arrangement of the kind mentioned in (1) comes to an end; or
 - (3) carries out the administration under an agreement with an *authorised person* who has *permission* for carrying on that *regulated activity*.

These exclusions are subject to certain conditions and are explained in greater detail in ■ PERG 4.8 (Administering a regulated mortgage contract), ■ PERG 14.3, ■ PERG 14.4 and ■ PERG 14.4A (Guidance on home reversion, home purchase and regulated sale and rent back agreement activities).

- 2.8.14B** **G**
- The following exclusions apply in specified circumstances where a *person* is *administering a home finance transaction*:
- (1) while acting as trustee or personal representative (see ■ PERG 2.9.3 G);
 - (2) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see ■ PERG 2.9.5 G);
 - (3) [deleted]
 - (4) in connection with, or for the purposes of, *managing a UK UCITS or managing an AIF* and the *person* has a *Part 4A permission to manage a UK UCITS or manage an AIF* (see ■ PERG 2.9.22 G (Managers of UCITS and AIFs)); and
 - (5) if the *person* is a *local authority* (see ■ PERG 2.9.23 G);
 - (6) in the course of carrying on *CBTL business* as a *CBTL firm* (see ■ PERG 4.10B).

Regulated credit agreements

2.8.14ZA **G** A person who is not an *authorised person* and exercises, or has the right to exercise, the *lender's* rights and duties under a *regulated credit agreement* does not require *authorisation* to do so where he:

- (1) arranges for another *person* to do so and the other person is an *authorised person* with *permission* to carry on that *regulated activity*;
- (2) does so for up to one month after an arrangement of the kind in (1) comes to an end; or
- (3) does so under an agreement with an *authorised person* who has *permission* to carry on that *regulated activity*.

2.8.14ZB **G** [deleted]

2.8.14ZC **G** (1) [deleted]

- (2) There is also an exclusion from *entering into a regulated credit agreement as lender* and exercising, or having the right to exercise, the *lender's* rights and duties under a regulated credit agreement for any activity carried on by a *local authority* in so far as the *credit agreement* is of a kind to which the *Consumer Credit Directive* does not apply under article 2(2) of that Directive (see ■ PERG 2.9.23 G).

Regulated consumer hire agreements

2.8.14ZD **G** (1) The exclusion for an activity carried on by a *local authority* (see ■ PERG 2.9.23 G) also applies to the *regulated activities* of *entering into a regulated consumer hire agreement as owner* and exercising, or to having the right to exercise, the *owner's* rights and duties under a regulated consumer hire agreement.

Providing credit information services or credit references

2.8.14C **G** (1) The exclusions relating to activities carried on by members of the legal profession (see ■ PERG 2.8.6CG (6)) applies to *providing credit information services* and *providing credit references*.

(2) The exclusions for activities carried on by a *local authority* (see ■ PERG 2.9.23 G) and insolvency practitioners (see ■ PERG 2.9.25 G) also apply to *providing credit information services*.

Regulated claims management activity

2.8.14D **G** The *Regulated Activities Order* excludes a number of activities from *regulated claims management activity*. The exclusions include:

- (1) activity carried on by or through a legal practitioner, or by a natural person who carries on that activity at the direction of, and under the supervision of, a legal practitioner, provided that the legal practitioner carries on that activity in the ordinary course of legal practice pursuant to the professional rules to which that legal practitioner is subject (article 89N);

- (2) activity carried on by a charity or *not-for-profit body* (article 89O);
- (3) exclusion from *seeking out, referrals and identification of claims or potential claims* for providers of referrals who meet all the following conditions (article 89V):
 - (a) the *person* who refers those details (“the introducer”) carries on no other *regulated claims management activity*;
 - (b) the activity is incidental to the introducer’s main business;
 - (c) the details are only referred to *authorised persons*, legal practitioners, or a firm, *organisation*, or *body corporate* that provides the service through legal practitioners;
 - (d) of the claims that the introducer refers to such *persons*, that introducer is paid, in money or money’s worth, for no more than 25 claims per calendar quarter;
 - (e) the introducer, in obtaining and referring those details, has complied with, the Privacy and Electronic Communications (EC Directive) Regulations 2003, *data protection legislation* and the *Unfair Trading Regulations* (but this condition does not apply in the case of a referral to a legal practitioner, or to a firm, *organisation*, or *body corporate* that carries on the activity through legal practitioners); and
- (4) any *regulated activity* of the kind specified in articles 21, 25, 39A, 53 or 64 of the *Regulated Activities Order* carried on by a *person* who has *permission* to carry on that activity in relation to a *contract of insurance* (article 89U).

Agreeing

2.8.15

G

A *person* who agrees to carry on certain other *regulated activities* (which is itself a *regulated activity* see ■ PERG 2.7.21 G) does not require *authorisation* where the *person* concerned is an *overseas person* and the agreement is reached as a result of a legitimate approach (see ■ PERG 2.9.12 G). For this exclusion to apply, the agreement must be one to arrange deals, *manage investments*, *assist in the administration and performance of a contract of insurance*, *safeguard and administer investments* or *send dematerialised instructions*.

2.8.16

G

To the extent that an exclusion applies in relation to a *regulated activity*, then 'agreeing' to carry on an activity falling within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order*.

2.9 Regulated activities: exclusions applicable in certain circumstances

2.9.1 **G** The various exclusions outlined below deal with a range of different circumstances.

(1) Within each set of circumstances, the *Regulated Activities Order*, in Chapter XVII of Part II of the Order, makes separate provision for each *regulated activity* affected. This is necessary because each exclusion has to be tailored to reflect the different nature of the *regulated activity* involved and the different language required (for example, some activities involve entering directly into transactions while others relate to the provision of services).

(2) [deleted]

2.9.2 **G** The exclusions grouped together in the *Regulated Activities Order* are described below in this chapter in general terms. The exact terms of each exclusion will need to be considered by any *person* who is considering whether they need *authorisation*. Each description is accompanied by an indication of which *regulated activities* are affected.

Trustees, nominees or personal representatives.....

2.9.3 **G** This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

(1) *dealing in investments as principal;*

(2) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*

(2A) *arranging a home finance transaction;*

(3) *managing investments;*

(4) *assisting in the administration and performance of a contract of insurance;*

(5) *safeguarding and administering investments;*

(6) *sending dematerialised instructions;*

(7) *advising on investments, advising on regulated credit agreements for the acquisition of land or advising on a home finance transaction;*

- (8) *entering into a home finance transaction; and*
- (9) *administering a home finance transaction.*

The exclusion is, however, disapplied where a *person* is carrying on *insurance distribution* or *reinsurance distribution*, or the *person* would be an *MCD firm*. This is due to article 4(4A) and 4(4B) of the *Regulated Activities Order*. *Guidance* on exclusions relevant to *insurance distribution activities* is in ■ PERG 5 (Guidance on insurance distribution activities) and *guidance* on activities and exclusions relevant to the *MCD* is in ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive).

2.9.4

G

A *person* carrying on certain *regulated activities* does not require *authorisation* in specified circumstances if he is acting in a representative capacity. The representative capacities covered by the exclusions depend on the *regulated activity* concerned but, in most cases, the focus is on *persons* who are acting as trustee or personal representative. In broad terms, the exclusions apply to specified transactions, or activities, that are part of the discharge of his general obligations by the trustee or representative when he is acting as such. Many of the exclusions require that the trustee or representative must not hold himself out as providing services consisting of the *regulated activity* in question. In addition, he must not receive remuneration that is additional to any he receives for acting in the representative capacity (although a *person* is not to be regarded as receiving additional remuneration merely because his remuneration as trustee or representative is calculated by reference to time spent). The exclusions for *entering into a home finance transaction* and for *administering a home finance transaction*, however, work on a different basis. They apply where the activity relates to a *home finance transaction* under which the borrower, *reversion occupier*, *home purchaser* or *SRB agreement seller* as the case may be is a beneficiary.

Professions or business not involving regulated activities.....

2.9.5

G

This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as agent;*
- (2) *arranging (bringing about) deals in investments, and making arrangements with a view to transactions in investments;*
- (2A) *arranging a home finance transaction;*
- (3) *assisting in the administration and performance of a contract of insurance;*
- (4) *safeguarding and administering investments; and*
- (5) *advising on investments, advising on regulated credit agreements for the acquisition of land or advising on a home finance transaction.*

The exclusion is, however, disapplied where a *person* is carrying on *insurance distribution* or *reinsurance distribution*. This is due to article 4(4A) of the *Regulated Activities Order*. *Guidance* on exclusions relevant to *insurance distribution activities* is in ■ PERG 5 (Guidance on insurance distribution

activities). The exclusion is also disapplied for *persons* who, when carrying on the relevant *regulated activity*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

The exclusion is also disapplied for *persons* who, when carrying on the relevant *regulated activity*, are *MCD firms* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive)).

- 2.9.6 G The exclusions apply where the *regulated activity* is carried out in the course of a profession or business which does not otherwise consist of the carrying on of *regulated activities* in the *United Kingdom*. However, activities are only excluded to the extent that they may reasonably be regarded as a necessary part of the other services provided in the course of the profession or business. The exclusion does not apply if separate remuneration is received in respect of any *regulated activity* that is carried on. (See separate *guidance for authorised professional firms* in *PROF*.)

Sale of goods and supply of services

- 2.9.7 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (4) *managing investments;*
- (5) *safeguarding and administering investments;* and
- (6) *advising on investments.*

- 2.9.8 G Broadly speaking, the exclusions focus on cases where the main business of a *person* is to sell goods or supply services but where certain activities may have to be carried on for the purposes of that business which would otherwise be *regulated activities*. The exclusions are not available where the customer to whom goods are sold or services are supplied is an individual. They are also not available where what is at issue is a transaction entered into, or service provided, in relation to rights under a *contract of insurance* or *units* in a *collective investment scheme* (or rights to, or interests in, either). The exclusions are also disapplied for *persons* who, when carrying on the relevant *regulated activity*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

Group and joint enterprises

- 2.9.9 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal;*

- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (4) *managing investments;*
- (5) *safeguarding and administering investments;*
- (6) *sending dematerialised instructions; and*
- (7) *advising on investments.*

2.9.10 G These exclusions apply to intra-group dealings and activities and to dealings or activities involving participators in a joint enterprise which take place for the purposes of, or in connection with, the enterprise. The general principle here is that, as long as activities that would otherwise be *regulated activities* take place wholly within a group of companies, then there is no need for *authorisation*. The same principle applies to dealings or activities that take place wholly within a *joint enterprise* entered into for commercial purposes related to the participators' unregulated business. The exclusions in ■ PERG 2.9.9G (2), ■ (3), ■ (4) and ■ (7) are disapplied where they concern a *contract of insurance*. *Guidance* on exclusions relevant to *insurance distribution activities* is in ■ PERG 5 (Guidance on insurance distribution activities). The exclusions are also disapplied for *persons* who, when carrying on the relevant *regulated activity*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

Sale of body corporate
.....

2.9.11 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments; and*
- (4) *advising on investments.*

2.9.12 G The exclusions apply in relation to transactions to *buy or sell shares* in a *body corporate* where, in broad terms:

- (1) the transaction involves the acquisition or disposal of a least 50 per cent of the voting shares in the *body corporate* and is, or is to be, between certain specified kinds of *person*; or
- (2) the object of the transaction may otherwise reasonably be regarded as being the acquisition of day-to-day control of the affairs of the *body corporate*.

These exclusions also apply to transactions that are entered into for the purposes of the above transactions (such as transactions involving the offer of *securities* in the offeror as consideration or part consideration for the sale of the *shares* in the *body corporate*). These exclusions do not have effect in relation to shares in an *open-ended investment company*. The exclusions in ■ PERG 2.9.11G (2), ■ (3) and ■ (4) are disapplied where they concern a *contract of insurance*. Guidance on exclusions relevant to *insurance distribution activities* is in ■ PERG 5 (Guidance on insurance distribution activities). The exclusions are also disapplied for *persons* who, when carrying on the relevant *regulated activity*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G to ■ PERG 2.5.5 G (Investment services and activities)).

2.9.12A [G] [deleted]

Employee share schemes

2.9.13 [G] This group of exclusions applies, in specified circumstance, to the *regulated activities* of:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (4) *safeguarding and administering investments.*

2.9.14 [G] In broad terms, the exclusions apply to activities which further an employee share scheme, or are carried on in operation of such a scheme. They apply to activities carried on by the *company* whose securities or debentures (which are given an extended meaning for this exclusion) are the subject of the scheme. They also apply to activities of any *company* in the same *group* or of any trustee who holds certain types of securities or debentures under the scheme. They do not apply to the activities of a *person* who is neither such a *company* nor such a trustee (for example, a third party administration service provider).

Overseas persons

2.9.15 [G] This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (3A) *arranging a home finance transaction;*
- (3B) *operating a multilateral trading facility;*

- (3C) *operating an organised trading facility;*
- (4) *advising on investments;*
- (5) *entering into a home finance transaction;*
- (6) *administering a home finance transaction; and*
- (7) *agreeing to carry on the regulated activities of managing investments, arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, assisting in the performance and administration of a contract of insurance, safeguarding and administering investments or sending dematerialised instructions.*

2.9.16 **G** An overseas person is defined as a person who carries on what would be regulated activities (including any activity that would otherwise be excluded from being a regulated activity by virtue of the exclusions for overseas persons referred to in ■ PERG 2.9.15 G) but who does not do so, or offer to do so, from a permanent place of business maintained by him in the United Kingdom. Where a person does not have a permanent place of business in the United Kingdom, he will not, in any event, need to rely on these exclusions unless what he does is regarded as carried on in the United Kingdom (see ■ PERG 2.4). Nor will a person be able to rely on the exclusions in ■ PERG 2.9.15 G (1) to (4) if when carrying on the relevant regulated activity it is a MiFID investment firm and its Home State is the United Kingdom.

2.9.17 **G** The exclusions are available, for regulated activities other than those that relate to home finance transactions in the two broad cases set out below. For some of these regulated activities, the exclusions apply in each case. In others, they apply in only one.

- (1) The first case is where the nature of the regulated activity requires the direct involvement of another person and that person is authorised or exempt (and acting within the scope of his exemption). For example, this might occur where the person with whom an overseas person deals is an authorised person or where the arrangements he makes are for transactions to be entered into by such a person.
- (2) The second case is where a particular regulated activity is carried on as a result of what is termed a 'legitimate approach'. An approach to an overseas person that has not been solicited by him in any way, or has been solicited in a way that does not contravene the restrictions on financial promotion in section 21 of the Act, is a legitimate approach. An approach that is made by him in a way that does not contravene section 21 of the Act is also a legitimate approach. In such circumstances, the overseas person can, without requiring authorisation, enter into deals with (or on behalf of) a person in the United Kingdom, give advice in the United Kingdom or enter into agreements in the United Kingdom to carry on certain regulated activities. The exemptions to the financial promotion restrictions made by the Treasury under section 21 of the Act (Restrictions on financial promotion) will be relevant to the question of whether those restrictions have been contravened (see separate guidance on

financial promotion in ■ PERG 8 (Financial promotion and related activities)).

2.9.17A G The exclusions for *overseas persons* who carry on certain *regulated activities* related to *home finance transactions* work in a different way. They depend on the residency of the borrower or borrowers, the *reversion occupier* or *reversion occupiers*, the *home purchaser* or *home purchasers* or the *SRB agreement seller* or *SRB agreement sellers* as the case may be. In addition, some of the exclusions also depend on the residency of the reversion provider or *SRB agreement provider*. Guidance on these exclusions is in ■ PERG 4.11 (Link between activities and the United Kingdom) and ■ PERG 14.6 (Guidance on home reversion, home purchase and regulated sale and rent back agreement activities).

2.9.17B G

- (1) The exclusion for *overseas persons* described in ■ PERG 2.9.17G does not apply to an *investment firm* or *credit institution* set up in a third country that has been found equivalent under article 46 or 47 of *MiFIR*, as described in more detail in the rest of this paragraph.
- (2) Article 46 of *MiFIR* has a mechanism under which the *FCA* may register a *third country investment firm* or a third country *credit institution* without a *branch* in the *United Kingdom*. Registration allows the *third country investment firm* or third country *credit institution* to provide certain services to certain customers within the *United Kingdom* without the need for further authorisation by the *United Kingdom*.
- (3) (2) only applies where the Treasury has made a formal assessment that the legal and supervisory arrangements of that third country ensure that *investment firms* and *credit institutions* authorised in that third country comply with legally binding prudential and conduct of business requirements which have equivalent effect to the *UK* provisions which implemented *MiFID*, *MiFIR* and *CRD*.
- (4) [deleted]
- (5) The exclusion for *overseas persons* described in ■ PERG 2.9.17G does not apply to *investment services* or *activities* provided by an *investment firm* or *credit institution* in (1) if:
 - (a) it is registered as described in (2); or
 - (b) [deleted]
 - (c) it provides the *investment services* or *activities* at the initiative of certain *United Kingdom*-based clients.
- (6) However, (5) only applies from three years after the equivalence decision in (3). For the first three years following the equivalence decision, the exclusion for *overseas persons* described in ■ PERG 2.9.17G continues to apply in the normal way.
- (7) The purpose of the three year period is to implement article 54 of *MiFIR* (transitional provisions) under which the *Act* will continue to apply for three years after the equivalence decision in (3).

(8) There are currently no special provisions in the *Act* or related legislation such as the *Regulated Activities Order* dealing expressly and specifically with the treatment of *third country investment firms* and *third country credit institutions* under the *general prohibition* after the overseas persons exclusion is switched off at the end of the three year period in (6).

2.9.18 **G** [deleted]

Insurance distribution activities.....

2.9.19 **G** The exclusions in this group apply to certain *regulated activities* involving certain *contracts of insurance*. The exclusions and the *regulated activities* to which they apply are as follows.

(1) The first exclusion of this kind relates to certain activities carried on by a provider of non-motor goods or services, or services related to travel in connection with *general insurance contracts* that satisfy a number of conditions.

(a) The contracts must:

(i) have a premium of:

(A) 600 euro or less (calculated on a pro rata annual basis);
or

(B) 200 euro or less, where the *contracts of insurance* are complementary to a service being provided by the provider and the duration of that service is equal to or less than three months,

or equivalent amounts of sterling or another currency;

(ii) cover:

(A) breakdown or loss of or damage to non-motor goods supplied by the provider;

(B) loss of or damage to baggage and other risks linked to certain travel services booked with the provider; or

(C) the non-use of services supplied by the provider.

(b) The travel services must be the hire of an aircraft, vehicle or vessel which does not provide sleeping accommodation, or must relate to attendance at an event organised or managed by the provider.

(c) Where the travel services relate to an event, the exclusion does not apply if the party seeking insurance is an individual (acting in their private capacity) or a small business. A small business is a sole trader, *body corporate*, *partnership* or unincorporated association which had a turnover in the last financial year of less than £1,000,000 (but where it is a member of a group, the combined turnover of the group is used). Turnover means the amounts derived from the provision of goods and services falling within the business's ordinary activities, after deduction of trade discounts, value added tax and any other taxes based on those amounts.

- (d) There must not be any liability risk cover other than (in relation to travel risk) where this is ancillary to the main risk covered in a travel policy.
- (e) The insurance must be complementary to the goods or services being supplied by the provider in the course of the provider's carrying on a business or profession not otherwise consisting of *regulated activities*.
- (f) This exclusion applies where the *regulated activities* concerned are:
 - (i) *dealing in investments as agent;*
 - (ii) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
 - (iii) *assisting in the administration and performance of a contract of insurance; and*
 - (iv) *advising on investments.*

(2) The second exclusion applies where information is provided to a *policyholder* by a *person* on an incidental basis in the course of that *person's* profession or business that does not otherwise consist of *regulated activities*. This exclusion applies where the *regulated activities* are:

- (a) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (b) *managing investments;*
- (c) *assisting in the administration and performance of a contract of insurance; and*
- (d) *safeguarding and administering investments;*

(3) The third exclusion applies to certain *general insurance contracts* covering large risks where the risk is situated outside the *United Kingdom*. This exclusion applies where the *regulated activities* concerned are:

- (a) *dealing in investments as agent;*
- (b) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (c) *assisting in the administration and performance of a contract of insurance; and*
- (d) *advising on investments.*

The fourth exclusion applies where specified information is provided to a potential *policyholder*, or to a relevant insurer (as defined in article 39B(2) of the *Regulated Activities Order*), an insurance intermediary (as defined in article 2(1)(3) of the *IDD*) or an *IDD reinsurance intermediary*, by a *person* who does not take any other step to assist in the conclusion of a *contract of insurance* (see ■ PERG 2.8.6A(10A)G and ■ PERG 5.6.4B-EG).

Guidance on these and other exclusions relevant to *insurance distribution activities* is in ■ PERG 5 (Guidance on insurance distribution activities).

Business angel-led enterprise capital funds

2.9.20 **G** This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as agent;*
- (2) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
- (3) *managing investments;*
- (4) *safeguarding and administering investments;*
- (4A) *managing a UK UCITS;*
- (4B) *managing an AIF;*
- (5) *establishing, operating or winding up a collective investment scheme;* and
- (6) *advising on investments.*

2.9.21 **G** The exclusions apply, in general terms:

- (1) to a *body corporate* with limited liability:
 - (a) that is formed in accordance with the law of, and having its registered office, central administration or principal place of business in, the *United Kingdom*;
 - (b) that operates a business angel-led enterprise capital fund, being a fund that invests only in *securities* of unlisted *companies* and whose participants are made up solely of *persons* of a specified kind; and
 - (c) whose members are limited to *persons* of a specified kind.

2.9.21A **G** The exclusions for business angel-led enterprise capital funds are also disapplied for *persons* who, when carrying on the relevant *regulated activity*, are *MiFID investment firms* or *third country investment firms* (see ■ PERG 2.5.4 G (Investment services and activities)).

Managers of UCITS and AIFs

2.9.22 **G** This exclusion applies to a *person* with a *Part 4A permission* to carry on the activity of *managing an AIF* or *managing a UK UCITS*. The exclusion means that activities carried on by the *person* in connection with, or for the purposes of, *managing a UK UCITS* or (as the case may be) *managing an AIF*, are excluded from being *regulated activities* (except the activities of *managing an AIF* and *managing a UK UCITS* themselves). In the *FCA's* view this is particularly likely to affect the following *regulated activities*:

- (1) *dealing in investments as agent;*
- (2) *dealing in investments as principal;*

- (3) *arranging (bringing about) deals in investments;*
- (4) *managing investments;*
- (5) *arranging safeguarding and administration of assets;*
- (6) *advising on investments (except pension transfers and pension opt-outs); and*
- (7) *agreeing to carry on specified kinds of activity.*

Local authorities

2.9.23

G

This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *accepting deposits;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments;*
- (4) *making arrangements with a view to transactions in investments;*
- (5) *arranging (bringing about) regulated mortgage contracts;*
- (6) *making arrangements with a view to regulated mortgage contracts;*
- (7) *arranging (bringing about) a home reversion plan;*
- (8) *making arrangements with a view to a home reversion plan;*
- (9) *arranging (bringing about) a home purchase plan;*
- (10) *making arrangements with a view to a home purchase plan;*
- (11) *arranging (bringing about) a regulated sale and rent back agreement;*
- (12) *making arrangements with a view to a regulated sale and rent back agreement;*
- (13) *credit broking;*
- (14) *assisting in the administration and performance of a contract of insurance;*
- (15) *debt adjusting;*
- (16) *debt counselling;*
- (17) *debt collecting;*
- (18) *debt administration;*
- (19) *advising on investments;*
- (20) *advising on regulated mortgage contracts;*

- (20A) *advising on regulated credit agreements for the acquisition of land;*
- (21) *advising on a home reversion plan;*
- (22) *advising on a home purchase plan;*
- (23) *advising on a regulated sale and rent back agreement;*
- (23A) *entering as provider into a funeral plan contract;*
- (23B) *carrying out a funeral plan contract as provider;*
- (24) *entering into a regulated credit agreement as lender;*
- (25) *exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement;*
- (26) *entering into a regulated consumer hire agreement as owner;*
- (27) *exercising, or having the right to exercise, the owner's rights and duties under a regulated consumer hire agreement;*
- (28) *entering into a regulated mortgage contract;*
- (29) *administering a regulated mortgage contract;*
- (30) *entering into a home reversion plan;*
- (31) *administering a home reversion plan;*
- (32) *entering into a home purchase plan;*
- (33) *administering a home purchase plan;*
- (34) *entering into a regulated sale and rent back agreement;*
- (35) *administering a regulated sale and rent back agreement;*
- (36) *providing credit information services.*

2.9.24

G

- (1) Subject to (2), (3) and (4), the exclusions apply, in relation to any activity carried on by a *local authority*.
- (2) The exclusion relating to the *regulated activities* of:
 - (a) *dealing in investments as agents;*
 - (b) *arranging (bringing about) deals in investments;*
 - (c) *making arrangements with a view to transactions in investments;*
 - (d) *assisting in the administration and performance of a contract of insurance; and*
 - (e) *advising on investments;*applies to any activity carried on by a *local authority* which relates to a *contract of insurance* which is not a *life policy*.

(3) In essence, the *Regulated Activities Order* exempts activity in relation to *credit agreements* carried on by a *local authority* to the extent permitted by the *Consumer Credit Directive* and the *MCD*. The exclusions relating to *entering into a regulated credit agreement as lender and exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement* therefore apply only in relation to an agreement within (3A) or (4).

(3A) A *credit agreement* is within this paragraph if:

- (a) it was entered into before 21 March 2016; or
- (b) it is entered into on or after that date for a purpose other than acquiring or retaining property rights in *land* or in an existing or projected building;

but a *credit agreement* is only within this paragraph in so far as the agreement is of a kind to which the *Consumer Credit Directive* does not apply under article 2(2) of that Directive (see (3B)).

(3B) In summary, the kinds of agreements to which the *Consumer Credit Directive* does not apply under article 2(2) of that Directive include *credit agreements*:

- (c) involving a total amount of credit less than £160 or more than £60,260, except where the agreement is a *residential renovation agreement*;
- (d) which are *hire-purchase agreements*, where an obligation to purchase the object of the agreement is not laid down either by the agreement itself or by any separate agreement (such an obligation is deemed to exist if it is so decided unilaterally by the *lender*);
- (e) in the form of an *overdraft facility* and where the *credit* has to be repaid within one month;
- (f) where the *credit* is granted free of interest and without any other charges;
- (g) under which the *credit* has to be repaid within three months and only insignificant charges are payable;
- (h) where the *credit* is granted by an employer to his employees as a secondary activity free of interest or at an *APR* lower than those prevailing on the market and which are not offered to the public generally;
- (i) which are the outcome of a settlement reached in court or before another statutory authority;
- (j) which relate to the deferred payment, free of charge, of an existing debt;
- (k) for pawnbroking where the liability of the consumer is strictly limited to the pledged item; and
- (l) which relate to loans granted to a restricted group (not the public generally) under a statutory provision with a general interest purpose, and at lower interest rates than those prevailing on the market or free of interest, or on other terms which are more favourable to the consumer than those prevailing on the market and at interest rates not higher than those prevailing on the market.

- (4) A *credit agreement* is within this paragraph if it:
 - (a) is entered into on or after 21 March 2016; and
 - (b) meets one of the following conditions:
 - (i) it is of a kind to which the *MCD* does not apply by virtue of article 3(2) of the *MCD* (in other words, it is an agreement listed in ■ PERG 4.10A.5G(1) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or
 - (ii) it is a *bridging loan* described in ■ PERG 4.13.6 G; or
 - (iii) it is a restricted public loan described in ■ PERG 4.13.7 G.

Insolvency practitioners

2.9.25

G

This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent;*
- (3) *arranging (bringing about) deals in investments;*
- (4) *making arrangements with a view to transactions in investments;*
- (5) *operating a multilateral trading facility;*
- (5A) *operating an organised trading facility;*
- (6) *managing investments;*
- (7) *assisting in the administration and performance of a contract of insurance;*
- (8) *debt adjusting;*
- (9) *debt counselling;*
- (10) *debt collecting;*
- (11) *debt administration;*
- (12) *safeguarding and administering investments;*
- (13) *sending dematerialised instructions;*
- (14) *managing a UK UCITS;*
- (15) *acting as trustee or depositary of a UK UCITS;*
- (16) *managing an AIF;*
- (17) *acting as a trustee or depositary of an AIF;*
- (18) *establishing, operating or winding up a collective investment scheme;*

- (19) *establishing, operating or winding up a stakeholder pension scheme;*
- (20) *establishing, operating or winding up a personal pension scheme;*
- (21) *advising on investments;*
- (22) *providing credit information services;*

2.9.26 G These exclusions apply to a *person* acting as an insolvency practitioner. The term "insolvency practitioner" is to be read with section 388 of the Insolvency Act 1986 or, as the case may be, article 3 of the Insolvency (Northern Ireland) Order 1989. The exclusions relating to *debt adjusting*, *debt counselling* and *providing credit information services* also apply to any activity carried on by a *person* acting in reasonable contemplation of that *person's* appointment as an insolvency practitioner. In relation to *debt counselling*, insolvency practitioners may find ■ PERG 17.7 helpful, including examples 12, 13 and 13A.

2.9.27 G A *person* acting as an insolvency practitioner or in reasonable contemplation of that *person's* appointment as an insolvency practitioner include anything done by the *person's* firm in connection with that *person* so acting. For these purposes, the reference to "the *person's* firm" means the *person's* employer, the *partnership* in which he is a partner or the *limited liability partnership* of which he is a member, as the case may be.

Registered consumer buy-to-let credit firms

2.9.28 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *arranging (bringing about) regulated mortgage contracts;*
- (2) *making arrangements with a view to regulated mortgage contracts;*
- (3) *credit broking;*
- (4) *advising on regulated mortgage contracts;*
- (5) *advising on regulated credit agreements for the acquisition of land;*
- (6) *exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement;*
- (7) *entering into a regulated credit agreement as a lender;*
- (8) *entering into a regulated mortgage contract;*
- (9) *administering a regulated mortgage contract.*

2.9.29 G These exclusions apply to any *CBTL business* carried on by a *CBTL firm* (see ■ PERG 4.10B).

Persons seeking to use the exemption under Article 2.1(j) of the Markets in Financial Instruments Directive

2.9.30

G

This exclusion applies to the activities of:

- (1) *dealing in investments as principal;*
- (2) *dealing in investments as agent; and*
- (3) *arranging (bringing about) deals in investments.*

It is available to a *person* who is not an *authorised person* and whose activity is one to which article 2(1)(j) of *MiFID* applies (see ■ PERG 13 Q44). Where the *person* meets the conditions of the exemption relating to article 2(1)(j) but during a calendar year is not able to perform the market threshold test in article 2 of *MiFID RTS 20* because the relevant data is not available from an *EU* institution or regulator, its activities are excluded from the activities in (1) to (3) above. Similarly, if the *person* has made an application for a *Part 4A permission* in relation to any of the activities in (1) to (3) above, to which article 2(1)(j) of *MiFID* applies, the exclusion applies for as long as that application has not been determined or withdrawn. In each case, a *person* seeking to rely on the article 2(1)(j) exemption must provide notice to the *FCA* in accordance with regulation 47 of the *MiFI Regulations*.

2.10 Persons carrying on regulated activities who do not need authorisation

2.10.1 **G** There are various provisions that disapply the *general prohibition* from specific *persons* in relation to the carrying on by them of particular *regulated activities*. There is, however, no general provision for *persons* to apply for an exemption.

2.10.2 **G** *Persons* may be exempted from the *general prohibition* in relation to one or more particular *regulated activities*. The extent of any exemption may also be limited to specified circumstances (such as where another *person* who is *authorised* and has relevant *permission* has accepted responsibility for the *regulated activities* in question) or subject to specified conditions (such as a requirement that the activity is not carried on for pecuniary gain).

2.10.3 **G** The *Act* provides that *appointed representatives* (see ■ PERG 2.10.5 G), *recognised investment exchanges* and *recognised clearing houses* (see ■ PERG 2.10.6 G) and certain other *persons* exempt under miscellaneous provisions (see ■ PERG 2.10.7 G) are *exempt persons* (although in certain circumstances, an *appointed representative* may not be an *exempt person*, but may have a *limited permission* to carry on certain *credit-related regulated activities*). Members of Lloyds and members of the professions are not '*exempt persons*' as such, but the *general prohibition* in section 19 of the *Act* only applies to them in certain circumstances. The distinction is significant in relation to various provisions (such as those in the *Regulated Activities Order*) that apply only to transactions and other activities that involve *exempt persons*.

2.10.4 **G** *Appointed representatives* and the *persons* exempt under miscellaneous provisions cannot be exempt in relation to some *regulated activities* and *authorised* in relation to others. If a *person* is already *authorised*, and proposes to carry on additional *regulated activities* in respect of which he would otherwise be exempt as an *appointed representative* or under miscellaneous provisions, he must seek an extension to his existing *permission* to cover those additional activities. A *person* in either of these categories who would otherwise be exempt in relation to particular activities will, if he becomes *authorised*, no longer be able to rely on the exemption.

Appointed representatives

2.10.5 **G** With one exception, a *person* is exempt if they are an *appointed representative* of an *authorised person*. In some circumstances, however, a

person may be an appointed representative and not be exempt, if the person has a limited permission for certain credit-related regulated activities. See ■ SUP 12 (Appointed representatives). But where an appointed representative carries on insurance distribution or reinsurance distribution, that person will not be exempt unless they are included on the register kept by the FCA under article 93 of the Regulated Activities Order (Duty to maintain a record of unauthorised persons carrying on insurance distribution activities) (see ■ PERG 5.13 (Appointed representatives)).

Recognised Investment Exchanges, Recognised Clearing Houses and Recognised Auction Platforms

2.10.6 **G** Investment exchanges and clearing houses can apply for recognition under Part XVIII of the Act (Recognised investment exchanges and clearing houses). Auction platforms can apply for recognition under the RAP Regulations. See REC.

Particular exempt persons

2.10.7 **G** Various named persons are exempted by Order made by the Treasury under section 38 of the Act from the need to obtain authorisation (the Exemption Order). Some of the exemptions are subject to restrictions as to the circumstances in which they apply. For example, a person is only exempt when acting in a particular capacity or for particular purposes.

2.10.8 **G** The exemptions apply so as to confer exemption on persons from the general prohibition in respect of four distinct categories of regulated activities.

- (1) The first category is carrying on any regulated activity, apart from effecting or carrying out contracts of insurance (or agreeing to do so). Exempt persons here are generally supranational bodies of which the United Kingdom or another EEA State is a member.
- (2) The second category is the regulated activity of accepting deposits. Exempt persons here include municipal banks, local authorities, charities and industrial and provident societies.
- (3) The third category is carrying on any of those regulated activities relating to securities or relevant investments or to 'any property' (or agreeing to do so). Exempt persons here include persons whose activities are subject to a certain degree of control or oversight by the Government.
- (4) The fourth category is carrying on one or more specified regulated activities (or agreeing to do so). Exempt persons here cover a range of different persons.

Members of Lloyd's

2.10.9 **G** Several activities carried on in connection with business at Lloyds are regulated activities in respect of which authorisation must be obtained. These include the regulated activities of advising on syndicate participation at Lloyd's or managing the underwriting capacity of Lloyd's syndicate as a managing agent at Lloyd's or arranging (bringing about) deals in

investments or making arrangements with a view to transactions in investments for another in relation to such participation or underwriting capacity.

2.10.10 **G** But under section 316 of the *Act* (Direction by a regulator) the *general prohibition* does not apply to a *person* who is a member of the *Society of Lloyds* unless the *FCA* or *PRA* has made a direction that it should apply. The *general prohibition* is disapplied in relation to any *regulated activity* carried on by a member relating to *contracts of insurance* written at *Lloyds*. Directions can be made by the *FCA* or *PRA* in relation to individual *members* or the *members* of the *Society of Lloyds* taken together. Alternatively, instead of being required to obtain *authorisation*, a member of the *Society of Lloyd's* may, as a result of a direction under section 316 of the *Act*, become subject to specific provisions of the *Act* even though he is not an *authorised person*.

2.10.11 **G** A *person* who ceased to be an *underwriting member* at any time on or after 24 December 1996 may, without *authorisation*, carry out *contracts of insurance* he has underwritten at *Lloyds*. But this is subject to any requirements or *rules* that the *PRA* may impose under sections 320 to 322 of the *Act* (Former underwriting members).

Members of the professions

2.10.12 **G** The *general prohibition* does not in certain circumstances apply to a *person* providing professional services that are supervised and regulated by a professional body designated by the Treasury under section 326 of the *Act* (Designation of professional bodies) (see *PROF*). Certain of the exclusions from *regulated activities* outlined in ■ PERG 2.8 and ■ PERG 2.9 will be relevant to members of *designated professional bodies*. The regime outlined below applies only where no exclusion applies and a *person* will be carrying on a *regulated activity*.

2.10.13 **G** Such a *person* may carry on *regulated activities* if the conditions outlined below are met, that is the *person*:

- (1) is not affected by an order or direction made by the *FCA* under section 328 or 329 of the *Act* (Directions and orders in relation to the general prohibition) which has the effect of re-imposing the *general prohibition* in any particular case;
- (2) is, or is controlled by, a member of a profession;
- (3) does not receive any pecuniary reward or other advantage from the *regulated activities* which is given to him by any *person* other than his client (or if he does, he must account to his client for it);
- (4) provides any service in the course of carrying on the *regulated activities* in a manner which is incidental to the provision of professional services;

(5) carries on only those *regulated activities* which are permitted by the rules of the professional body or in respect of which they are an *exempt person*; and

(6) Is not an *authorised person*.

2.10.14

G

The *regulated activities* that may be carried on in this way are restricted by an Order made by the Treasury under section 327(6) of the Act (Exemption from the general prohibition) (the *Non-Exempt Activities Order*). Accordingly, under that section, a *person* may not by way of business carry on any of the following activities without *authorisation*:

(1) *accepting deposits*;

(2) *effecting or carrying out contracts of insurance*;

(3) *dealing in investments as principal*;

(3A) [deleted]

(3B) *managing a UK UCITS*;

(3C) *acting as trustee or depositary of a UK UCITS*;

(3D) *managing an AIF*;

(3E) *acting as trustee or depositary of an AIF*;

(4) *establishing, operating or winding up a collective investment scheme*;

(5) *establishing, operating or winding up a stakeholder pension scheme or a personal pension scheme*;

(6) *managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's*;

(7) *entering as provider into funeral plan contracts*;

(7A) *carrying out a funeral plan contract as provider*;

(8) agreeing to do certain of the above activities.

2.10.15

G

In addition, there are restrictions on carrying on (or agreeing to carry on) certain other *regulated activities*. These relate to *managing investments, advising on investments, advising on a home finance transaction, advising on syndicate participation at Lloyd's, entering into a home finance transaction or administering a home finance transaction*.

2.10.16

G

A *person* carrying on *regulated activities* under the regime for members of the professions will be subject to rules made by the professional body designated by the Treasury. Such bodies are obliged to make rules governing the carrying on by their members of those *regulated activities* that they are able to carry on without *authorisation* under the Act. Where such a *person* is carrying on *insurance distribution* or *reinsurance distribution*, that *person* must also be included on the register kept by the FCA under article 93 of the

Regulated Activities Order (Duty to maintain a record of unauthorised persons carrying on insurance distribution activities) (see ■ PERG 5.10 (Exemptions)).



2.11 Persons who are exempt for credit-related regulated activities

2.11.1 **G** Various persons are exempted by Order made by the Treasury under section 38 of the *Act* from the need to obtain *authorisation* for certain *credit-related regulated activities* in the circumstances specified in the Order (for example, in some cases, a *person* is exempt only when acting in a particular capacity or for particular purposes). *Persons* exempt under the Order cannot be exempt in relation to some *regulated activities* and *authorised* in relation to others (except where the *person* is an *authorised person* with only *interim permission*).

Official receivers

2.11.2 **G** A *person* acting as:

- (1) an official receiver; or
- (2) a judicial factor;

is exempt in respect of *debt adjusting*, *debt counselling*, *debt collecting*, *debt administration* or *providing credit information services*.

Cycle to work

2.11.3 **G** This exemption applies to a scheme under which an employer provides or makes available to their employees a cycle or cyclist's safety equipment up to the value of £1,000 (which is designed to allow employees to take advantage of section 244 of the Income Tax (Earnings and Pensions) Act 2003). An employer does not require *authorisation* for the *regulated activities* relating to *regulated consumer hire agreements* just because it operates such a scheme.

Tracing agents

2.11.4 **G** A *person* who takes steps to ascertain the identity or location (or the means of ascertaining the identity or location) of a *borrower* or *hirer* is exempt from *debt-collecting* as long as the *person* is not the *lender* or *owner* under the agreement concerned, takes no other steps to collect debts due under the agreement and carries on no other activity which requires *authorisation*.

Enterprise schemes

2.11.5 **G** There are also exemptions from *credit broking*, *debt adjusting*, *debt-counselling* and *providing credit information services* for an enterprise

scheme as long as it does not carry on the activity for, or with the prospect of, direct or indirect pecuniary gain. Sums reasonably regarded as necessary to meet the costs of carrying on the activity do not constitute a pecuniary gain for this purpose.

Charities

2.11.6 **G** The exemption from *operating an electronic system in relation to lending* in paragraph 44(A1) of the Schedule to the *Exemption Order* applies to a charity (as defined in article 3 to the *Exemption Order*) which carries on that activity in relation to an article 36H agreement (see ■ PERG 2.7.7HG(4)). For the exemption to apply, the only amount payable to the *lender* under, or in connection with, the agreement must be the amount of *credit* provided; no interest or other charges may be added.

Process servers

2.11.7 **G**

(1) Under paragraph 54A(1) of the Schedule to the *Exemption Order*, a *person* who serves, or takes steps to serve, a document on a *borrower* or a *hirer* for the purposes of legal proceedings, including arbitration and insolvency proceedings, brought or to be brought for the payment of a debt due under a *credit agreement*, a *P2P agreement* or a *consumer hire agreement* is exempted from *debt collecting*, as long as the *person*:

- (a) is not the *lender* or *owner* under the agreement; and
- (b) does not take any other steps to procure the payment of the debt or any other debt due from the *borrower* or the *hirer* under the agreement.

(2) Under paragraph 54A(2) of the Schedule to the *Exemption Order*, a *person* who serves, or takes steps to serve, a document on a *borrower* or a *hirer* for the purposes of legal proceedings, including arbitration and insolvency proceedings, brought or to be brought for the exercise or enforcement of rights under a *credit agreement*, a *P2P agreement* or a *consumer hire agreement* is exempted from *debt administration*, as long as the *person*:

- (a) is not the *lender* or *owner* under the agreement;
- (b) does not take any other steps to exercise or enforce rights under the agreement; and
- (c) does not take any steps in the performance of any duties under the agreement.

Persons exercising, or having the right to exercise, the rights of the person who provided credit under a regulated credit agreement: special purpose vehicles

2.11.8 **G** (1) The exemption in paragraph 55 of the Schedule to the *Exemption Order* covers special purpose vehicles and other entities which are part of a structured finance transaction and which meet the specified conditions. It confers exemption from the *general prohibition* on a *person* (“P”) for the *regulated activity* of *exercising, or having the right to exercise, the lender’s rights and duties under a regulated credit agreement* (and associated *regulated activities*) where there is an arrangement for an *authorised person* who holds a relevant

permission to service the loans, or such an arrangement has ended in the previous 30 days.

- (2) The exemption is available to a *person* ("P") who:
 - (a) is not the original *lender*;
 - (b) does not grant or promise to grant, and is not required to grant, *credit* under any *regulated credit agreement*;
 - (c) has entered into a servicing arrangement with an *authorised person* who has permission to carry on the *regulated activities of debt collecting, debt administration or consumer credit lending* ("the servicer"), under which the servicer is to exercise on P's behalf P's rights under a *regulated credit agreement* (other than P's right to dispose of those rights); and
 - (d) does not undertake the regulated activities of *debt counselling, debt adjusting or debt collecting* in relation to a *regulated credit agreement* other than during an "exempt period". An "exempt period" is the period of 30 days beginning on the day after the day on which a servicing arrangement came to an end. Where, for example, a servicing agreement comes to an end suddenly or unexpectedly, P has a grace period of 30 days to find a new servicer and enter into a new servicing arrangement, and may service its own loans in that period without being authorised.
- (3) In addition, P must have arranged for the servicer to comply with:
 - (a) any provision of, or made under, the *Act* applicable to *authorised persons* that relates to the exercise of the right of the *lender* under a *regulated credit agreement* to vary terms and conditions of the agreement; and
 - (b) the requirements of, or made under, section 82 of the CCA (variation of agreements).

Where P varies the agreement itself, P must comply with those provisions and requirements.

- (4) Where P is exempt (as set out above), the exemption also extends to the *regulated activities of debt counselling and debt collecting* carried on in an exempt period in relation a *regulated credit agreement* under which P exercises, or has the right to exercise, the rights of the original *lender*.
- (5) For the purposes of this exemption, activities carried on by P under, or for the purposes of, a servicing arrangement are excluded from the *regulated activities of debt counselling and debt collecting* in relation to a *regulated credit agreement*.

Persons exercising, or having the right to exercise, the rights of the person who provided credit under a regulated consumer hire agreement: special purpose vehicles

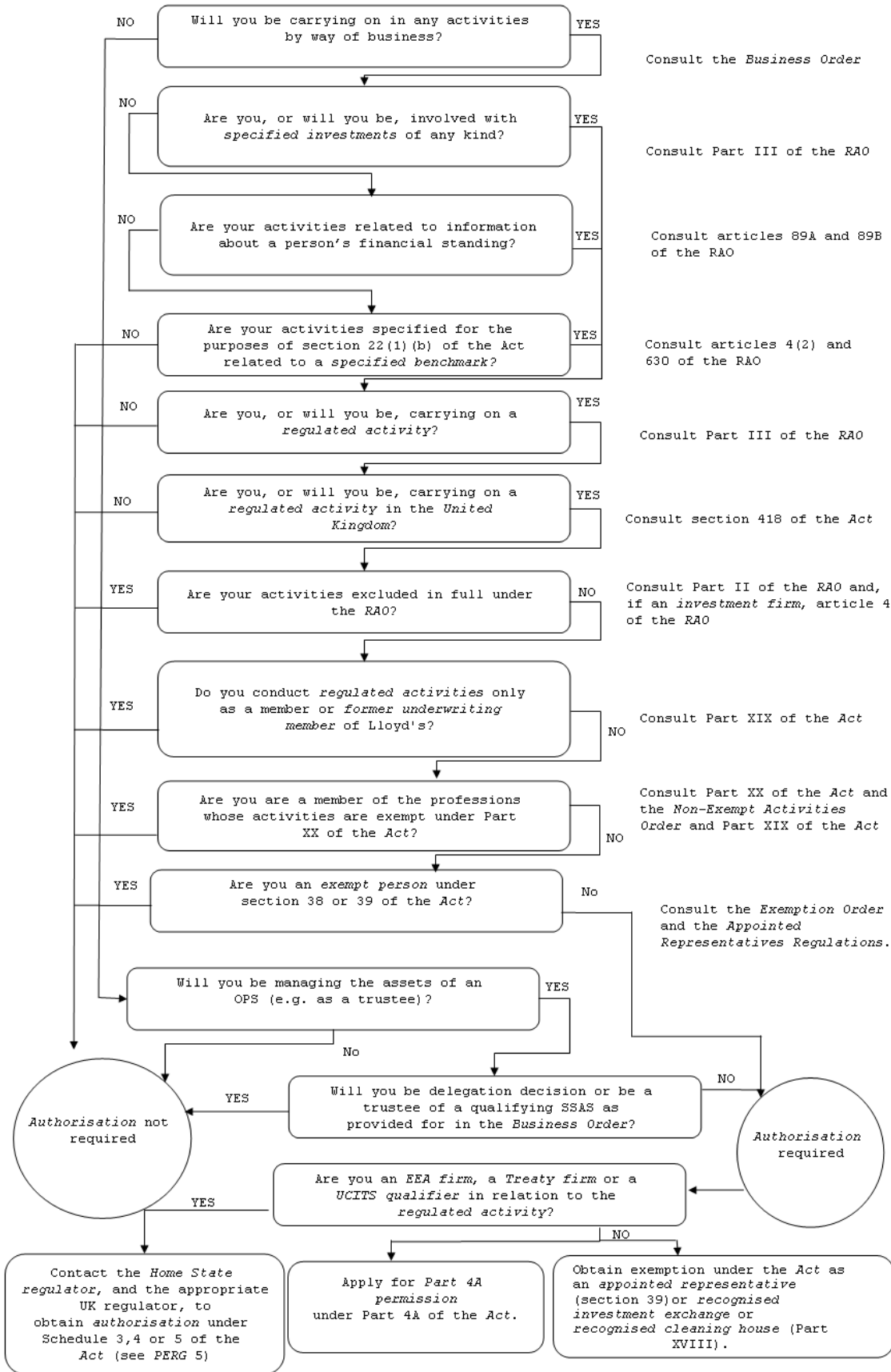
2.11.9

G

Paragraph 56 of the Schedule to the *Exemption Order* confers an exemption analogous to that in paragraph 55 of the Schedule to the *Exemption Order* and described in ■ PERG 2.11.8G. It applies to the *regulated activity of exercising, or having the right to exercise. the lender's rights and duties under a regulated credit agreement.*

Authorisation and regulated activities

Do you need authorisation?



Regulated activities and the permission regime

1 Table

1.1 G	Table 1 is designed to relate the <i>permission</i> regime as operated by the FCA to <i>regulated activities</i> . It does not explain how the <i>permission</i> regime as operated by the PRA relates to regulated activities. It therefore does not cover <i>PRA-regulated activities</i> which only apply to <i>PRA-authorised persons</i> . Those <i>PRA-regulated activities</i> are set out in Table 1A. Section 55E(4) of the Act gives the FCA the power to describe the <i>regulated activity</i> or <i>regulated activities</i> for which it gives <i>permission</i> in such manner as the FCA considers appropriate. Table 1 details how the FCA has chosen to describe the <i>regulated activities</i> and <i>specified investments</i> for the purposes of the <i>permission</i> regime.
1.2 G	In an application for <i>Part 4A permission</i> , an applicant will need to state the <i>regulated activities</i> it requires <i>permission</i> to carry on. This will involve an applicant identifying the <i>regulated activities</i> and the <i>specified investments</i> associated with those activities for which it requires <i>Part 4A permission</i> .
1.3 G	<p>Part II of the <i>Regulated Activities Order</i> (Specified activities) specifies the activities for the purposes of section 22 of the Act. This section states that an activity is a <i>regulated activity</i> if it is an activity of a specified kind which is carried on by way of business and:</p> <ul style="list-style-type: none"> (1) relates to an <i>investment</i> of a specified kind; or (2) in the case of an activity specified for the purposes of section 22(1)(b) of the Act, is carried on in relation to property of any kind. (3) relates to information about a <i>person's</i> financial standing. <p>Part III of the <i>Regulated Activities Order</i> (Specified investments) specifies the <i>investments</i> referred to in (1).</p>
1.4 G	Column 1 of Table 1 lists the <i>regulated activities</i> and column 2 lists the associated <i>specified investments</i> . Descriptions of some categories of <i>specified investments</i> are expanded in Tables 2 and 3. There are notes to all three tables which provide further explanation where appropriate.
1.5 G	A reference to an article in the tables in PERG 2 Annex 2 G is to the relevant article in the <i>Regulated Activities Order</i> .

2 Table

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]	
Regulated activity	Specified investment in relation to which the regulated activity (in the corresponding section of column one) may be carried on
(a) [deleted]	
Issuing electronic money	
(aa) <i>issuing electronic money</i> (article 9B)	<i>electronic money</i> (article 74A)
Activities of a dormant account fund operator	

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]

(ab) the <i>meeting of repayment claims and managing dormant account funds (including the investment of such funds)</i> (article 63N)	See Note 8 to Table 1
Bidding in emissions auctions	
(ac) <i>bidding in emissions auctions</i>	<i>emissions auction products</i>
(b) [deleted]	
(c) [deleted]	
Designated investment business [see notes 1A, 1B and 1C to Table 1]	
(d) <i>dealing in investments as principal</i> (article 14) [see note 2 to Table 1]	(in relation to (d) to (g) and (h) to (l)) <i>security</i> [expanded in Table 3]; or
(e) <i>dealing in investments as agent</i> (article 21) [see notes 1B and 2 to Table 1] [also see Section of Table 1 headed 'Activities relating to structured deposits']	<i>contractually based investment</i> [expanded in Table 3]. (in relation to (e) to (g) and (j) only) a <i>long-term care insurance contract</i> which is a <i>pure protection contract</i> .
(f) <i>arranging (bringing about) deals in investments</i> (article 25(1)) [see note 1B to Table 1] [also see Sections of Table 1 headed 'The Lloyd's market', and 'Regulated mortgage activity' and 'Activities relating to structured deposits']	
(g) <i>making arrangements with a view to transactions in investments</i> (article 25(2)) [see note 1B to Table 1] [also see Sections of Table 1 headed 'The Lloyd's market, 'Regulated mortgage activity' and 'Activities relating to structured deposits']	
(ga) operating a <i>multilateral trading facility</i> (article 25D) [see note 2A]	<i>securities</i> or <i>contractually based investments</i> which are <i>financial instruments</i> (see PERG 13 Annex 2 G Table 2 and note 2A to Table 1)).
(gb) operating an <i>organised trading facility</i> (article 25DA) [see note 2A]	certain kinds of <i>securities</i> or <i>contractually based investments</i> which are <i>financial instruments</i> . PERG 2.7.7DDG lists the <i>securities</i> and <i>contractually based investments</i> covered.
(h) <i>managing investments</i> (article 37) [see note 3 to Table 1] [also see Section of Table 1 headed 'Activities relating to structured deposits']	
(i) <i>safeguarding and administering investments</i> (article 40) [see note 3 Table 1]	
For the purposes of the <i>permission</i> regime, this <i>regulated activity</i> is subdivided into:	
(i) <i>safeguarding and administration of assets (without arranging)</i> ; and	
(ii) <i>arranging safeguarding and administration of assets</i> .	
(j) <i>advising on investments (except P2P agreements)</i> (article 53(1)) [see note 1B to Table 1] [also see Sections of Table 1 headed 'Regulated mortgage activity' and 'Activities relating to structured deposits']	
For the purposes of the <i>permission</i> regime, this <i>regulated activity</i> :	

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]

- (i) does not apply to advice given in the course of carrying on the *regulated activity of providing basic advice on a stakeholder product*; and
- (ii) is subdivided into:
 - (A) *advising on investments (except pension transfers and pension opt-outs)*; and
 - (B) *advising on pension transfers and pension opt-outs* [see note 4 to Table 1]
- (ja) *advising on P2P agreements* (article 53(2)) [see note 9 to Table 1]
- (jb) *advising on conversion or transfer of pension benefits* (article 53E) is contained in the permission of *advising on pension transfers and pension opt-outs* [see note 4 to Table 1]
- (k) *sending dematerialised instructions* (article 45(1))
- (l) *causing dematerialised instructions to be sent* (article 45(2))
- (m) [deleted] [see note 5 to Table 1]
- (ma) *managing a UK UCITS* (article 51ZA);
- (mb) *acting as trustee or depositary of a UK UCITS* (article 51ZB);
- (mc) *managing an AIF* (article 51ZC);
- For the purposes of the *permission* regime, this *regulated activity* is subdivided into:
 - (i) *managing an AIF* where the AIF is an *authorised AIF*; and
 - (ii) *managing an AIF* where the AIF is an *unauthorised AIF*.
- (md) *acting as trustee or depositary of an AIF* (article 51ZD);
- For the purposes of the *permission* regime, this *regulated activity* is subdivided into:
 - (i) *acting as trustee or depositary of an AIF* where the AIF is an *authorised AIF*; and
 - (ii) *acting as trustee or depositary of an AIF* where the AIF is an *unauthorised AIF*.
- (me) *establishing, operating or winding up a collective investment scheme* (article 51ZE);
- (n) [deleted]
- (na) [deleted]
- (o) [deleted]
- (p) *establishing, operating or winding up a stakeholder pension scheme* (article 52(a))

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]

<p>(pa) <i>providing basic advice on a stakeholder product</i> (article 52B)</p>	<p>those <i>specified investments</i> that are also a <i>stakeholder product</i> [see note 7]</p>
<p>(p-a) <i>establishing, operating or winding up a personal pension scheme</i> (article 52(b))</p>	
<p>Insurance distribution activity [see note 5A to Table 1]</p>	
<p>(pb) <i>dealing in investments as agent</i> (article 21)</p>	<p><i>life policy</i> [see note 5B to Table 1] <i>non-investment insurance contract</i> [see note 5C to Table 1]</p>
<p>(pc) <i>arranging (bringing about) deals in investments</i> (article 25(1))</p>	<p><i>rights to or interests in investments</i> (article 89) in so far as they relate to a <i>life policy</i></p>
<p>(pd) <i>making arrangements with a view to transactions in investments</i> (article 25(2))</p>	
<p>(pe) <i>assisting in the administration and performance of a contract of insurance</i> (article 39A)</p>	
<p>(pf) <i>advising on investments (except P2P agreements)</i> (article 53(1))</p>	
<p>For the purpose of the <i>permission</i> regime, this <i>regulated activity</i> is sub-divided into:</p>	
<p>(i) <i>advising on investments (except pension transfers or pension opt-outs)</i>;</p>	
<p>(ii) <i>advising on pension transfers or pension opt-outs</i> [See note 5D to Table 1].</p>	
<p>The Lloyd's market</p>	
<p>(q) <i>advising on syndicate participation at Lloyd's</i> (article 56)</p>	<p>membership of a Lloyd's syndicate (article 86(2))</p>
<p>(r) [deleted]</p>	
<p>(s) <i>arranging (bringing about) deals in investments</i> (article 25(1))</p>	<p><i>underwriting capacity of a Lloyd's syndicate</i> (article 86(1))</p>
<p>(t) <i>making arrangements with a view to transactions in investments</i> (article 25(2))</p>	<p>membership of a Lloyd's syndicate (article 86(2)) <i>rights to or interests in investments</i> (article 89) in so far as they relate to <i>underwriting capacity of a Lloyd's syndicate</i> or <i>membership of a Lloyd's syndicate</i></p>
<p>Funeral plan providers</p>	
<p>(u) <i>entering as provider into a funeral plan contract</i> (article 59(1))</p>	<p><i>funeral plan contract</i> (article 87) [see Note 1A to Table 1]</p>
<p>(ua) <i>carrying out a funeral plan contract as provider</i> (article 59(1A))</p>	
<p>Regulated home finance activity</p>	
<p>(v) <i>arranging (bringing about) regulated mortgage contracts</i> (article 25A(1) and (2A))</p>	<p><i>regulated mortgage contract</i> (article 88)</p>
<p>(w) <i>making arrangements with a view to regulated mortgage contracts</i> (article 25A(2))</p>	
<p>(x) <i>advising on regulated mortgage contracts</i> (article 53A)</p>	
<p>(xa) [deleted]</p>	
<p>(y) <i>entering into a regulated mortgage contract</i> (article 61(1))</p>	

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]

(z) administering a regulated mortgage contract (article 61(2))	
(za) arranging (bringing about) a home reversion plan (article 25B(1))	rights under a home reversion plan (article 88A)
(zb) making arrangements with a view to a home reversion plan (article 25B(2))	
(zc) advising on a home reversion plan (article 53B)	
(zd) entering into a home reversion plan (article 63B(1))	
(ze) administering a home reversion plan (article 63B(2))	
(zf) arranging (bringing about) a home purchase plan (article 25C(1))	rights under a home purchase plan (article 88B)
(zg) making arrangements with a view to a home purchase plan (article 25C(2))	
(zh) advising on a home purchase plan (article 53C)	
(zi) entering into a home purchase plan (article 63F(1))	
(zj) administering a home purchase plan (article 63F(2))	
(zk) arranging (bringing about) a regulated sale and rent back agreement (article 25E(1))	rights under a regulated sale and rent back agreement (Article 88C)
(zl) making arrangements with a view to a regulated sale and rent back agreement (article 25E(2))	
(zm) advising on a regulated sale and rent back agreement (article 53D))	
(zn) entering into a regulated sale and rent back agreement (article 63J(1))	
(zo) administering a regulated sale and rent back agreement (Article 63(J)(2))	
Credit-related regulated activity	
(zp) entering into a regulated credit agreement as lender (article 60B(1))	Rights under a credit agreement (article 88D) (see note 9 to Table 1), except for (zwa): see note 11 to Table 1
(zq) exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement (article 60B(2))	
(zr) credit broking (article 36A)	
(zs) operating an electronic system in relation to lending (article 36H)	
(zt) debt adjusting (article 39D(1))	
(zu) debt counselling (article 39E(1))	
(zv) debt collecting (article 39F(1))	
(zw) debt administration (article 39G(1))	

Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]

<i>(zwa) advising on regulated credit agreements for the acquisition of land (article 53DA)</i>	
<i>(zx) entering into a regulated consumer hire agreement as owner (article 60N(1))</i>	<i>Rights under a consumer hire agreement (article 88E)</i>
<i>(zy) exercising, or having the right to exercise, the owner's rights and duties under a regulated consumer hire agreement (article 60N(2))</i>	
<i>(zz) credit broking (article 36A)</i>	
<i>(zaa) debt adjusting (article 39D(2))</i>	
<i>(zab) debt counselling (article 39E(2))</i>	
<i>(zac) debt collecting (article 39F(2))</i>	
<i>(zad) debt administration (article 39G(2))</i>	
<i>(zae) providing credit information services (article 89A)</i>	<i>(see note 10 to Table 1)</i>
<i>(zaf) providing credit references (article 89B)</i>	
Activities relating to structured deposits	
<i>(zag) dealing in investments as agent (article 21)</i>	<i>structured deposits</i>
<i>(zah) arranging (bringing about) deals in investments (article 25(1))</i>	
<i>(zai) making arrangements with a view to transactions in investments (article 25(2))</i>	
<i>(zaj) managing investments (article 37) [see note 3 to Table 1]</i>	
<i>(zak) advising on investments (except P2P agreements) (article 53(1))</i>	

3 Table

Notes to Table 1

Note 1:

In addition to the *regulated activities* listed in Table 1, article 64 of the *Regulated Activities Order* specifies that *agreeing to carry on a regulated activity* is itself a *regulated activity* in certain cases. This applies in relation to all the *regulated activities* listed in Table 1 apart from:

- *issuing electronic money (article 9B);*
- *operating a multilateral trading facility (article 25D)*
- *operating an organised trading facility (article 25DA)*
- *managing a UK UCITS (article 51ZA);*
- *acting as trustee or depositary of a UK UCITS (article 51ZB);*
- *managing an AIF (article 51ZC);*
- *acting as trustee or depositary of an AIF (article 51ZD);*
- *establishing, operating or winding up a collective investment scheme (article 51ZE);*
- *establishing, operating or winding up a stakeholder pension scheme or establishing, operating or winding up a personal pension scheme (article 52); and*
- *the meeting of repayment claims and/or managing dormant account funds (including the investment of such funds) (article 63N).*

Permission to carry on the activity of agreeing to carry on a regulated activity will be given automat

Notes to Table 1

ically by the FCA in relation to those other *regulated activities* for which an applicant is given *permission* (other than those activities in articles 9B, 51 and 52 detailed above).

Note 1A:

Funeral plan contracts are contractually based investments. Accordingly, the following are *regulated activities* when carried on in relation to a *funeral plan contract*: (a) *dealing in investments as agent*, (b) *arranging (bringing about) deals in investments*, (c) *making arrangements with a view to transactions in investments*, (d) *managing investments*, (e) *safeguarding and administering investments*, (f) *advising on investments (except P2P agreements)*, (g) *sending dematerialised instructions* and (h) *causing dematerialised instructions to be sent* (as well as agreeing to carry on each of the activities listed in (a) to (h)). However, they are not *designated investment business*.

Note 1B:

Life policies are contractually based investments. Where the *regulated activities* listed as *designated investment business* in (e) to (g) and (j) are carried on in relation to a *life policy*, these activities also count as *insurance mediation activities*¹. The full list of *insurance distribution activities* is set out in (pb) to (pf). The *regulated activities* of agreeing to carry on each of these activities will, if carried on in relation to a *life policy*, also come within both *designated investment business* and *insurance distribution activities*.

Note 1C:

Although *MiFID business bidding* (part of *bidding in emissions auctions*) is *designated investment business*, it is not separately listed in this table under *designated investment business* because *bidding in emissions auctions* is already referred to above.

Note 2:

For the purposes of the *regulated activity* of *dealing in investments as principal* (article 14), the definition of *contractually based investments* [expanded in Table 3] excludes a *funeral plan contract* (article 87) and rights to or interests in *funeral plan contracts*.

Note 2A:

PERG 13 Ann 2 Table 2 contains a map indicating which *securities* and *contractually based investments* correspond to *financial instruments*. A *firm's permission* should comprise each of the categories of *security* and *contractually based investment* in relation to which it carries on the activity of *operating a multilateral trading facility*.

Note 3:

The *regulated activities* of *managing investments* (article 37) and *safeguarding and administering investments* (article 40) may apply in relation to any assets, in particular circumstances, if the assets being managed or safeguarded and administered include, (or may include), any *security*, *contractually based investment* or (in the case of *managing investments*) *structured deposit*.

Note 4:

For the purposes of the *permission* regime, the activity in (j)(ii) of *advising on pension transfers and pension opt-outs* includes the following two *regulated activities*: (1) *advising on investments (except P2P agreements)* where it is carried on in respect of the following *specified investments*:

- unit* (article 81);
- stakeholder pension scheme* (article 82(1));
- personal pension scheme* (article 82(2));
- life policy* (explained in note 5); and
- rights to or interests in investments* in so far as they relate to a *unit*, a *stakeholder pension scheme*, a *personal pension scheme* or a *life policy*;

(2) *advising on conversion or transfer of pension benefits* where it is carried on in respect of rights or interests under a pension scheme which provides *safeguarded benefits*.

Note 5:

Article 4(2) of the *Regulated Activities Order* specifies the activities (ma) to (p) for the purposes of section 22(1)(b) of the Act. That is, these activities will be *regulated activities* if carried on in relation to any property and are not expressed as relating to a *specified investment*.

Notes to Table 1

Note 5A:

Where they are carried on in relation to a *life policy*, the activities listed as *insurance distribution activities* in (pb) to (pf) (as well as the *regulated activity* of agreeing to carry on those activities) are also *designated investment business*.

Note 5B:

In *PERG*, *life policy* is the term used in the *Handbook* to mean 'qualifying contract of insurance' (as defined in article 3(1) of the *Regulated Activities Order*). For the purpose of the *permission* regime, the term also includes a *long-term care insurance contract* which is a *pure protection contract* and a *pension term assurance policy*.

Note 5C:

Non-investment insurance contract is the term used in firms permissions to mean *pure protection contract* or *general insurance contract*. *Pure protection contract* is the term used in the *Handbook* to mean a *long-term insurance contract* which is not a *life policy*. *General insurance contract* is the term used in the *Handbook* to mean *contract of insurance* within column 1 of Table 2.

Note 5D:

[deleted]

Note 5E:

For the purposes of the *permission* regime, the activity in (pf)(ii) of *advising on pension transfers and pension opt-outs* is carried on in respect of the following *specified investments*:
life policy (explained in note 5A); and
rights to or interests in investments in so far as they relate to a *life policy*.

Note 6:

[deleted]

Note 7:

A *stakeholder product* is defined in the *Glossary* as:
 an investment of a kind specified in the *Stakeholder Regulations*:
 a *stakeholder pension scheme*; and
 a *stakeholder CTF*.

Note 8:

Article 4(2) of the *Regulated Activities Order* specifies the activity at (ab) for the purposes of section 22(1)(b) of the Act, that is, these activities will be *regulated activities* if carried on in relation to any property and are not expressed as related to a *specified investment*.

Note 9:

For the purposes of the *permission* regime with respect to the *regulated activities* of *entering into a regulated credit agreement as lender* and exercising, or having the right to exercise, the lender's rights and duties under a regulated credit agreement, this is sub-divided into:

- (i) a *regulated credit agreement* (excluding *high-cost short-term credit*, a *home credit loan agreement* and a *bill of sale loan agreement*);
- (ii) *high-cost short-term credit*;
- (iii) a *home credit loan agreement*;
- (iv) a *bill of sale loan agreement*.

For the purposes of *operating an electronic system in relation to lending*, rights under a *credit agreement* include rights under an article 36H agreement within the meaning of article 36H (4) of the *Regulated Activities Order*.

For the purposes of *advising on P2P agreements*, rights under a *credit agreement* include rights under a relevant article 36H agreement within the meaning of article 53(4) of the *Regulated Activities Order*.

Note 10:

Notes to Table 1

Article 4 (2A) of the *Regulated Activities Order* specifies the activities (zae) and (zaf) for the purposes of section 22(1A)(a) of the *Act* (these activities are expressed as relating to information about a person's financial standing rather than to a *specified investment*) and accordingly will be *regulated activities* when carried on by way of business.

Note 11:

The specified investment in relation to which the regulated activity of *advising on regulated credit agreements for the acquisition of land* (article 53DA) may be carried on, is a *regulated credit agreement* which meets the description in PERG 2.7.16F G.

4 Table

Table 1A: PRA-only regulated Activities [See notes 1 and 2 to Table 1A]

Regulated activity	Specified investment in relation to which the regulated activity (in the corresponding section of column one) may be carried on
Accepting deposits	
(a) <i>accepting deposits</i> (article 5)	<i>deposit</i> (article 74) See note (3)
Insurance business	
(b) <i>effecting contracts of insurance</i> (article 10(1))	<i>contract of insurance</i> (article 75) [expanded in Table 2]
(c) <i>carrying out contracts of insurance</i> (article 10(2))	
The Lloyd's market	
(d) <i>managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's</i> (article 57)	<i>underwriting capacity of a Lloyd's syndicate</i> (article 86(1))
(e) the activity of arranging, by the <i>Society</i> , of deals in contracts of insurance written at Lloyd's (article 58)	<i>contract of insurance</i>

5 Table

Notes to Table 1A

Note 1:

In addition to the *regulated activities* listed in Table 1A, article 64 of the *Regulated Activities Order* specifies that *agreeing to carry on a regulated activity* is itself a *regulated activity* in certain cases. This only applies in relation to the Lloyd's market activities in paragraphs (d) and (e).

Note 2:

The activity of *dealing in investments as principal* is also a PRA regulated activity where carried on by a person designated by the *PRA*.

Note 3:

Accepting deposits is not the only *regulated activity* relating to *deposits*. For a *deposit* that is a *structured deposit*, certain other *regulated activities* apply. These are listed in Table 1.

6 Table

Table 2: Contracts of insurance

Contract of insurance (article 75 of the RAO)

Table 2: Contracts of insurance

(a) <i>general insurance contract</i> (Part I of Schedule 1 to the Regulated Activities Order)		(b) <i>long-term insurance contract</i> (Part II of Schedule 1 to the Regulated Activities Order)
Number		
1	<i>Accident</i> (paragraph 1)	<i>life and annuity</i> (paragraph I)
2	<i>Sickness</i> (paragraph 2)	<i>marriage or the formation of a civil partnership and birth</i> (paragraph II)
3	<i>Land vehicles</i> (paragraph 3)	<i>linked long-term</i> (paragraph III)
4	<i>Railway rolling stock</i> (paragraph 4)	<i>permanent health</i> (paragraph IV)
5	<i>Aircraft</i> (paragraph 5)	<i>tontines</i> (paragraph V)
6	<i>Ships</i> (paragraph 6)	<i>capital redemption</i> (paragraph VI)
7	<i>Goods in transit</i> (paragraph 7)	<i>pension fund management</i> (paragraph VII)
8	<i>fire and natural forces</i> (paragraph 8)	<i>collective insurance</i> (paragraph VIII)
9	<i>damage to property</i> (paragraph 9)	<i>social insurance</i> (paragraph IX)
10	<i>motor vehicle liability</i> (paragraph 10)	
11	<i>aircraft liability</i> (paragraph 11)	
12	<i>liability of ships</i> (paragraph 12)	
13	<i>general liability</i> (paragraph 13)	
14	<i>credit</i> (paragraph 14)	
15	<i>suretyship</i> (paragraph 15)	
16	<i>miscellaneous financial loss</i> (paragraph 16)	
17	<i>legal expenses</i> (paragraph 17)	
18	<i>assistance</i> (paragraph 18)	

7 Table

Table 3: Securities, contractually based investments and relevant investments [see notes 1 and 2 to Table 3]

Security (article 3(1))	Contractually based investment (article 3(1))	Relevant investments (article 3(1))
<i>share</i> (article 76)	<i>option</i> (article 83)	<i>contractually based investments</i> (article 3(1))
<i>debenture</i> (article 77)	For the purposes of the <i>permission</i> regime, <i>option</i> is subdivided into:	<i>non-investment insurance contract</i> [see note 5C to Table 1]
<i>alternative debenture</i> (article 77A)	(i) <i>option</i> (excluding a <i>commodity option</i> and an <i>option on a commodity future</i>);	
<i>government and public security</i> (article 78)	(ii) <i>commodity option</i> and <i>option on a commodity future</i> .	
<i>warrant</i> (article 79)		

Table 3: Securities, contractually based investments and relevant investments [see notes 1 and 2 to Table 3]

<p><i>certificate representing certain security</i> (article 80)</p> <p><i>unit</i> (article 81)</p> <p><i>stakeholder pension scheme</i> (article 82(1))</p> <p><i>personal pension scheme</i> (article 82(2));</p> <p><i>emission allowance</i> (article 82B)</p> <p><i>rights to or interests in investments</i> (article 89) in so far as they relate to any of the above categories of <i>security</i></p>	<p><i>future</i> (article 84)</p> <p>For the purposes of the <i>permission</i> regime, <i>future</i> is subdivided into:</p> <p>(i) <i>future</i> (excluding a <i>commodity future</i> and a <i>rolling spot forex contract</i>);</p> <p>(ii) <i>commodity future</i>;</p> <p>(iii) <i>rolling spot forex contract</i>.</p> <p><i>contract for differences</i> (article 85)</p> <p>For the purposes of the <i>permission</i> regime, <i>contract for differences</i> is subdivided into:</p> <ul style="list-style-type: none"> • <i>contract for differences</i> (excluding a <i>spread bet</i>, a <i>binary bet</i> and a <i>rolling spot forex contract</i>); • <i>spread bet</i>; • <i>rolling spot forex contract</i>; <p>and</p> <ul style="list-style-type: none"> • <i>binary bet</i>. <p><i>life policy</i> (but excluding a <i>long-term care insurance contract</i> which is a <i>pure protection contract</i>) [see note 5B to Table 1]</p> <p><i>funeral plan contract</i> (article 87) [see note 1A to Table 1]</p> <p><i>rights to or interests in investments</i> (article 89) in so far as they relate to any of the above categories of <i>contractually based investment</i>.</p>
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Notes to Table 3

Note 1:

Security, contractually based investment and *relevant investment* are not, in themselves, *specified investments* they are defined as including a number of *specified investments* as set out in Table 3. *Relevant investments* is the term that is used to cover *contractually based investments* together with rights under a *general insurance contract* and a *pure protection contract*.

Note 2:

For the purposes of the *regulated activity of dealing in investments as principal* (article 14), the definition of *contractually based investments* excludes a *funeral plan contract* (article 87) and rights to or interests in *funeral plan contracts*.

Chapter 3A

Guidance on the scope of the Electronic Money Regulations 2011

3A.1 Introduction

Q1. What is the purpose of these questions and answers ('Q&As') and who should be reading them?

The purpose of these Q&As is to help *persons* to consider whether they fall within the scope of the *Electronic Money Regulations*. The Q&As are intended to help these *persons* consider whether they need to be authorised or registered for the purposes of *electronic money* issuance in the *United Kingdom*.

The *Electronic Money Regulations* implemented the *Electronic Money Directive* in the *United Kingdom*. The *Electronic Money Regulations* create a separate authorisation and registration regime for issuers of *electronic money* that are not *full credit institutions*, *credit unions* or municipal banks:

- the conditions for authorisation as an *authorised electronic money institution* are set out at regulation 6 of the *Electronic Money Regulations*;
- *small electronic money institutions* have less stringent capital requirements than *authorised electronic money institutions*; however, they need to be registered in accordance with regulation 13 of the *Electronic Money Regulations*;
- *full credit institutions*, *credit unions* and municipal banks are exempt from requiring authorisation and registration under the *Electronic Money Regulations* but must have a *Part 4A permission* for *issuing electronic money* and are subject to some of the conduct of business requirements in the *Electronic Money Regulations*.

A reference in this chapter to:

- individual regulations is a reference to the *Electronic Money Regulations* unless otherwise stated; and
- 'municipal bank' means a company which, immediately before 1st December 2001, fell within the definition in section 103 of the Banking Act 1987.

The Q&As that follow are set out in the following sections:

- General issues (■ PERG 3A.2)
- The definition of electronic money (■ PERG 3A.3)
- Small electronic money institutions, mixed businesses, distributors, agents and exempt bodies (■ PERG 3A.4)
- Exclusions (■ PERG 3A.5)
- Territorial scope (■ PERG 3A.6)
- Transitional arrangements (■ PERG 3A.7)

3A.2 General issues

3A

Q2. Why does it matter whether or not we fall within the scope of the Electronic Money Regulations?

It matters because if you issue *electronic money* in the *United Kingdom* and do not fall within an exclusion or exemption you must be:

- (a) • an *authorised electronic money institution*; or
- (b) • a *small electronic money institution*; or
- (c) (d) • a *credit institution*; or
- (e) • the Post Office Limited; or
- (f) • the Bank of England when not acting in its capacity as a monetary authority or other public authority; or
- (g) • a government department or local authority when acting in its capacity as a public authority; or
- (h) • a *credit union*, municipal bank or the National Savings Bank.

Otherwise you risk committing a criminal offence under regulation 63.

Q3. How much can we rely on these Q&As?

The answers given in these Q&As represent the *FCA's* views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of *Electronic Money Regulations* affects the regulatory position of any particular *person* will depend on their individual circumstances. If you have doubts about your position after reading these Q&As, you may wish to seek legal advice. The Q&As do not purport to be exhaustive and are not a substitute for reading the relevant legislation. In addition to *FCA* guidance, some of the *Electronic Money Directive* provisions (from which the *Electronic Money Regulations* are derived) may be the subject of guidance or communications by the European Commission.

Q4. As an electronic money issuer am I carrying on the regulated activity of accepting deposits when I receive a sum in exchange for electronic money?

No, provided the sum paid over is exchanged immediately for *electronic money*; see article 9A of the *Regulated Activities Order*.

Some *electronic money* products may be charged up by means of scratch cards that can be purchased from shops. The price paid for the card is the monetary value of the *electronic money*. The card contains a number. The purchaser then enters the number on a web site to activate the *electronic money* account. There is thus a delay between the payment for the *electronic money* and its use by the holder. In our view, this delay does not make the payment for the *electronic money* a *deposit*. This is because the means of spending the *electronic money* is put into the hands of the purchaser when they purchase the card.

Q5. I intend to issue electronic money in the United Kingdom. How does the authorisation and registration process apply to me?

It depends on a number of factors:

- i) i) Unless you are a person falling within ii) to iv) below you must apply under the *Electronic Money Regulations* for either:
 - • authorisation to be an *authorised electronic money institution* (see regulation 6 for the relevant conditions); or
 - • registration to be a *small electronic money institution* (see regulation 13).
- ii) ii) If you are a *credit union*, municipal bank or a *full credit institution*:
 - • authorisation and variation of permission remains that imposed by Part 4A of the *Act*. This means you will need to have a separate *Part 4A permission* in order to issue *electronic money*;
 - • where you issue *electronic money* you will be subject to the provisions on issuance and redeemability of *electronic money* in the *Electronic Money Regulations*;
 - • note that you may also be subject to the conduct of business requirements in the *Payment Services Regulations*.
- iii) iv) Government departments, local authorities, the Post Office Limited and the National Savings Bank cannot apply for authorisation or registration under the *Electronic Money Regulations* but they must give notice to the *FCA* if they issue or propose to issue *electronic money*.

Transitional arrangements may also be relevant, see ■ PERG 3A.7.

Q6. We are a payment institution. How will the Electronic Money Regulations apply to us?

If you are a *payment institution* that does not intend to issue *electronic money* or act as agent for an *electronic money institution* the *Electronic Money Regulations* are unlikely to apply to you.

If you are a *payment institution* that wishes to also issue *electronic money* then, in our view, you should cancel your authorisation or registration as a *payment institution* and apply to be an *electronic money institution*. An *electronic money institution* does not need to be authorised or registered under the *Payment Services Regulations* to provide *payment services*.

Q7. As an electronic money institution how will the Payment Services Regulations apply to us?

The issuance of *electronic money* is not itself a *payment service* but it is likely to entail the provision of *payment services*. For example, issuing a *payment instrument* is a *payment service* and *electronic money* is likely to be issued on a *payment instrument* in order to make a payment transaction. See Q20 at ■ PERG 15 for more detail on what amounts to issuing *payment instruments*.

As an *electronic money institution* you are permitted to engage in the provision of *payment services* as well as other activities, see regulation 32 and Q19 below, without needing to be separately authorised or registered under the *Payment Services Regulations*.

The conduct of business requirements in Parts 6 and 7 of the *Payment Services Regulations* apply to *electronic money issuers*.

Transitional arrangements may also be relevant; see ■ PERG 3A.7.

3A.3 The definition of electronic money

Q8. How is electronic money defined in the Electronic Money Regulations?

The definition in the *Electronic Money Regulations* mirrors that in the *Electronic Money Directive*. *Electronic money* means monetary value as represented by a claim on the issuer which is:

- (1) stored electronically, including magnetically;
- (2) issued on receipt of funds;
- (3) used for the purposes of making payment transactions (as defined in regulation 2 of the *Payment Services Regulations*);
- (4) accepted as a means of payment by persons other than the issuer;

and is not otherwise excluded by the *Electronic Money Regulations*, see

■ PERG 3A.5.

Electronic money is an electronic payment product. The value is held electronically or magnetically on the payment instrument itself (either locally or remotely) and payments using the value are made electronically. So, for example, monetary value stored on a:

- prepaid payment card;
- personal computer; or
- a *plastic card* that uses magnetic stripe technology;

may all fall within the definition if the value is intended to be used for the purposes of making payment transactions.

Q9. Does the electronic money definition only apply to card-based schemes?

No. Any electronic payment scheme that involves prepaid monetary value that can be used to purchase goods and services directly from third party merchants is capable of being *electronic money*. This would include account-based schemes.

Recital (7) of the *Electronic Money Directive* states that the intention is to introduce a definition of *electronic money* in order to make it technically neutral so as to cover all situations where the payment service provider issues pre-paid stored value in exchange for funds. Hence the definition expressly captures both electronically and magnetically stored value and there is no longer a reference to there needing to be an 'electronic device' on which the *electronic money* is stored. These changes make it clear that *electronic money* stored on computers hard drives or account-based schemes are caught.

Q10. Can you explain why pre-payment is a necessary ingredient of electronic money?

The definition of *electronic money* says that for a product to be *electronic money*, it must be issued on receipt of funds. This part of the definition means that *electronic money* is a prepaid product. That is, unlike credit provided through a credit card, the *customer* pays for the spending power in advance. This is why credit cards are excluded from the definition of *electronic money*. This does not mean that *electronic money* paid for with a credit card falls outside the definition. The purchase of the *electronic money* represents the purchase of monetary value. The fact that the purchaser is lent the funds to buy the *electronic money* does not affect this. There are two contracts, one for the *sale* of *electronic money* and one for credit.

Value on a debit card may be *electronic money* or a *deposit*. Guidance on this is given in Q15.

Q11. Does it matter that the device on which electronic value is held may be used for other purposes?

No. The fact that the device on which monetary value is stored is made available, for example, on a *plastic card* that also functions as a debit or credit card or is a mobile phone does not stop that monetary value from being *electronic money*.

Q12. Does it matter that the monetary value can be spent with the issuer and third parties?

No. If monetary value can be spent with third parties, it does not stop being *electronic money* just because the *electronic money* can also be spent with the issuer. This is so even if in practice most of the *electronic money* is spent with the issuer and only a small portion spent with third parties.

Q13. Are electronic travellers cheques electronic money?

An electronic travellers cheque is a product, based on a plastic card, designed to replace paper travellers cheques. There are two types of electronic travellers cheques:

- (1) ones that can also be used to buy goods and services from third parties; and
- (2) ones whose only function is to allow the holder to withdraw cash in a foreign currency from ATMs when abroad.

The plastic card is loaded with value, the holder pays for the value on issue and uses the value to purchase goods and services. It is likely then to meet the first three conditions in the definition of *electronic money* listed at Q8. The remaining condition is whether the value is accepted as a means of payment by persons other than the issuer.

An electronic travellers cheque falling into (1) above is likely to be *electronic money* as it can be used to purchase goods from third parties.

An electronic travellers cheque falling into (2) is unlikely to be *electronic money* provided that:

- it can only be used to withdraw foreign currency from ATMs owned by the issuer of the value; or
- the withdrawal of foreign currency by a cardholder will never involve the purchase of the currency from the owner of the ATM but instead the repayment of prepaid value by the issuer of the prepaid value.

Q14. If I use a trust account to store monetary value in respect of funds I have accepted payment for, will I be issuing electronic money?

Putting monetary value into a trust account does not, of itself, prevent the *person* who accepts the payment for electronic value from issuing *electronic money*.

Q15. How does electronic money differ from deposits?

Recital (13) of the *Electronic Money Directive* provides that *electronic money* does not constitute a deposit-taking activity under the BCD "in view of its specific character as an electronic surrogate for coins and banknotes, which is used for making payments, usually of limited amount and not as a means of saving."

In distinguishing *electronic money* and *deposits*, relevant factors include the following:

- If the monetary value is kept on an account that can be used by non-electronic means, that points towards it being a *deposit*. For example, an account on which cheques can be drawn is unlikely to be *electronic money*.
- If a product is designed in such a way that it is only likely to be used for making payments of limited amounts and not as a means of saving, that feature points towards it being *electronic money*. Relevant features might include how long value is allowed to remain on the account, disincentives to keeping value on the account and the payment of interest on it.
- One should have regard to whether the product is sold as *electronic money* or as a *deposit*.

In other words, a *deposit* involves the creation of a debtor-creditor relationship under which the *person* who accepts the *deposit* stores value for eventual return. *Electronic money*, in contrast, involves the purchase of a means of payment.

Q16. What sort of factors will the FCA take into account in deciding whether a particular scheme might be electronic money?

In considering this question relevant factors include:

- the risks incurred by the holder of the value;
- the nature of the rights and obligations of the holder of the prepaid value, the issuer of the value and third parties involved in the scheme; and
- what the scheme allows the holder of the value to do.

Therefore artificial features of a scheme that disguise, or try to disguise, the payment function as the supply of another sort of service are not likely to prevent the scheme from involving the issuance of *electronic money*.



3A.4 Small electronic money institutions, mixed businesses, distributors, agents and exempt bodies

Q17. What criteria must we meet to be a small electronic money institution?

The relevant conditions are set out at regulation 13 and include the following:

- your total business activities immediately before the time of registration generates an *average outstanding electronic money* that does not exceed 5 million euros;
- the monthly average, over the period of 12 months preceding the application, of the total amount of payment transactions which are not related to the issuance of *electronic money* and are executed by you or your agents in the *United Kingdom*, must not exceed 3 million euros;
- immediately before the time of registration you must hold such initial capital, if any, which is required in accordance with Part 1 of Schedule 2 to the regulations;
- you must have taken adequate measures for the purposes of safeguarding *electronic money* holders' fund as set out at regulation 20;
- you must satisfy the *FCA* that the persons responsible for the management of your *electronic money* and *payment services* are of good repute and possess appropriate knowledge and experience to issue *electronic money* and provide those *payment services* that you intend to undertake;
- none of the individuals responsible for the management or operation of your business has been convicted of offences relating to money laundering, or terrorist financing or *financial crime*;
- you must be a body corporate whose head office is in the *United Kingdom*;
- you must comply with the registration requirements of the *Money Laundering Regulations* where they apply to you.

Q18. We satisfy the conditions for registration as a small electronic money institution - does that mean we have to register as one?

Not necessarily, there are other options available to you.

If your business does not currently exceed the thresholds referred to in the first two bullets at Q17, but you expect that it will, you may also wish to apply for authorisation rather than registration.

Q19. We are a firm providing non-financial products and services to the general public. Would it be possible for us to obtain authorisation as an electronic money institution?

Yes. One of the changes made by the *Electronic Money Regulations* is to allow *electronic money institutions* to undertake mixed business. So, *electronic money institutions* may, in addition to issuing *electronic money*, engage in the following activities:

- the provision of *payment services*; and
- the provision of operational and closely related ancillary services, including ensuring the execution of payment transactions, foreign exchange services, safe-keeping activities and the storage and processing of data; and
- the operation of payment systems, as defined at regulation 2(1); and
- business activities other than the issuance of *electronic money*.

Q20. We are a branch of a firm which has its head office outside the UK. If we became an electronic money institution can we also engage in mixed business?

Yes, but you can only provide *payment services* that are linked to the issuance of *electronic money*. You cannot undertake any of the other *payment services*.

Q21. We act as agent for an electronic money institution. What is the scope of our activities under the regulations?

As such an agent you may provide *payment services* on behalf of your principal, but only if you are registered by them on the *Financial Services Register*. You may also distribute or redeem *electronic money* for your principal. You cannot however issue *electronic money* on their behalf.

Q22. We distribute and redeem electronic money. What is the scope of our activities under the regulations?

In some *electronic money* schemes an originator creates *electronic money* and then sells it to banks and other distributors. The latter then sell the *electronic money* to the public. In our view reference to the issuer of *electronic money* in the *Electronic Money Regulations* is a reference to the originator and not the distributor.

So, provided you are not:

- • issuing *electronic money* yourself; or
- • acting as an agent for an *electronic money institution*, see Q21;

you do not need to be authorised or registered under the *Electronic Money Regulations*. However, the *electronic money institution* that is acting as your principal should notify the *FCA* that you are acting as a distributor, see regulations 26 and 37 and Schedule 1.

You should also bear in mind that if, in distributing and redeeming *electronic money*, your activities amount to *payment services* you will need to consider whether you are required to be authorised or registered under the *Payment Services Regulations*, see ■ PERG 15 for further guidance.

Q23. We have been registered by one of our principals as an agent under the Payment Services Regulations. If we wish to act as agent for an electronic money institution as well will we need to be registered again?

Yes. If your principal is an *electronic money institution*, it is its responsibility to apply for registration on your behalf even if you have been registered as agent under the *Payment Services Regulations*. You are required to be registered on the *Financial Services Register* before you provide *payment services* for your principal, subject to any relevant transitional provisions which may delay or avoid the need for registration.

Q24. We are a credit union. Are we exempt from the regulations?

Yes, in part. You are exempt from the authorisation and registration requirements in the regulations. However, if you wish to issue *electronic money* you must ensure you have the relevant *Part 4A permission*. You will also be subject to the safeguarding requirements in Part 3 and the redeemability provision in Part 5 of the *Electronic Money Regulations*.

Q25. We are a municipal bank. Are we exempt from the regulations?

Save that you are not subject to the safeguarding requirements in Part 3 of the regulations, your position is identical to that of *credit unions*, see Q24.

3A.5 Exclusions

Q26. Are there any exclusions from the definition of electronic money that we should be aware of?

Yes. The *Electronic Money Regulations* have two express exclusions:

- the first covers monetary value stored on specific payment instruments that may be used only in a limited way (the 'limited network' exclusion) (regulation 3(a)). See ■ PERG 15 Q40 which deals with the same exclusion for the purposes of the *Payment Services Regulations*; and
- the second covers monetary value used to make certain payment transactions resulting from services provided by a provider of electronic communications networks or services in addition to their provision of electronic communications services, where the payment is charged to the related bill (the 'electronic communications exclusion') (regulation 3(b)). See ■ PERG 15 Q41A which deals with the same exclusion for the purposes of the *Payment Services Regulations*.

Q27. We offer branded prepaid cards which consumers can use to purchase goods in a particular shopping centre . Are we issuing electronic money?

Yes, it is likely that you will be issuing *electronic money* unless you are able to fall within an exclusion. The most likely exclusion is the limited network exclusion (see Q26). In our view you will not be able to take advantage of this exclusion here unless:

- it is made clear in the relevant terms and conditions of the card that the purchaser of the value is only permitted to use the card to buy from merchants located within that particular shopping centre with whom you have direct commercial agreements; and
- the facility to use the card to purchase goods and services outside this shopping centre does not exist. A card that can be used at a number of different shopping centres, or where use is restricted only by the terms and conditions that apply to the card and is not functionally restricted to one shopping centre is unlikely to fall within this exclusion.

Q28. [deleted]



3A.6 Territorial scope

3A

Q29. We are a non-UK firm with a branch in the United Kingdom and we wish to issue electronic money. Can we apply for authorisation or registration?

Yes. You may apply to be an *authorised electronic money institution* if you are a body corporate (regulation 6(4)(b)). However, you cannot apply to be a *small electronic money institution* unless your head office is in the *United Kingdom* (regulation 13(9)).

3A.7 Transitional arrangements

3A.7

Q30. We were authorised as an electronic money institution before 13 January 2018 (when the Payment Services Regulations 2017 (PSRs 2017) came into force). Can we continue to provide services under the Electronic Money Regulations?

Yes, but only for a limited time. The PSRs 2017 amend the *Electronic Money Regulations* to require *authorised electronic money institutions* and *small electronic money institutions* that wish to continue to provide services under the *Electronic Money Regulations* on or after 13 July 2018 to provide additional information to the FCA before 13 April 2018 (section 78A of the *Electronic Money Regulations*). The FCA must then determine whether the institution's authorisation or registration should be continued.

Q31. We are an authorised electronic money institution. Can we provide account information services and payment initiation services after 13 January 2018?

In relation to the *payment services* introduced by the PSRs 2017 (account information services and payment initiation services), from 13 January 2018 all *electronic money institutions* authorised before that date will be treated as if the FCA had imposed a requirement to refrain from providing those services for an indefinite period. Institutions wishing to provide those services must comply with a number of requirements before they can apply for a variation of this requirement.

More information on these transitional arrangements can be found in Chapter 3 (Authorisation and Registration) of the Payment Services and Electronic Money Approach Document.

Chapter 4

Guidance on regulated activities connected with mortgages

4.1 Application and purpose

Application

- 4.1.1 **G** This chapter applies to any *person* who needs to know whether the activities he conducts in relation to mortgages are subject to *FCA* regulation.

Purpose of guidance

- 4.1.2 **G** Certain activities relating to mortgages are regulated by the *FCA*. The purpose of this *guidance* is to help *persons* decide whether they need *authorisation* and, if they do, to determine the scope of the *Part 4A permission* for which they will need to apply.

Effect of guidance

- 4.1.3 **G** This *guidance* is issued under section 139A of *Act* (*Guidance*). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* in the circumstances contemplated by it, then the *FCA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates.

- 4.1.4 **G** Rights conferred on third parties cannot be affected by *guidance* given by the *FCA*. This *guidance* represents the *FCA's* view, and does not bind the courts, for example, in relation to an action for damages brought by a private *person* for breach of a *rule* (see section 138D of the *Act* (*Action for damages*)), or in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (*Enforceability of agreements*)). A *person* may need to seek his own legal advice.

- 4.1.5 **G** Anyone reading this *guidance* should refer to the *Act* and to the various *Orders* that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*.

Guidance on other activities

- 4.1.6 **G** A *person* may be intending to carry on activities related to other forms of investment in connection with mortgages, such as advising on and arranging an endowment policy or *ISA* to repay an interest-only mortgage. Such a *person* should also consult the *guidance* in ■ PERG 2 (*Authorisation and*

regulated activities), ■ PERG 5 (Guidance on insurance distribution activities) and ■ PERG 8 (Financial promotion and related activities). In addition, ■ PERG 14 (Guidance on home reversion and home purchase activities) has *guidance on regulated activities relating to home reversion plans, home purchase plans and regulated sale and rent back agreements.*

4.2 Introduction

Requirement for authorisation or exemption

- 4.2.1 **G** In most cases, any *person* who carries on a *regulated activity* in the *United Kingdom* by way of business must either be an *authorised person* or an *exempt person*. Otherwise, the *person* commits a criminal offence and certain agreements may be unenforceable. ■ PERG 2.2 (Introduction) contains further *guidance* on these consequences.

Professional firms

- 4.2.2 **G** Certain *professional firms* are allowed to carry on some *regulated activities* without *authorisation* so long as they comply with specified conditions (see ■ PERG 4.14 (Mortgage activities carried on by professional firms)).

Questions to be considered to decide if authorisation is required

- 4.2.3 **G** A *person* who is concerned to know whether his proposed activities may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form, in the flowchart in ■ PERG 4.18):
- (1) will I be carrying on my activities by way of business (see ■ PERG 4.3.3 G (The business test))?
 - (2) if so, will my activities relate to *regulated mortgage contracts* (see ■ PERG 4.4 (What is a regulated mortgage contract))?
 - (3) if so, will I be carrying on any of the *regulated mortgage activities* (see ■ PERG 4.5 (Arranging regulated mortgage contracts) to ■ PERG 4.9 (Agreeing to carry on a regulated activity))?
 - (4) if so, there is the necessary link with the *United Kingdom* (see ■ PERG 4.11 (Link between activities and the United Kingdom))?
 - (4A) is the only available exclusion the one for *CBTL firms* (see ■ PERG 4.10B (Regulation of buy to let lending))?
 - (5) if so, will any or all of my activities be excluded (see ■ PERG 4.5 (Arranging regulated mortgage contracts) to ■ PERG 4.10 (Exclusions applying to more than one regulated activity))?

- (5A) if so, is the exclusion on which I am relying disapplied because the business is subject to the *Mortgage Credit Directive* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive))?
- (6) if the answer to 4A is “no” and it is not the case that all of my activities are excluded, am I a *professional firm* whose activities are exempted under Part XX of the *Act* (see ■ PERG 4.14 (Mortgage activities carried on by professional firms))?
- (7) if not, am I exempt as an *appointed representative* (see ■ PERG 4.12 (Appointed representatives))?
- (8) if not, am I otherwise an *exempt person* (see ■ PERG 4.13 (Other exemptions))?

If a *person* gets as far as question (8) and the answer to that question is 'no', that *person* requires *authorisation* and should refer to the *FCA* website "Apply for authorisation": www.fca.org.uk/firms/authorisation/apply-authorisation for details of the application process.

However, if a *person* wishes to carry on *CBTL business* see ■ PERG 4.10B (Regulation of buy to let lending) it may be able benefit from the exclusion for *CBTL firms* and be placed on the relevant register described in ■ PERG 4.10B if:

- (a) no other exclusion applies; and
- (b) the answer to questions (6) to (8) is “no”.

Note that *the person* would need to apply to be included on the relevant register described in ■ PERG 4.10B.

4.2.4 G [deleted]

Financial promotion.....

4.2.5 G An *unauthorised person* who intends to carry on activities connected with mortgages will also need to comply with section 21 of the *Act* (Restrictions on financial promotion). This *guidance* does not cover *financial promotions* that relate to mortgages. *Persons* should refer to the general *guidance* on *financial promotion* in Appendix 1 to the *Authorisation manual*, ■ PERG 8 (Financial promotion and related activities) and, in particular, to ■ PERG 8.17 (Financial promotions concerning agreements for qualifying credit).

4.3 Regulated activities related to mortgages

4.3.1 G There are six *regulated mortgage activities* requiring *authorisation* or exemption if they are carried on in the *United Kingdom*. These are set out in the *Regulated Activities Order*. They are:

- (1) *arranging (bringing about) regulated mortgage contracts* (article 25 A(1) and (2A) (Arranging regulated mortgage contracts));
- (2) *making arrangements with a view to regulated mortgage contracts* (article 25A(2) (Arranging regulated mortgage contracts));
- (3) *advising on regulated mortgage contracts* (article 53A (Advising on regulated mortgage contracts));
- (4) *entering into a regulated mortgage contract as lender* (article 61(1) (Regulated mortgage contracts));
- (5) *administering a regulated mortgage contract* where that contract is entered into by way of business on or after 31 October 2004 or the contract was entered into by way of business before that date and is a *legacy CCA mortgage contract* (article 61(2) (Regulated mortgage contracts)); and
- (6) *agreeing to carry on any of the above* (article 64 (Agreeing to carry on specific kinds of activity)).

4.3.2 G The scope of these activities is limited by certain exclusions contained in Parts II and III of the *Regulated Activities Order*. These exclusions are referred to in ■ PERG 4.5 (Arranging regulated mortgage contracts) to ■ PERG 4.10 (Exclusions applying to more than one regulated activity).

The business test

4.3.3 G A *person* will only need *authorisation* or exemption if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated activities)). There are, in fact, three different forms of business test applied to the *regulated mortgage activities*. In the *FCA's* view, however, the difference in the business tests should have little practical effect.

4.3.4 G There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. The *Business Order* has been made using this power (partly reflecting differences in the nature of

the different activities). The result (which is summarised in ■ PERG 4.3.5 G) is that:

- (1) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *entering into a regulated mortgage contract*;
- (2) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *administering a regulated mortgage contract*, but another 'by way of business' test arises because the contract being administered by way of business must itself have been entered into by way of business (see ■ PERG 4.8.2 G); and
- (3) in the case of arranging and advising, the effect of article 3A of the *Business Order* (Arranging and advising on regulated mortgage contracts) is that a *person* is not to be regarded as acting 'by way of business' unless he is 'carrying on the business of engaging in one or more of those activities'.

4.3.5

G Summary of which variant of the business test applies to the different regulated mortgage activities. This table belongs to ■ PERG 4.3.4 G.

By way of business	Carrying on the business
<i>Entering into a regulated mortgage contract</i> (article 61(1))	<i>Arranging (bringing about) regulated mortgage contracts</i> (article 25A(1)) and arranging (bringing about) mortgage contracts behalf of a lender (article 25A(2A))
<i>Administering a regulated mortgage contract</i> (article 61(2)) (and the contract administered must have been entered into by way of business)	<i>Making arrangements with a view to regulated mortgage contracts</i> (article 25A(2))
	<i>Advising on regulated mortgage contracts</i> (article 53A)

4.3.6

G The 'carrying on the business' test in the *Business Order* is a narrower test than that of carrying on *regulated activities* 'by way of business' in section 22 of the *Act* as it requires the *regulated activities* to represent the carrying on of a business in their own right. Whether or not the business test is satisfied in any particular case is ultimately a question of judgement that takes account of a number of factors (none of which is likely to be conclusive). The nature of the particular *regulated activity* that is carried on will also be relevant to the factual analysis. The relevant factors include:

- (1) the degree of continuity;
- (2) the existence of a commercial element; and
- (3) the scale of the activity and, for the 'by way of business' test, the proportion which the activity bears to the other activities carried on by the same *person* but which are not regulated.

In the case of the 'carrying on the business' test, these factors will need to be considered having regard to all the activities together.

4.3.7 **G** The main factor that might cause an activity to satisfy the 'by way of business' test in section 22 but not the narrower 'carrying on the business' test in the *Business Order* is that of frequency or regularity. As a general rule, the activity would need to be undertaken with some degree of frequency or regularity to satisfy the narrower 'carrying on the business' test. Conversely, the 'by way of business' test in section 22 could be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done by 'way of business' in all other respects).

4.3.8 **G** It follows that whether or not any particular *person* may be carrying on a *regulated mortgage activity* 'by way of business' will depend on his individual circumstances. However, some typical examples where the applicable business test would be likely to be satisfied are where a *person*:

- (1) enters into one or more *regulated mortgage contracts* as lender in the expectation of receiving interest or another form of payment that would enable him to profit from his actions;
- (2) administers a *regulated mortgage contract* in return for a payment of some kind (whether in cash or in kind); and
- (3) arranges or advises on *regulated mortgage contracts*, or does both, on a regular basis and receives payment of some kind (whether in cash or in kind and whether from the borrower or from some other *person*).

4.3.9 **G** Some typical examples where the business test is unlikely to be satisfied are:

- (1) when an individual enters into or administers a one-off mortgage securing a loan to a friend or member of his family whether at market interest rates or not; or
- (2) when a *person* provides a service without any expectation of reward or payment of any kind, such as advice given or arrangements made by many Citizens Advice Bureaux and other voluntary sector agencies (but see ■ PERG 4.3.8G (3) where payment is received for advice).

4.4 What is a regulated mortgage contract?

The definition of "regulated mortgage contract"

4.4.1

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Article 61(3)(a) of the *Regulated Activities Order* defines a *regulated mortgage contract* as a contract which, at the time it is entered into, satisfies the following conditions:

- (1) the contract is one where a lender provides credit to an individual or trustees (the 'borrower');
- (2) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land, where "land" for this purpose means:
 - (a) in relation to a contract entered into before *IP completion day*, land in the *United Kingdom* or, if the contract was entered into on or after 21 March 2016, within the territory of an *EEA State*; and
 - (b) in relation to a contract entered into on or after *IP completion day*, land in the *United Kingdom*; and
- (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling.

This section sets out the *FCA's* understanding of some key concepts contained in article 61(3)(a). It should be noted that, where a contract meets the necessary requirements for both a *regulated mortgage contract* and a *home purchase plan*, it will be treated as a *home purchase plan* only and will not be a *regulated mortgage contract*. Guidance on the meaning of a *home purchase plan* is in ■ PERG 14.4 (Guidance on home reversion and home purchase activities).

4.4.1-A

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A contract is not a *regulated mortgage contract* if it is:

- (1) a loan to a commercial borrower excluded under ■ PERG 4.4.17 G or ■ PERG 4.4.21 G; or
- (2) a second charge loan by a credit union excluded under ■ PERG 4.4.24 G; or
- (3) a second charge bridging loan excluded under ■ PERG 4.4.27 G;
- (4) a *CBTL credit agreement* excluded as described in ■ PERG 4.4.31G.

Provision of credit

4.4.1A

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- (1) Article 61(3)(c) of the *Regulated Activities Order* states that credit includes a cash loan and any other form of financial accommodation. Although 'financial accommodation' has a potentially wide meaning, its scope is limited by the terms used in the definition of a *regulated mortgage contract* set out in ■ PERG 4.4.1 G. Whatever form the financial accommodation may take, article 61(3)(a) envisages that it must include an obligation to repay on the part of the individual who receives it.
- (2) In the *FCA's* view, an obligation to repay implies the existence, or the potential for the existence, of a debt owed by the individual to whom the financial accommodation is provided (the 'borrower') to the *person* who provides it (the 'lender').
- (3) For example, a bank would be providing 'credit' which, subject to the other requirements being met, could amount to a *regulated mortgage contract* if it gives a guarantee that:
 - (a) creates a debt or a potential debt; and
 - (a) allows for deferred payment.

Which borrowers?

4.4.2

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The condition set out in ■ PERG 4.4.1G (1) limits the range of borrowers to whom the protections of the mortgage regulation regime apply to individuals and trustees. If a *company* (which is not acting as a trustee) borrows money for the purpose of funding the *company's* business, and the loan is secured by a mortgage over the *company's* property, the mortgage contract is not a *regulated mortgage contract*. So a lender will not carry on a *regulated activity* by entering into that contract, nor will the lender carry on a *regulated activity* if it advises on, arranges or administers that contract. However, if the lender makes a loan for business purposes to an individual sole trader, or (in England and Wales) a partnership, and the loan is secured on the borrower's house or houses, the contract will be a *regulated mortgage contract*.

4.4.2A

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- (1) A loan to a trustee is caught, even if the trustee or the beneficiary is not an individual.
- (2) Therefore, it is possible that a loan to a trustee acting for a large commercial *company* is a *regulated mortgage contract*.
- (3) In practice, the exclusions for loans to commercial borrowers (in particular, see ■ PERG 4.4.17 G and ■ PERG 4.4.21 G) are likely to prevent such loans from being *regulated mortgage contracts*.
- (4) If:
 - (a) the loan is made to a trustee;
 - (b) the trustee is a bare trustee or nominee; and
 - (c) the beneficiary of the trust is acting for commercial purposes;
 it is likely that the trustee will also be acting for commercial purposes.

4.4.2B **G** A loan to a partnership may be a loan to an individual if the partnership is made up of real people (that is natural, as opposed to legal, *persons*).

Date the contract is entered into

4.4.3 **G** In order to meet the definition of a *regulated mortgage contract*, a mortgage contract must meet the conditions set out in ■ PERG 4.4.1G (1) to ■ PERG 4.4.1G (3) at the time it was entered into. The effect is that contracts which meet those conditions at that time remain *regulated mortgage contracts* throughout their remaining term, even if there are periods of time when some or all of the conditions are not satisfied. Conversely, contracts that do not start out as *regulated mortgage contracts* cannot subsequently become so, even if they meet all the conditions set out in ■ PERG 4.4.1G (1) to ■ PERG 4.4.1G (3). A *person* that only administers mortgage contracts which did not meet those conditions at the time they were entered into will not, therefore, need *permission* to *administer regulated mortgage contracts*.

4.4.4 **G** There may, however, be instances where an existing contract, which was not a *regulated mortgage contract* at the time it was entered into, is replaced as a result of a variation (whether the variation is initiated by the customer or by the lender), and the new contract qualifies as a *regulated mortgage contract*. A *person* may therefore need to consider this possibility (which could affect contracts initially entered into before 31 October 2004 as well as subsequent loans) when deciding whether he needs *permission* to carry on any of the *regulated mortgage activities*.

Land

4.4.5 **G** The condition set out in ■ PERG 4.4.1G (2) means that a *regulated mortgage contract* must be secured on land, where "land" for this purpose means:

- (1) in relation to a contract entered into before *IP completion day*, land in the *United Kingdom* or, if the contract was entered into on or after 21 March 2016, within the territory of an *EEA State*; and
- (2) in relation to a contract entered into on or after *IP completion day*, land in the *United Kingdom*.

Contracts which involve taking security over moveable property therefore cannot be *regulated mortgage contracts*. So a contract secured on a caravan will not be a *regulated mortgage contract*, unless the contract also involves a mortgage over the land on which the caravan stands.

Occupancy requirement

4.4.6 **G** The condition set out in ■ PERG 4.4.1G (3) means that loans secured on property which is entirely used for business purposes (such as an office block) cannot fall within the definition. However, loans secured on 'mixed use' property could be covered, provided that the occupier uses at least 40% of the total of the land as or in connection with a dwelling. Loans secured on a six-floor property, half of which was occupied by a family as their home and half let out for business purposes would therefore satisfy the definition. (Article 61(4)(b) makes it clear that 'land', in the context of a multi-storey building, means the aggregate of the floor area of each of the storeys.)

4.4.6A **G** The most obvious example of a *regulated mortgage contract* is a loan made to an individual to enable the individual to buy a home for themselves where the loan is secured on that home. However, there is no requirement that the borrower should occupy the property. There is a requirement that at least 40% of the land should be used as a house, but no requirement that it is the borrower who uses it as a house. So, for example:

- (1) a loan may be a *regulated mortgage contract* if the property on which it is secured is to be occupied by the borrower's relatives as their home; or
- (2) a loan may be a *regulated mortgage contract* if the borrower does not occupy the property on which the loan is secured and instead intends to sell the property to a third party, with the mortgage remaining on the house until then.
- (3) However, if the borrower is acting on a commercial basis, the loan in (2) may be excluded as a loan to a commercial borrower under the exclusions in ■ PERG 4.4.17 G or ■ PERG 4.4.21 G.
- (4) A buy-to-let loan secured on the property to be let is potentially a *regulated mortgage contract*. However, such a loan may be excluded as a loan to a commercial borrower under the exclusions referred to in (3) or under the buy-to-let exclusions described in ■ PERG 4.4.31G and ■ PERG 4.10B which refer to consumer borrowers.

4.4.7 **G** The expression 'as or in connection with a dwelling' set out in ■ PERG 4.4.1G (3) means that loans to buy a small house with a large garden would in general be covered. However, if at the time of entering into the contract the intention was for the garden to be used for some other purpose – for example, if it was intended that a third party were to have use of the garden – the contract would not constitute a *regulated mortgage contract*. Furthermore, the FCA would not regard a loan to purchase farmland and a farmhouse as constituting a *regulated mortgage contract* (where the farmhouse and garden amount to less than 40% of the land area), since it does not appear that the land could properly be said to be used 'in connection with' the farmhouse. The presence of the farmhouse is unconnected with the use to which the farmland is put (in contrast to a residential property's garden, which would have no existence independent of the property).

4.4.8 **G** [deleted]

4.4.9 **G** [deleted]

Purpose of the loan is irrelevant

4.4.10 **G** The definition of *regulated mortgage contract* contains no reference to the purpose for which the loan is being made. So, in addition to loans made to individuals to purchase residential property, the definition is wide enough to cover other loans secured on land, such as loans to consolidate debts, or to enable the borrower to purchase other goods and services.

Type of lending

4.4.11 **G** The definition of *regulated mortgage contract* also covers a variety of types of product. Apart from the normal mortgage loan for the purchase of property, the definition also includes other types of secured loan, such as secured overdraft facility, a *bridging loan* (although bridging loans described in ■ PERG 4.4.27 G are not *regulated mortgage contracts*), a secured credit card facility and *regulated lifetime mortgage contracts* under which the borrower (usually an older person) takes out a loan where repayment of the capital (and in some cases the interest) is not required until the property is sold, usually on the death of the borrower.

4.4.12 **G** Loans secured on commercial premises are not *regulated mortgage contracts* as the property will not be used as or in connection with a dwelling.

4.4.13 **G** [deleted]

4.4.14 **G** [deleted]

Type of security

4.4.15 **G** A loan may be a *regulated mortgage contract* whether it is secured by a first, second or subsequent mortgage.

4.4.16 **G** A mortgage has a wide meaning for the purpose of the definition of a *regulated mortgage contract*. It includes:

- (1) a legal mortgage;
- (2) equitable security;
- (3) (in Scotland) a heritable security;
- (4) [deleted]

4.4.16A **G** It is possible for more than one mortgage contract to be secured by the same charge.

Exclusions for lending to commercial borrowers

4.4.17 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
- (2) less than 40% of the land secured by the mortgage is used, or intended to be used, as or in connection with a dwelling by the borrower or (for credit provided to trustees) by an individual who is a beneficiary of the trust, or by a *related person*; and

- (3) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

4.4.18 **G** The *Regulated Activities Order* refers to this as an “investment property loan”.

4.4.19 **G** Under the *Regulated Activities Order* 'related person' means, in relation to the borrower or (for credit provided to trustees) a beneficiary of the trust:

- (1) that *person's* spouse or civil partner;
- (2) a *person* (whether or not of the opposite sex) whose relationship with that *person* has the characteristics of the relationship between husband and wife; or
- (3) that *person's* parent, brother, sister, child, grandparent or grandchild.

4.4.20 **G** (1) If less than 40% of the land secured by the mortgage is used, or intended to be used, as or in connection with a dwelling then the exclusion for loans to commercial borrowers described in **■ PERG 4.4.17 G** is irrelevant, as the loan falls outside **■ PERG 4.4.1 G** and so cannot be a *regulated mortgage contract*.

- (2) The exclusion becomes relevant (if all the conditions in **■ PERG 4.4.17 G** are met) if at least 40% of the land secured by the mortgage is used, or intended to be used, as or in connection with a dwelling by:
 - (a) someone other than the borrower; or
 - (b) the borrower and someone else, if the percentage used by the borrower as residential property is less than 40%.

- (3) Therefore, the exclusion would, for example, cover a loan secured on residential property where a commercial borrower is not going to occupy any of the property but is going to sell it to a third party.

4.4.21 **G** There is also an exclusion for loans to commercial borrowers secured by a second or subsequent security. A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it meets the conditions in **■ PERG 4.4.1G (1)** to **■ (3)**; and
- (2) the lender provides the borrower with credit exceeding £25,000; and
- (3) the mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
- (4) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

4.4.22 **G** The *Regulated Activities Order* refers to this as a “second charge business loan”.

- 4.4.23** **G**
- (1) There is no exclusion from the £25,000 floor in ■ PERG 4.4.21G (2) for an item entering into the *total charge for credit*.
 - (2) Giving time for payment of interest if the borrower gets into difficulty, does not affect the calculation of the sum as the definition relates to the time at which the contract is entered into.
 - (3) However, for example, if the credit includes a broker fee, that fee may be excluded in the calculation of the floor.

Exclusion for lending by credit unions

4.4.24 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
- (2) the lender is a *credit union*; and
- (3) it is a *borrower-lender agreement*; and
- (4) the mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
- (5) the rate of the *total charge for credit* does not exceed 42.6 per cent.

4.4.25 **G** The *Regulated Activities Order* refers to this as a “limited interest second charge credit union loan”.

4.4.26 **G** The exclusion in ■ PERG 4.4.24 G only applies if the loan meets the following conditions:

- (1) the borrower receives timely information on the main features, risks and costs of the contract at the pre-contractual stage; and
- (2) any advertising of the contract is fair, clear and not misleading.

Exclusion for second charge bridging loans

4.4.27 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
- (2) it is a *borrower-lender-supplier agreement* financing the purchase of land; and
- (3) it is used by the borrower as a temporary financing solution while changing to another financial arrangement for the land secured by the mortgage; and

- (4) the mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
- (5) the number of payments to be made by the borrower under the contract is not more than four.

4.4.28 G The *Regulated Activities Order* refers to this as a “limited payment second charge bridging loan”.

Exclusion for equitable mortgage bridging loans

4.4.28A G A contract is excluded from the definition of *regulated mortgage contract* if, at the time is entered into, it meets the following conditions:

- (1) it is a *bridging loan* described in ■ PERG 4.13.6G;
- (2) it is secured by an equitable mortgage on *land*; and
- (3) it is an exempt agreement within the meaning of article 60B(3) (*regulated credit agreements*) of the *Regulated Activities Order* by virtue of article 60E(2): in summary, the *lender* is a *local authority*, or the agreement is specified in ■ CONC App 1.3 and the *lender* is a person or within class of persons specified in ■ CONC App 1.3 (see ■ PERG 2.7.19FG(1) and (2)).

4.4.28B G The *Regulated Activities Order* refers to such a contract as an ‘exempt equitable mortgage bridging loan’.

Exclusion for housing association and other housing authority loans

4.4.28C G A contract is excluded from the definition of *regulated mortgage contract* if, at the time is entered into, it meets the following conditions:

- (1) it provides for credit to be granted by a ‘housing authority’ within the meaning of article 60E of the *Regulated Activities Order*. The definition in article 60E includes housing associations registered under the relevant housing legislation (see ■ PERG 2.7.19FAG);
- (2) if entered into on or after 21 March 2016:
 - (a) it is an agreement an agreement to which section 423A(3) of the *Act* applies (in other words, it is an agreement listed in ■ PERG 4.10A.5G(1) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or
 - (b) it is a *bridging loan* described in ■ PERG 4.13.6G; or
 - (c) it is a restricted public loan described in ■ PERG 4.13.7G.

4.4.28D G The *Regulated Activities Order* refers to such a contract as an ‘exempt housing authority loan’.

Certificate that borrower is not a consumer

4.4.29 **G** The two exclusions for loans to commercial borrowers (■ PERG 4.4.17 G and ■ PERG 4.4.21 G) depend on the borrower not being a consumer. For these purposes, if an agreement includes a declaration which:

- (1) is made by the borrower; and
- (2) includes:
 - (a) a statement that the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower;
 - (b) a statement that the borrower understands that the borrower will not have the benefit of the protection and remedies that would be available to the borrower under the *Act* if the agreement were a *regulated mortgage contract* under the *Act*; and
 - (c) a statement that the borrower is aware that if the borrower is in any doubts as to the consequences of the agreement not being regulated by the *Act*, then the borrower should seek independent legal advice;

the agreement is to be presumed to have been entered into by the borrower wholly or predominantly for the purposes specified in (2)(a).

4.4.30 **G** However, the presumption in ■ PERG 4.4.29 G does not apply if, when the agreement is entered into:

- (1) the lender (or, if there is more than one lender, any of the lenders); or
- (2) any *person* who has acted on behalf of the lender (or, if there is more than one lender, any of the lenders) in connection with the entering into of the agreement;

knows, or has reasonable cause to suspect, that the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

Exclusion for certain consumer buy-to-let mortgage contracts

4.4.31 **G** There is an exclusion for what the *RAO* refers to as an “exempt consumer buy-to-let mortgage contract”. This is explained in ■ PERG 4.10B (Regulation of buy-to-let lending).

4.4.32 **G** For a *buy-to-let credit agreement* (described in ■ PERG 4.10B.5G), article 61A(5) of the *Regulated Activities Order* says that a borrower is to be regarded as entering into an agreement, or intending to enter into an agreement, for the purposes of a business if (1) or (2) are met:

- (1) (a) the borrower previously purchased, or is entering into the contract in order to finance the purchase by the borrower of, the land secured by the mortgage;

- (b) at the time of the purchase the borrower intended that the land would be occupied as a dwelling on the basis of a rental agreement and would not at any time be occupied as a dwelling by the borrower or by a *related person* (see ■ PERG 4.4.19G), or where the borrower has not yet purchased the land the borrower has such an intention at the time of entering into the contract; and
 - (c) where the borrower has purchased the land, since the time of the purchase the land has not at any time been occupied as a dwelling by the borrower or by a *related person* (see ■ PERG 4.4.19G);
- (2) the borrower is the owner of land, other than the land secured by the mortgage, which is
- (a) occupied as a dwelling on the basis of a rental agreement and is not occupied as a dwelling by the borrower or by a *related person* (see ■ PERG 4.4.19G); or
 - (b) secured by a mortgage under a *buy-to-let credit agreement*.



4.4A Mortgage contracts entered into before 21 March 2016

4.4A.1 **G** [deleted]

4.4A.1A **G** Prior to 21 March 2016, the definition of ‘regulated mortgage contract’ in article 61(3)(a) of the *Regulated Activities Order* was limited to mortgage contracts secured by a first legal mortgage (but not a second charge mortgage or an equitable mortgage) of *land* in the *United Kingdom* (rather than *land* in the *EEA*), and the regulated activity of *administering a regulated mortgage contract* was limited to mortgage contracts entered into on or after 31 October 2004, being the date on which mortgage regulation under the *Act* began. Accordingly, prior to 21 March 2016 some mortgage contracts were *regulated mortgage contracts* regulated under *MCOB*; some mortgage contracts were *regulated credit agreements* regulated under the *CCA* and, from 1 April 2014, *CONC*; and some mortgage contracts were outside regulation.

4.4A.1B **G** When the *Regulated Activities Order* was amended to implement the *MCD*, the limitations mentioned in ■ PERG 4.4A.1AG were removed: the legislative intention was to provide a single regulatory regime for mortgage contracts under *MCOB* from 21 March 2016, subject to a six month transitional period for first charge mortgages entered into before 31 October 2004. Mortgage contracts that were *regulated mortgage contracts* before that date did not cease to be *regulated mortgage contracts*. But many mortgage contracts that were not *regulated mortgage contracts* immediately before 21 March 2016 became *regulated mortgage contracts* on that date provided that they met the conditions set out in ■ PERG 4.4.1G(1) to (3), even though these conditions did not apply in that form at the time the contract was entered into.

4.4A.1C **G**

- (1) Mortgage contracts that potentially became *regulated mortgage contracts* on 21 March 2016 include, for example:
 - (a) mortgages entered into before 31 October 2004;
 - (b) second charge mortgages; and
 - (c) equitable mortgages.
- (2) However:
 - (a) a mortgage contract entered into before 21 March 2016, which was not already a *regulated mortgage contract* only became a *regulated mortgage contract* if it was a ‘consumer credit back book mortgage contract’ within the meaning of article 2 of the *MCD Order* (and see paragraph (a)(iii) of the *Glossary* definition

of regulated mortgage contract). Briefly, this means a regulated credit agreement that would have been a regulated mortgage contract if it had been entered into on or after 21 March 2016, with the exception of certain buy-to-let mortgages (which will remain regulated credit agreements if they were regulated credit agreements at the time they were entered into);

- (b) the exclusions set out in article 61A of the *Regulated Activities Order* and reflected in paragraph (a)(ii) of the *Glossary* definition of regulated mortgage contract replicate various consumer credit exemptions, for example equitable mortgage bridging loans; and
- (c) the regulated activities of administering a regulated mortgage contract, advising on regulated mortgage contracts and arranging (bringing about) regulated mortgage contracts are limited, in their application to mortgage contracts entered into before 21 March 2016, to mortgage contracts which were already regulated mortgage contracts or which are 'consumer credit back book mortgage contracts' within the meaning of article 2 of the *MCD Order* (see (a)).

4.4A.2 G [deleted]

4.4A.3 G [deleted]

4.4A.4 G [deleted]

4.4A.5 G
(2) [deleted]

4.4A.6 G [deleted]

4.4A.7 G [deleted]

4.4A.8 G
(3) [deleted]

4.4A.9 G [deleted]

4.4A.10 G [deleted]

(3) [deleted]

4.5 Arranging regulated mortgage contracts

Definition of the regulated activities involving arranging

4.5.1

G

Article 25A of the *Regulated Activities Order* describes two types of *regulated activities* concerned with *arranging regulated mortgage contracts*. These are:

- (1) making arrangements:
 - (a) for another *person* to enter into a *regulated mortgage contract* as borrower; or
 - (b) to enter into a regulated mortgage contract with a borrower on behalf of a lender; or
 - (c) for another *person* to vary the terms of a *regulated mortgage contract* entered into by that person as borrower on or after 31 October 2004 or a *legacy CCA mortgage contract* entered into by that person as borrower in such a way as to vary that person's obligations under the contract; and
- (2) making arrangements with a view to a *person* who participates in the arrangements entering into a *regulated mortgage contract* as borrower.

4.5.2

G

The first activity (article 25A(1) and (2A)) is referred to in this *guidance* as *arranging (bringing about) regulated mortgage contracts*. Various points arise:

- (1) It is not necessary for the potential borrower himself to be involved in making the arrangements.
- (2) This activity is carried on only if the arrangements bring about, or would bring about a *regulated mortgage contract*. This is because of the exclusion in article 26 (see ■ PERG 4.5.4 G). As explained in ■ PERG 4.5.4A G, this exclusion does not apply to the activity in ■ PERG 4.5.1G (1)(b).
- (3) This activity therefore includes the activities of brokers who make arrangements on behalf of a borrower to enter into or vary a *regulated mortgage contract* where these arrangements go beyond merely introducing (see ■ PERG 4.5.10 G) or advising (although giving advice may be the *regulated activity of advising on regulated mortgage contracts*). Such arrangements might include, for instance, negotiating the terms of the *regulated mortgage contract* with the eventual lender, on behalf of the borrower. It also includes the

activities of certain so-called 'packagers' (see ■ PERG 4.15 (Mortgage activities carried on by 'packagers').)

- (4) ■ PERG 4.6.2 G contains examples of variations that are, in the FCA's view, within the definition of *advising on regulated mortgage contracts* and would also be covered by article 25A(1) arrangements.

4.5.3

G

The second activity (article 25A(2)) is referred to in this *guidance* as making *arrangements with a view to regulated mortgage contracts*. This activity is different from article 25A(1) and (2A)) because it requires a potential borrower to actively participate by utilising the arrangements to enter into a *regulated mortgage contract*. It does not require that the arrangements would bring about a *regulated mortgage contract*. Nor does it cover arrangements leading to contract variations. It includes the activities of introducers (see ■ PERG 4.5.10 G below) introducing potential borrowers to brokers and lenders. It may also, in certain circumstances, extend to the activities of a publisher, broadcaster, or website operator, albeit subject to exclusions in the *Regulated Activities Order* (see ■ PERG 4.5.5 G and ■ PERG 4.5.6 G).

Exclusion: article 25A(1) arrangements not causing a deal

4.5.4

G

Article 26 of the *Regulated Activities Order* (Arrangements not causing a deal) excludes from article 25A(1) *arrangements* which do not bring about or would not bring about the *regulated mortgage contract* in question. In the FCA's view, a *person* brings about or would bring about a *regulated mortgage contract* if his involvement in the chain of events leading to the *transaction* is of enough importance that without that involvement it would not take place.

4.5.4A

G

- (1) Article 26 does not apply to the activity described in ■ PERG 4.5.1G (1)(b).
- (2) As the activity in ■ PERG 4.5.1G (1)(b) covers a *person* that concludes a *regulated mortgage contract* with a borrower on behalf of a lender, in many cases the activity will only apply if the arrangements bring about, or would bring about, a *regulated mortgage contract*. Therefore, in many cases the fact that article 26 does not apply will make no difference.
- (3) However, if a *person* enters into a *regulated mortgage contract* on behalf of a lender, that *person* carries out the *regulated activity* described in ■ PERG 4.5.1G (1)(b). That activity is not excluded just because most of the work is done by another.

Exclusion: article 25(A)2 arrangements enabling parties to communicate

4.5.5

G

Article 27 of the *Regulated Activities Order* (Enabling parties to communicate) contains an exclusion that applies to arrangements which might otherwise fall within article 25A(2) merely because they provide the means by which one party to a *regulated mortgage contract* (or potential *regulated mortgage contract*) is able to communicate with other parties. Simply providing the means by which parties to a *regulated mortgage contract* (or potential *regulated mortgage contract*) are able to communicate

with each other is excluded from article 25(A)2 only. This will ensure that *persons* such as Internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to be *arrangements made with a view to regulated mortgage contracts*).

- 4.5.6 G In the *FCA's* view, the crucial element of the exclusion in article 27 is the inclusion of the word "merely". When a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25A(2). Further detailed *guidance* relating to the scope of the exclusion in article 27 is contained in ■ PERG 8.32.6 G to ■ PERG 8.32.11 G.

Exclusion: article 25A(1) and (2) arranging of contracts to which the arranger is a party

- 4.5.7 G Arranging a *regulated mortgage contract* (or contract variation) to which the arranger is to be a party is excluded from both article 25A(1) and (2) by article 28A of the *Regulated Activities Order* (Arranging contracts to which the arranger is a party). As a result, a *person* cannot both be *entering into a regulated mortgage contract* and arranging a *regulated mortgage contract* under article 25A as regards a particular *regulated mortgage contract*. This means that a direct sale by a mortgage lender does not involve the *regulated activity* of arranging but, if the transaction is completed, does involve the *regulated activity* of *entering into a regulated mortgage contract*. The *FCA's* rules on *arranging regulated mortgage contracts*, however, do apply to direct sales.

- 4.5.7A G Article 28A does not apply to the activity described in ■ PERG 4.5.1G (1)(b). This is because the activity described in ■ PERG 4.5.1G (1)(b) is defined so that it cannot apply to an activity carried out by the lender. There is, therefore, no need to apply article 28A.

Exclusion: article 25A(1) and (2) arrangements with or through authorised persons

- 4.5.8 G An *unauthorised person* who makes arrangements for or with a view to a *regulated mortgage contract* between a borrower and an *authorised person*, is excluded from article 25A(1) and (2), 25A(2A) and by article 29 of the *Regulated Activities Order* (Arranging deals with or through authorised persons) if specified conditions as to advice and remuneration are satisfied. For example, the exclusion is dependent on the borrower not receiving any advice on the *regulated mortgage contract* from the *unauthorised person* making the arrangements. Additionally, payment must not be received unless it is accounted for to the borrower (which, in the *FCA's* view, means that it must be paid over to, or treated as belonging to and held to the order of, the borrower).
- 4.5.8A G Article 29 does not apply if applying the exclusion would take activities outside article 25A that should be regulated under the *MCD*. Please see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive) for more details.

Exclusion: article 25A(1)(b) arrangements made in the course of administration by authorised person

4.5.9 **G** Article 29A of the *Regulated Activities Order* excludes from article 25A(1)(b) (which covers making arrangements for another *person* to vary the terms of a *regulated mortgage contract*) certain activities of an *unauthorised person* who is taking advantage of the exclusion from *administering a regulated mortgage contract* in article 62 (Exclusion: arranging administration by authorised persons) see ■ PERG 4.8.4 G).

Exclusion: article 25A(2) arrangements and introducing

4.5.10 **G** Article 33A of the *Regulated Activities Order* (Introducing to authorised persons) excludes from article 25A(2) arrangements under which a borrower is introduced to certain *persons*. Introducing is only a *regulated activity* under article 25A(2) as it does not of itself bring about *regulated mortgage contracts* (see ■ PERG 4.5.2 G).

4.5.11 **G** The exclusion applies for introductions to:

- (1) an *authorised person* who has *permission* to carry on a *regulated activity* specified in article 25A (Arranging regulated mortgage contracts) or article 53A (Advising on regulated mortgage contracts) or article 61(1) (Entering into a regulated mortgage contract as lender); introducers can check the status of an *authorised person* and its *permission* by visiting the *Financial Services Register* at <http://www.fsa.gov.uk/register/>;
- (2) an *appointed representative* who is appointed to carry on a *regulated activity* specified in article 25A or article 53A of the *Regulated Activities Order*; introducers can check the status of an *appointed representative* by visiting the *FCA's register* at www.fca.org.uk/firms/financial-services-register; the *FCA* would normally expect introducers to request and receive confirmation of the *regulated activities* that the *appointed representative* is appointed to carry on, prior to proceeding with an introduction; and
- (3) an *overseas person* who carries on a *regulated activity* specified in article 25A (Arranging regulated mortgage contracts) or article 53A (Advising on regulated mortgage contracts) or article 61(1) (Entering into a regulated mortgage contract).

4.5.12 **G** The exclusion in article 33A only applies when the introducer satisfies two conditions:

- (1) he does not receive any money paid by the borrower in connection with any transaction that the borrower enters into with or through the *person* to whom the borrower is introduced as a result of the introduction, other than money payable to him on his own account; and
- (2) before making the introduction he discloses to the borrower all relevant information described in ■ PERG 4.5.14 G.

- 4.5.13 **G** In the *FCA's* view, money payable to an introducer on his own account includes money legitimately due to him for services rendered to the borrower, whether in connection with the introduction or otherwise. It also includes sums payable to an introducer (for example, a housebuilder) by a buyer in connection with a transfer of property. For example, article 33A allows a housebuilder to receive the purchase price on a property that he sells to a borrower, whom he previously introduced to an *authorised person* or *appointed representative* to help him finance the purchase and still take the benefit of the exclusion. This is because the sums that the housebuilder receives in connection with the introduction and with the sale of his property to the borrower are both "payable to him on his own account". The housebuilder may also receive a commission from the *person* introduced to. He may not, however, receive any sums payable by the borrower to the *person* to whom the borrower is introduced, for example valuation fees, as those sums are not payable to the housebuilder on his own account.
- 4.5.14 **G** The information that the introducer must disclose to the borrower prior to making the introduction is, where relevant:
- (1) that he is a member of the same *group* as the *person* (N) to whom the borrower is introduced;
 - (2) details of any payment which he will receive from N, by way of fee or commission, for introducing the borrower to N; and
 - (3) an indication of any other reward or advantage arising out of his introducing to N.
- 4.5.15 **G** In the *FCA's* view, details of fees or commission referred to in **■ PERG 4.5.14G (2)** does not require an introducer to provide an actual sum to the borrower, where it is not possible to calculate the full amount due prior to the introduction. This may arise in cases where the fee or commission is a percentage of the eventual loan taken out and the amount of the required loan is not known at the time of the introduction. In these cases, it would be sufficient for the introducer to disclose the method of calculation of the fee or commission, for example the percentage of the eventual loan to be made by N.
- 4.5.16 **G** In the *FCA's* view, the information condition in **■ PERG 4.5.14G (3)** requires the introducer to indicate to the borrower any other advantages accruing to him as a result of ongoing arrangements with N relating to the introduction of borrowers. This may include, for example, indirect benefits such as office space, travel expenses, subscription fees and this and other relevant information may be provided on a standard form basis to the borrower, as appropriate.
- 4.5.17 **G** The *FCA* would normally expect an introducer to keep a written record of disclosures made to the borrower under article 33A of the *Regulated Activities Order* including those cases where disclosure is made on an oral basis only.

4.5.18

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In addition to the exclusion in article 33A, introducers may be able to take advantage of the exclusion in article 33 of the *Regulated Activities Order* (Introducing). This excludes arrangements where:

- (1) they are arrangements under which *persons* will be introduced to another *person*;
- (2) the *person* to whom the introduction is to be made is:
 - (a) an *authorised person*; or
 - (b) an *exempt person* acting in the course of business comprising a *regulated activity* in relation to which he is exempt; or
 - (c) a *person* who is not unlawfully carrying on *regulated activities* in the *United Kingdom* and whose ordinary business involves him in engaging in certain activities; and
- (3) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to *investments* generally or in relation to any class of *investments* (including mortgages) to which the arrangements relate.

Other exclusions

4.5.19

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The *Regulated Activities Order* contains a number of other exclusions which have the effect of preventing certain activities from amounting to *regulated activities* within article 25. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity). There is also an exclusion where both the arranger and borrower are overseas, which is referred to in ■ PERG 4.11 (Link between activities and the United Kingdom).

4.6 Advising on regulated mortgage contracts

Definition of 'advising on regulated mortgage contracts'

4.6.1

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Article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts) makes *advising on regulated mortgage contracts* a *regulated activity*. This covers advice which is both:

- (1) given to a *person* in his capacity as borrower or potential borrower; and
- (2) advice on the merits of the borrower:
 - (a) entering into a particular *regulated mortgage contract* (whether or not the entering into is done by way of business); or
 - (b) varying the terms of a *regulated mortgage contract* entered into by the borrower on or after 31 October 2004, or a *legacy CCA mortgage contract* entered into by the borrower, in such a way as to vary the borrower's obligations under the contract.

4.6.2

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In the *FCA's* view, the circumstances in which a *person* is giving advice on the borrower varying the terms of a *regulated mortgage contract* so as to vary his obligations under the contract include (but are not limited to) where the advice is about:

- (1) the borrower obtaining a further advance secured on the same land as the original loan; or
- (2) a rate switch or a product switch (that is, where the borrower does not change lender but changes the terms for repayment from, say, a variable rate of interest to a fixed rate of interest or from one fixed rate to another); or
- (3) the borrower transferring from a repayment mortgage to an interest-only mortgage or the reverse situation.

Although advice on varying the terms of a *regulated mortgage contract* is not a *regulated activity* if the contract was entered into before 31 October 2004, unless the contract is a *legacy CCA mortgage contract*, there may be instances where the variation to the old contract is so fundamental that it amounts to *entering into a new regulated mortgage contract* (see ■ PERG 4.4.4 G). In that case, giving the advice would be a *regulated activity*.

4.6.3 **G** For advice to fall within article 53A as set out in **■ PERG 4.6.1 G** it must:

- (1) relate to a particular mortgage contract (that is, one that the borrower may enter into or, in the case of advice on a variation, one that he has already entered into);
- (2) be given to a *person* in his capacity as a borrower or potential borrower;
- (3) be advice (that is, not just information); and
- (4) relate to the merits of the borrower entering into, or varying the terms of, the contract.

4.6.4 **G** Each of these aspects is considered in greater detail in **■ PERG 4.6.5 G** (Advice must relate to a particular regulated mortgage contract) to **■ PERG 4.6.17 G** (Advice must relate to the merits (of entering into as borrower or varying)). Additionally, the following should be borne in mind:

- (1) a *person* may be carrying on *regulated activities* involving arranging, whether or not that *person* is *advising on regulated mortgage contracts* (see **■ PERG 4.5**);
- (2) the provision of advice or information may involve the communication of a *financial promotion* (see **■ PERG 8** (Financial promotion and related activities)); and
- (3) **■ PERG 8.25** (Advice must relate to an investment which is a security or contractually based investment) to **■ PERG 8.31** (Exclusions for advising on investments) will be relevant to any person who may be advising on other forms of investment at the same time as they advise on *regulated mortgage contracts*; this includes, for example, a *person* advising on the merits of using a particular endowment policy or *ISA* as the means for repaying the capital under an *interest-only mortgage*.

Advice must relate to a particular regulated mortgage contract

4.6.5 **G** Advice will come within the *regulated activity* in article 53A of the *Regulated Activities Order* only if it relates to a particular *regulated mortgage contract* (or several different *regulated mortgage contracts*). Generic or general advice is not covered: examples of generic advice are shown in **■ PERG 4.6.7G** (but see **■ PERG 4.6.7AG** as well). Generic or general advice may, however, be a financial promotion (see **■ PERG 8.4** (Invitation or inducement)).

4.6.5A **G** **■ PERG 4.6.21G** to **■ 4.6.25BG** includes material about guiding a *person* through a decision tree.

4.6.6 **G** Advice relates to a particular contract if it recommends that a *person* should take out a mortgage with ABC Building Society without (expressly or by implication) specifying any particular ABC Building Society mortgage because it is advice on the merits of specific identifiable mortgages and compared to all others. The advice is essentially saying that there is a feature of each individual ABC Building Society mortgage that makes it better than a

mortgage from any other lender. Advice may be regulated even though it relates to more than one possible mortgage. Advice also relates to a particular contract if it recommends that a *person* should not take out a mortgage with ABC Building Society.

4.6.7

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Typical recommendations and whether they will be regulated as advice under article 53A of the *Regulated Activities Order*

This table belongs to ■ PERG 4.6.5 G and ■ PERG 4.6.6 G.

Recommendation	Regulated or not?
I recommend you take out the ABC Building Society 2 year fixed rate mortgage at 5%.	Yes. This is advice on a particular mortgage which the borrower could enter into.
I recommend you do not take out the ABC Building Society 2 year fixed rate mortgage at 5%.	Yes. This is advice on a particular mortgage which the borrower could have entered into.
I recommend that you take out either the ABC Building Society 2 year fixed rate mortgage at 5% or the XYZ Bank standard variable rate mortgage.	Yes. This is advice on more than one particular mortgage which the borrower could enter into.
I recommend you take out (or do not take out) an ABC Building Society fixed rate mortgage.	Yes. See PERG 4.6.6 G.
I suggest you take out (or do not take out) a mortgage with ABC Building Society.	Yes. See PERG 4.6.6 G.
I suggest you change (or do not change) your current mortgage from a variable rate to a fixed rate.	Yes. This is advice in respect of the advice about varying the terms of the particular mortgage that the borrower had already entered into.
I suggest you take out (or do not take out) a variable rate mortgage.	No. This is not advice on a particular mortgage which the borrower could enter into.
I recommend you take out (or do not take out) a mortgage.	No. This is not advice on a particular mortgage which the borrower could enter into.
I would always recommend buying a house and taking out a mortgage as opposed to renting a property.	No. This is an example of generic advice which is not advice on a particular mortgage that the borrower could enter into.
I recommend you do not borrow more than you can comfortably afford.	No. This is an example of generic advice.
If you are looking for flexibility with your mortgage I would recommend you explore the possibilities of either a flexible mortgage or an offset mortgage. There are a growing number of lenders offering both.	No. This is an example of generic advice.

4.6.7A

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(1) Although giving generic advice is generally not a *regulated activity*, if it is given in the course of or in preparation for a *regulated activity* it can form part of that *regulated activity*.

(2) For example, if a *firm* gives generic advice (for instance about the merits of a fixed rate mortgage rather than a variable rate mortgage) and then goes on to identify a particular fixed rate mortgage, the generic advice will form part of the *regulated activity of advising on regulated mortgage contracts*.

(3) Another example is a *firm* that provides generic advice to a *customer* or a potential customer prior to or in the course of carrying on the *regulated activity of arranging (bringing about) regulated mortgage contracts* for the *customer*. That generic advice is part of that *regulated activity of arranging (bringing about) deals in investments*.

4.6.8 **G** [deleted]

4.6.9 **G** [deleted]

Advice given to a person in their capacity as a borrower or potential borrower

4.6.10 **G** For the purposes of article 53A, advice must be given to or directed at someone who is acting as borrower or potential borrower. As indicated in ■ PERG 4.4.2 G (Which borrowers?), this means the individual or trustee to whom the credit has been provided by the lender or who is looking to obtain the credit on the security of his property. Advice given to a *body corporate* will not generally be caught because the advice will not concern a *regulated mortgage contract*, as defined. But this does not apply where the *body corporate* is acting as trustee.

4.6.11 **G** Article 53A will not, for example, apply where advice is given to *persons* who receive it as:

- (1) a lender under or administrator of a *regulated mortgage contract*; or
- (2) an adviser who may use it to inform advice given by him to others; or
- (3) a journalist or broadcaster; or
- (4) an agent of a borrower unless appointed as the borrower's attorney and therefore entering into the *regulated mortgage contract* as agent (or proxy) for the borrower.

4.6.12 **G** Advice will still be covered by article 53A even though it may not be given to or directed at a particular borrower (for example advice given in a periodical publication or on a website).

Advice or information

4.6.13 **G** In the *FCA's* view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information on the other hand, involves objective statements of facts and figures.

4.6.14

G

- (1) In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which a borrower may make is not advice.
- (2) The provision of purely factual information does not become regulated advice merely because it feeds into the *customer's* own decision-making process and is taken into account by them.
- (3) Regulated advice includes any communication with the *customer* which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into a particular *regulated mortgage contract* or to vary an existing *regulated mortgage contract*.
- (4) A key to the giving of advice is that the information:
 - (a) is either accompanied by comment or value judgement on the relevance of that information to the *customer's* decision; or
 - (b) is itself the product of a process of selection involving a value judgement so that the information will tend to influence the decision.
- (3) Advice can still be regulated advice if the *person* receiving the advice:
 - (a) is free to follow or disregard the advice; or
 - (b) may receive further advice from another *person* before making a final decision.

4.6.15

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Information relating to entering into *regulated mortgage contracts* may often involve one or more of the following:

- (1) an explanation of the terms and conditions of a *regulated mortgage contract*, whether given orally or in writing or by providing leaflets and brochures;
- (2) a comparison of the features and benefits of one *regulated mortgage contract* with another;
- (3) [deleted]
- (4) tables that compare the interest rates and other features of different mortgages;
- (5) leaflets or illustrations that help borrowers to decide which type of mortgage to take out;
- (6) the provision, in response to a request from a borrower who has identified the main features of the type of mortgage he seeks, of several leaflets together with an indication that all the *regulated mortgage contracts* described in them have those features.

4.6.16

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In the *FCA's* opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

- (1) a *person* may provide information on a selected, rather than balanced, basis that would tend to influence the decision of the borrower; and
- (2) a *person*, as a result of going through the sales process, may discuss the merits of one *regulated mortgage contract* over another, resulting in advice to enter into or not enter into a particular one.

4.6.16A **G** A key question is whether an impartial observer, having due regard to the *FCA rules* and guidance, context, timing and what passed between the parties, would conclude that what the adviser says could reasonably have been understood by the *customer* as being advice.

4.6.16B **G** An explicit recommendation to enter into a particular *regulated mortgage contract* is likely to be advice. However, something falling short of an explicit recommendation can be advice too. Any significant element of evaluation, value judgement or persuasion is likely to mean that advice is being given.

4.6.16C **G**

- (1) A *person* can give advice without saying (or implying) categorically that the *customer* should enter into a particular *regulated mortgage contract*. The adviser does not have to offer a definitive recommendation as to whether the *customer* should enter into that particular *regulated mortgage contract*.
- (2) For example, saying the following can still be advice:
 - (a) “this regulated mortgage contract is a very good deal but it is your decision whether or not to enter into it”; or
 - (b) “this regulated mortgage contract is a very good deal but I am going to leave it to you to decide because I don’t know how important it is to you to have certainty about your monthly mortgage payments”.
- (3) The examples in (2):
 - (a) involve advice and not just information; and
 - (b) involve advice on the merits of entering into a particular *regulated mortgage contract* (see ■ PERG 4.6.17G to ■ 4.6.20G (Advice must relate to the merits (of entering into as borrower or varying)).

4.6.16D **G** One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If a *customer* asks for a recommendation, any response is likely to be regarded as advice.

4.6.16E **G** On the other hand, if a *customer* makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that they do not give advice, or whether the adviser runs an advisory business.

Advice must relate to the merits (of entering into as borrower or varying)

- 4.6.17 **G** Advice under article 53A must relate to the pros or cons of *entering into a regulated mortgage contract* as borrower.
- 4.6.18 **G** An explanation of the implications under a *regulated mortgage contract* of, for example, exercising certain rights or failing to make interest payments on time, need not, itself, involve advice on the merits of entering into that contract or varying its terms.
- 4.6.19 **G** Neither does advice on the merits of using a particular mortgage broker or adviser in his capacity as such amount to advice for the purposes of article 53A. It is not advice on the merits of entering into or varying the terms of a *regulated mortgage contract*.
- 4.6.20 **G** Without an explicit or implicit recommendation on the merits of entering into as borrower or varying the terms of a *regulated mortgage contract*, advice will not fall under article 53A if it is advice on:
 - (1) the likely meaning of uncertain provisions in a *regulated mortgage contract*; or
 - (2) how to complete an application form; or
 - (3) the effect of contractual terms and their consequences; or
 - (4) terms which are common in the market.

Pre-sale questioning (including decision trees)

- 4.6.21 **G** Pre-sale questioning involves putting a sequence of questions in order to extract information from a person to help them best select a mortgage that meets their needs. A decision tree is an example of pre-sale questioning. The process of going through the questions will usually narrow down the range of options that are available.
- 4.6.22 **G**
 - (1) There are two aspects of the definition of *advising on regulated mortgage contracts* that are particularly relevant to whether pre-sale questioning involves *advising on regulated mortgage contracts*:
 - (a) the fact that advice must relate to a particular *regulated mortgage contract* (see ■ PERG 4.6.5G); and
 - (b) the distinction between information and advice (see ■ PERG 4.6.13G).
 - (2) Whether or not pre-sale questioning in any particular case is *advising on regulated mortgage contracts* will depend on all the circumstances.
 - (3) The pre-sale questioning process may involve identifying one or more particular *regulated mortgage contracts*. If so, to avoid *advising on regulated mortgage contracts*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the

borrower as, assisting the borrower to make their own choice of product which has particular features which the borrower regards as important. The questioner will need to avoid making any judgement on the suitability of one or more products for the borrower. See also ■ PERG 4.6.4G for other matters that may be relevant.

4.6.22A **G** There is considerable potential for variation in the form, content and manner of pre-sale questioning, but there are two broad types, as described in ■ PERG 4.6.23G and ■ 4.6.24G.

4.6.23 **G** The first type involves identifying *regulated mortgage contracts* based on factual matters. For example, the purpose may be to identify whether a borrower wishes to pay a fixed or variable rate of interest or the size of deposit available. There are various possible scenarios, including the following:

- (1) the questioner may go on to identify several particular *regulated mortgage contracts* which match features identified by the pre-sale questioning; provided these are presented in a balanced and neutral way (for example, they identify all the matching *regulated mortgage contracts*, without making a recommendation as to a particular one) this need not of itself involve *advising on regulated mortgage contracts*;
- (2) the questioner may go on to advise the borrower on the merits of one particular *regulated mortgage contract* over another; this would be *advising on regulated mortgage contracts*;
- (3) the questioner may, before or during the course of the pre-sale questioning, give information that considered on its own would not involve *advising on regulated mortgage contracts*, but may, following the pre-sale questioning, identify one or more particular *regulated mortgage contracts*. The factors described in ■ PERG 4.6.25G are relevant to deciding whether or not the questioner is *advising on regulated mortgage contracts*.

4.6.24 **G** The second type of pre-sale questioning involves providing questions and answers incorporating opinion, judgement or recommendations. There are various possible scenarios, including the following:

- (1) the pre-sale questioning may not lead to the identification of any particular *regulated mortgage contract*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on regulated mortgage contracts*; or
- (2) the pre-sale questioning may lead to the identification of one or more particular *regulated mortgage contracts*. In principle, this is likely to involve *advising on regulated mortgage contracts* as regulated advice includes any communication with the *customer* which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into the *regulated mortgage contract* (see ■ PERG 4.6.14G). However, the factors described in ■ PERG 4.6.25G are still relevant to deciding whether or not the questioner is *advising on regulated mortgage contracts*.

- 4.6.25 **G** When the scripted pre-sale questioning identifies particular *regulated mortgage contracts* (see ■ PERG 4.6.23G(3) and ■ PERG 4.6.24G(2)), the FCA considers that it is necessary to look at the process and outcome of the pre-sale questioning as a whole in deciding whether the process involves *advising on regulated mortgage contracts*. Factors that may be relevant include:
- (1) any representations made by the questioner at the start of the questioning relating to the service they are to provide;
 - (2) the context in which the questioning takes place;
 - (3) the stage in the questioning at which the opinion is offered and its significance;
 - (4) the role played by any questioner who guides a *person* through the pre-sale questions;
 - (5) the outcome of the questioning (whether particular *regulated mortgage contracts* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
 - (6) whether the pre-sale questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the borrower understand what the questions or options are and how to determine which option applies to their particular circumstances.
- 4.6.25A **G** A *firm* selling *regulated mortgage contracts* through its website might make its list of the *regulated mortgage contracts* it sells easier to search by allowing the *customer* to filter mortgages based on factors presented by the website and selected by the *customer*. Only products that meet the search criteria input by the *customer* are displayed.
- 4.6.25B **G**
- (1) The filtering described in ■ PERG 4.6.25AG might be based upon simple objective factors like price or eligibility criteria. This should not generally involve *advising on regulated mortgage contracts*, as explained in ■ PERG 4.6.23G(1).
 - (2) The filtering described in ■ PERG 4.6.25AG might, however, be based upon factors such as balancing *customer* preferences on price, interest rate and term. This is not a simple objective factor like price alone.
 - (3) Where all a *firm* is doing is listing product features of its own *regulated mortgage contracts*, for example by ranking objectively by the cost of any arrangement fee, that *firm* is unlikely to be *advising on regulated mortgage contracts* as long as it is clear to the *customer* that this objective ranking is all that the *firm* is doing. A description of a product's features is not advice.
 - (4) Where a *firm* is describing *regulated mortgage contracts* offered by a third party and the product features are drawn directly from information made available to the *firm* by that third party, the *firm* is also unlikely to be *advising on regulated mortgage contracts* as long as it is clear to the *customer* that all the *firm* is doing is describing *regulated mortgage contracts* offered by a third party. A description

of the product features is the factual representation of the *regulated mortgage contracts* and therefore likely to be information and not advice.

- (5) Similarly, an eligibility tool can draw on information supplied by third parties (such as eligibility criteria provided by lenders, or the results of a credit reference search) to provide an indication of whether a customer is likely to qualify for mortgage lending. Where it is clear to the *customer* that the tool is simply applying details provided by the *customer* to that information, to provide a view on whether a *customer's* application is likely to meet that criteria (and not giving a view on the merits of entering into that particular mortgage), the *firm* is unlikely to be advising on *regulated mortgage contracts*.
- (6) If the input from the *customer* is much more extensive, and the way that those inputs interact on the website is much more complicated, than the processes described in (3) and (4), the website is not simply displaying factual information about the design of the product. In that case the production of a list of results uses an element of opinion and skill (albeit automated) in translating the *customer's* input into a display of a particular product or products. Either explicitly or implicitly this is presented as meeting the *customer's* requirements and wishes as input into the system. The result is that the filtering process is closer to the one in (2) than the one in (3) and so it is more likely that the *firm* is *advising on regulated mortgage contracts*.

Medium used to give advice

4.6.26 G With the exception of periodicals, broadcasts and other news or information services (see ■ PERG 4.6.30 G (Exclusion: periodical publications, broadcasts and websites)) the medium used to give advice should make no material difference to whether or not the advice is caught by article 53A.

4.6.27 G Advice can be provided in many ways including:

- (1) face to face;
- (2) orally to a group;
- (3) by telephone;
- (4) by correspondence (including e-mail);
- (5) in a publication, broadcast or website; and
- (6) through the provision of an interactive software system.

4.6.28 G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The *firm* will be giving advice for the purpose of *advising on regulated mortgage contracts* only if the service goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into the *regulated mortgage contract* (see ■ PERG 4.6.21G to ■ PERG 4.6.25BG (Pre-sale questioning (including decision trees))).

4.6.28A **G** Some software services involve the generation of specific prompts promoting remortgaging. These prompts are liable, as a general rule, to be advice for the purposes of article 53A (as well as financial promotions) given by the *person* responsible for the provision of the software. The exception to this is where the user of the software is required to use enough control over the setting of parameters and inputting of information for the prompts to be regarded as having been generated by the *customer* rather than by the software itself.

4.6.29 **G** Advice in publications, broadcasts and websites is subject to a special regime – see **■ PERG 4.6.30 G** (Exclusion: periodical publications, broadcasts and websites) and **■ PERG 7** (Periodical publications, news services and broadcasts: applications for certification).

Exclusion: periodical publications, broadcasts and websites

4.6.30 **G** The main exclusion from *advising on regulated mortgage contracts* relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies to *advising on regulated mortgage contracts* if the principal purpose of any of these publications, news and information services or broadcasts is neither to give advice of the kind to which article 53A applies nor to lead or enable persons to: enter as borrower into *regulated mortgage contracts* or vary the terms of *regulated mortgage contracts* entered into by such *persons* as the borrower. This is explained in greater detail, together with the provisions on the granting of certificates, in **■ PERG 7** (Periodical publications, news services and broadcasts: applications for certification).

Exclusion: advice in the course of administration by authorised person

4.6.31 **G** Article 54A of the *Regulated Activities Order* excludes from *advising on regulated mortgage contracts* certain activities of an *unauthorised person* which is taking advantage of the exclusion from *administering a regulated mortgage contract* in article 62 (see **■ PERG 4.8.4 G**).

Other exclusions

4.6.32 **G** The *Regulated Activities Order* contains a number of other exclusions which have the effect of preventing certain activities from amounting to *advising on regulated mortgage contracts*. These are referred to in **■ PERG 4.10** (Exclusions applying to more than one regulated activity) and **■ PERG 4.10B** (Regulation of buy to let lending)

Further examples of what is and is not regulated advice

4.6.33 **G** The table in **■ PERG 4.6.34 G** sets out some further examples of typical situations and whether they involve regulated advice under article 53A of the *Regulated Activities Order*.

4.6.34 **G** Further examples of what is and is not regulated advice

This table belongs to ■ PERG 4.6.33 G.

Example of what the firm says and does	Regulated or not?
(1) The <i>firm</i> says "We have a wide range of mortgages, including fixed and variable rates. Here are some leaflets which set out the main features."	No. Leaflets that just explain the terms and conditions of a lender's products are not advice (see PERG 4.6.15G (1)). Even if the leaflet contains promotional material, merely handing over the leaflet does not mean that the <i>firm</i> is giving advice.
(2) The <i>firm</i> says "We have a wide range of mortgages, our best rates are two-year fixed rates, you might want to look at those."	Yes. The <i>firm</i> has identified specific products that it offers and is drawing the <i>customer's</i> attention to those products. Identifying which products have the lowest rates is not advice on its own, only facts. However, "best" involves a value judgement, particularly when a comparison is made with other products that have different periods for which interest is fixed or that have variable interest rates.
(3) The <i>firm</i> says "In order to provide you with an illustration, I need to know how much you want to borrow, the term and the property value. Which product or products would you like an illustration for?"	No. The <i>firm</i> is collecting factual information to provide the customer with an illustration of costs.
(4) The <i>firm</i> says "Based on what you've told me I think you would be best to look at two-year fixed rates. Here is some information about our products."	Yes. The <i>firm</i> has made a judgment on what type of product is best for the customer and has identified specific products of that type that it offers.
(5) The <i>firm</i> says "Our fixed rates start at 4.99% for two years with a £900 fee. Our variable rates start at 4.50% with a £800 fee. Depending on how much you want to borrow and your circumstances, this may affect the rate available to you."	No. The <i>firm</i> is comparing two products without recommending either, nor is the <i>firm</i> recommending one over the other.
(6) A lender with just one mortgage product advises a customer to take out that mortgage. The lender makes it clear that it does not give advice about products other than its own.	Yes. The lender may argue that this is not regulated advice because it is not recommending one product over another as it only has one product itself and does not give advice about the products of other lenders. However, in the <i>FCA's</i> view this is still regulated advice. For advice to be regulated it must be advice on the merits of entering into a particular <i>regulated mortgage contract</i> (or varying one). It is possible to give advice about the merits of a product without comparing that product with another.

Note: Unless otherwise specified, the *firm* might be the lender or an advisory or intermediary *firm*.



4.7 Entering into a regulated mortgage contract

Definition of 'entering into a regulated mortgage contract'

4.7.1 **G** Article 61(1) of the *Regulated Activities Order* makes *entering into a regulated mortgage contract as lender* a regulated activity.

Exclusions

4.7.2 **G** The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and personal representatives from amounting to *entering into a regulated mortgage contract*. There is also an exclusion for *local authorities* and their wholly-owned subsidiaries. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity). In addition, there are exclusions where both the lender and borrower are overseas, which is referred to in ■ PERG 4.11 (Link between activities and the United Kingdom) and related to consumer buy-to-let lending, which is described in ■ PERG 4.10B.

Transfer of lending obligations

4.7.3 **G** A *person* who provides credit to a borrower under a *regulated mortgage contract* will enter into a *regulated mortgage contract*, even if the lending obligations under that contract are subsequently transferred to a third party. Consequently, a *person* who acts as a so-called 'correspondent lender' in the mortgage market will need to seek *authorisation*.

4.8 Administering a regulated mortgage contract

Definition of 'administering a regulated mortgage contract'

4.8.1 **G** Article 61(2) of the *Regulated Activities Order* makes *administering a regulated mortgage contract* a *regulated activity* 'where the contract was entered into by way of business' on or after 31 October 2004 or the contract was entered into 'by way of business' before that date and is a *legacy CCA mortgage contract*.

4.8.2 **G** The definition does not include administration of a *regulated mortgage contract* which was not entered into by way of business. See ■ PERG 4.3.3 G for a discussion of the 'by way of business' test. The definition also does not include administration of a mortgage which was entered into before 31 October 2004 unless the contract is a *legacy CCA mortgage contract*. See, however, ■ PERG 4.4.4 G for a discussion of how a variation of a mortgage contract entered into before 31 October 2004 could amount to the entry into a new *regulated mortgage contract* on or after 31 October 2004.

4.8.3 **G** Under article 61(3)(b) of the *Regulated Activities Order*, *administering a regulated mortgage contract* is defined as either or both of:

- (1) notifying the borrower of changes in interest rates or payments due under the contract, or of other matters of which the contract requires him to be notified; and
- (2) taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower;

but does not include merely having or exercising a right to take action to enforce the *regulated mortgage contract*, or to require that action is or is not taken.

Exclusion: arranging administration by authorised persons

4.8.4 **G** Article 62 of the *Regulated Activities Order* provides that a *person* who is not an *authorised person* does not *administer a regulated mortgage contract* if he:

- (1) arranges for a *firm* with *permission* to administer a *regulated mortgage contract* (a '*mortgage administrator*') to administer the contract; or

- (2) administers the *regulated mortgage contract* itself, provided that the period of administration is no more than one month after the arrangement in (1) has come to an end.

4.8.5 G This exclusion may be of a particular interest to a special purpose vehicle which administers *regulated mortgage contracts* transferred to it as part of a *securitisation* transaction.

4.8.6 G If an *unauthorised* administrator makes *arrangements* for a *mortgage administrator* to administer its *regulated mortgage contracts*, the exclusion may cease to be available because the *mortgage administrator* ceases to have the required *permission*, or because the arrangement is terminated. The exclusion gives the *unauthorised* administrator a one-month grace period during which it may administer the contracts itself. If the period of administration exceeds one month, the *unauthorised* administrator will be in breach of the *general prohibition*, and the *FCA* may take proceedings in respect of the breach. However:

- (1) under section 23(3) of the *Act*, it is a defence in such proceedings for a *person* to show that 'he took all reasonable precautions and exercised all due diligence to avoid committing the offence';
- (2) the *FCA* would consider whether a *person* had taken 'all reasonable precautions and exercised all due diligence' on a case-by-case basis; what is reasonable is a matter for the senior management of the *unauthorised* administrator to decide in each case, taking account of, for example, the financial standing of the *mortgage administrator* and its ability to perform its obligations under the administration contract;
- (3) factors that the *FCA* would take into account in assessing whether an *unauthorised* administrator has taken 'all reasonable precautions and exercised all due diligence' would include:
 - (a) the level of the *person's* preparedness for a *mortgage administrator* to cease providing administration services; and
 - (b) the reasons for, and the circumstances of, the termination of *arrangements* with a *mortgage administrator*;
- (4) whether any agreement made by an *unauthorised* administrator would be enforceable under section 26 of the *Act* (Agreements made by *unauthorised* persons) depends on whether the court is satisfied that this would be just and equitable; in this context, the court may have regard to the extent to which the administrator has complied with the *FCA's guidance*.

Exclusion: administration pursuant to agreement with authorised person

4.8.7 G Under article 63 of the *Regulated Activities Order*, a *person* who is not an *authorised person* does not *administer a regulated mortgage contract* if he administers the contract under an agreement with a *firm* with *permission* to *administer a regulated mortgage contract*. A *firm* with *permission* to *administer a regulated mortgage contract* may thus outsource or delegate the administration function to an *unauthorised* third party. A *firm* that

proposes to do this should however note, as set out in ■ SYSC 8.1.6 R and ■ 8.1.8 R, that the *FCA* will continue to hold it responsible for the way in which the administration is carried on.

Other exclusions

4.8.8

G

The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and personal representatives from amounting to *administering regulated mortgage contracts*. There is also an exclusion for *local authorities* and their wholly-owned subsidiaries. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity). In addition, there are exclusions where both the administrator and borrower are overseas, which is referred to in ■ PERG 4.11 (Link between activities and the United Kingdom) and related to consumer buy-to-let lending, which is described in ■ PERG 4.10B.



4.9 Agreeing to carry on a regulated activity

- 4.9.1** G Under article 64 of the *Regulated Activities Order* (Agreeing to carry on specific kinds of activity), in addition to the *regulated activities* of *arranging (bringing about), making arrangements with a view to, advising on, entering into and administering regulated mortgage contracts*, agreeing to do any of these things is itself a *regulated activity*. In the FCA's opinion, this activity concerns the entering into of a legally binding agreement to provide the services that it concerns. So a *person* is not carrying on a *regulated activity* involving agreeing merely because he makes an offer to do so.

- 4.9.2** G To the extent that an exclusion applies in relation to a *regulated activity*, then 'agreeing' to carry on an activity within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order*.

4.10 Exclusions applying to more than one regulated activity

Exclusion: Activities carried on in the course of a profession or non-investment business

- 4.10.1** **G** The exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) applies to the *regulated activities* of *arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts*. ■ PERG 4.14 contains further *guidance* on mortgage activities carried on by *professional firms*.)
- 4.10.2** **G** *Arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts* are excluded if they are carried on by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is the case if it may reasonably be regarded as necessary for him to make the arrangements or give the advice in order to provide his professional or other services and he is not separately paid for making the arrangements or giving the advice.
- 4.10.3** **G** In the *FCA's* view, for arranging or advice to be a necessary part of other services it must, as a general rule, be the case that it is not possible for the other services to be provided unless the arranging or advising are also provided.
- 4.10.4** **G** Situations where this exclusion might apply, in the *FCA's* view, are set out below:
- (1) Advice by solicitors: the provision of legal services may involve a solicitor advising his client on the legal effects and consequences of entering into a particular *regulated mortgage contract*. To the extent that this may involve advice on the merits of entering into the contract it is likely to be a necessary part of the legal advice. But it would not be necessary for the solicitor to go on to recommend that his client would be better to enter into a different particular *regulated mortgage contract*.
 - (2) Advice by licensed conveyancers: as a necessary part of conveyancing work and under their duty of care to the client, a licensed conveyancer may state that the mortgage the client has applied for is right for them or not. If the client has already applied for a mortgage and the conveyancer just says that their choice is right or wrong but does not recommend alternatives, then that advice is likely to be

excluded. But if the conveyancer recommends an alternative then that advice is unlikely to be excluded.

- (3) Conveyancing as arranging: the provision of pure conveyancing services (whether performed by a solicitor or a licensed conveyancer) will, themselves, be arrangements within the scope of article 25A. So they will be excluded under article 67. But if the client does not yet have a mortgage, an introduction to or other arrangement involving a lender is unlikely to be a necessary part of conveyancing services.
- (4) Debt counselling services: The provision of debt counselling services may involve the counsellor advising his client on the merits of varying the terms of an existing *regulated mortgage contract* and, in certain cases, assisting a distressed borrower in corresponding with a lender. Such advice and arrangements are likely to be a necessary part of the debt counselling services. But it would not be a necessary part of those services for the counsellor to offer advice on the merits of his client entering into a new particular *regulated mortgage contract*.

4.10.4A G

- (1) The exclusion in article 67 of the Regulated Activities Order (Activities carried on in the course of a profession or non-investment business) does not apply if applying the exclusion would take activities within the scope of the *MCD* (or which would be within such scope if carried out in an *EEA State*, or in relation to a *customer* in an *EEA State* or an agreement secured on residential land in an *EEA State*) outside the definition of certain *regulated mortgage activities*.
- (2) Please see ■ PERG 4.10A (Activities within scope of the Mortgage Credit Directive) for more details.

Exclusion: Trustees, nominees and personal representatives.....

4.10.5 G

There are exclusions that apply, in certain circumstances, in relation to each of the *regulated mortgage activities* if the *person* carrying on the activity is acting in the capacity of trustee or personal representative. Article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) sets out the circumstances in which the exclusions apply. The terms of these differ slightly depending on the *regulated activity*.

4.10.6 G

For each of the *regulated activities of arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts*, the exclusions apply if the trustee or personal representative is acting in that capacity and:

- (1) the arrangements he makes concern the entering into or variation of *regulated mortgage contracts* and the contracts are to be entered into or varied either by himself and a fellow trustee or personal representative or by the beneficiary under the trust, will or estate on behalf of which he is acting; or
- (2) the advice is given to such trustees or personal representatives or beneficiaries.

4.10.7 G For each of the *regulated activities of entering into a regulated mortgage contract and administering a regulated mortgage contract*, the exclusions apply if the trustee or personal representative is acting in that capacity and the borrower is a beneficiary under the trust, will or estate on behalf of which he is acting.

4.10.8 G In every case, the trustee or personal representative must not receive any remuneration that is additional to any he receives for acting in his capacity as trustee or personal representative. But a *person* is not to be regarded as receiving additional remuneration merely because his remuneration as trustee or personal representative is calculated by reference to time spent.

4.10.8A G (1) The exclusion in article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) does not apply if applying the exclusion would take activities within the scope of the *MCD* (or which would be within such scope if carried out in an *EEA State*, or in relation to a *customer* in an *EEA State* or to an agreement secured on residential land in an *EEA State*) outside the definition of certain *regulated mortgage activities*.

(2) Please see ■ [PERG 4.10A](#) (Activities within scope of the Mortgage Credit Directive) for more details.

Exclusion: Managers of UCITS and AIFs

4.10.9 G Article 72AA of the *Regulated Activities Order* (Managers of UCITS and AIFs) contains an exclusion relating to *firms* with a *Part 4A permission to manage a UCITS or manage an AIF* (see ■ [PERG 2.9.22 G](#))

Exclusion: Local authorities

4.10.10 G There are exclusions that apply, in relation to each of the *regulated mortgage activities* and to *advising on regulated credit agreements for the acquisition of land*, if the *person* carrying on the activity is a *local authority* or a wholly owned subsidiary of a *local authority*. They can be found in article 72G of the *Regulated Activities Order*, but only apply where:

(a) the relevant agreement was entered into before 21 March 2016; or

(b) the relevant agreement is entered into on or after 21 March 2016 and:

(i) the agreement is one to which section 423A(3) of the *Act* applies (in other words, it is an agreement listed in ■ [PERG 4.10A.5G\(1\)](#) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or

(ii) it is a *bridging loan* described in ■ [PERG 4.13.6G](#); or

(iii) it is a restricted public loan described in ■ [PERG 4.13.7G](#).

Exclusion: Buy to let

4.10.11 G There is an exclusion for *CBTL business*. It is described in ■ [PERG 4.10B](#) (Regulation of buy to let lending).



4.10A Activities within scope of the Mortgage Credit Directive

General treatment for activities within scope of the Mortgage Credit Directive

4.10A.1 **G** Article 4(4B) of the *Regulated Activities Order* says that certain exclusions in the *Regulated Activities Order* do not apply in certain cases; briefly, those are cases which were covered by the *MCD* as it applied to the *United Kingdom* before *IP completion day*, and the effect of the legislation which refers to those cases has been preserved. This section explains the situations in which this applies. References in this section to agreements or activities covered by, regulated under or within the scope of the *MCD* should be read as including reference to agreements or activities which would be within such scope if secured on residential land in an *EEA State*, or carried out in an *EEA State* or in relation to a *customer* in an *EEA State*.

4.10A.2 **G** Article 4(4B) of the *Regulated Activities Order* says that where:

- (1) a *person* is:
 - (a) a mortgage creditor (see ■ PERG 4.10A.6 G); or
 - (b) a credit intermediary (see ■ PERG 4.10A.12 G); or
 - (c) a *person* providing advisory services (see ■ PERG 4.10A.20 G);under the *MCD*; and
- (2) that *person* is (ignoring the exclusions in (3)) carrying on one of the following *regulated activities*:
 - (a) article 25A (*arranging (bringing about) regulated mortgage contracts and making arrangements with a view to regulated mortgage contracts*);
 - (b) article 53A (*advising on regulated mortgage contracts*); or
 - (c) article 61(1) (entering into a regulated mortgage contract as lender); and
- (3) in acting as described in (1), that *person* is relying on one of the following exclusions to take it outside the *regulated activities* in (2):
 - (a) article 29 (*Arranging deals with or through authorised persons*);
 - (b) article 66 (*Trustees, nominees and personal representatives*); or
 - (c) article 67 (*Activities carried on in the course of a profession or non-investment business*);

then the result is that:

- (4) the exclusions in (3) are switched off; and
- (5) that *person* is treated as carrying on the *regulated activity* in (2) in question.

4.10A.2A G Some *credit agreements* fall outside of the mortgages perimeter but are nevertheless covered by *MCD*. Specifically, the scope of *MCD* includes *credit agreements* with *consumers* that are not secured on residential land where their purpose is to acquire or retain property rights in land or in an existing or projected building.

As a result of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2022, article 4(4B) of the *Regulated Activities Order* does not apply in respect of these *credit agreements* when entered into with high net worth *borrowers* on or after 21 July 2022. Such agreements can therefore now be exempt from the *consumer credit lending* activity if certain conditions (set out in article 60H of the *Regulated Activities Order*) are met (see ■ PERG 2.7.19J) (High net worth exception). It should be noted that this exemption does not apply to *regulated mortgage contracts* as there is no general ‘high net worth’ exemption to the mortgages perimeter.

The meaning of mortgage intermediary

4.10A.3 G The *Regulated Activities Order* refers to credit intermediaries (■ PERG 4.10A.2G (1)(b)) and providers of advisory services (■ PERG 4.10A.2G (1)(c)) as mortgage intermediaries.

What mortgages are covered by the Mortgage Credit Directive?: General

4.10A.4 G Article 4(4B) of the *Regulated Activities Order* only applies if the *regulated mortgage contract* is covered by the *MCD*. A *regulated mortgage contract* is covered if:

- (1) the lender is acting in the course of his trade, business or profession; and
- (2) the borrower is an individual; and
- (3) the borrower is acting for purposes which are outside their trade, business or profession; and
- (4) the *regulated mortgage contract* does not come within one of the exclusions summarised in ■ PERG 4.10A.5 G.

4.10A.5 G

- (1) This paragraph lists the *regulated mortgage contracts* outside the *MCD*.
- (2) *MCD exempt lifetime mortgages* are excluded from the *Mortgage Credit Directive*. These are *regulated mortgage contracts* or *article 3(1)(b) credit agreements* where the creditor:
 - (a) contributes a lump sum, periodic payments or other forms of credit disbursement;

- (b) contributes the sums in (a) in return for a sum deriving from the future sale of a residential property or a right relating to residential property; and
- (c) will not seek repayment of the capital until the occurrence of one or more *specified life events* of the consumer.

However, notwithstanding (c), the creditor may seek early repayment if the consumer breaches his contractual obligations and the breach allows the creditor to terminate the credit agreement.

Only *lifetime mortgages* that do not meet these conditions fall within the *Mortgage Credit Directive*. Normally, these will be mortgages where partial repayment of the capital is, or may become, due. These are known as *MCD lifetime mortgages*.

- (3) Agreements where:
 - (a) the credit is granted by an employer to his employees;
 - (b) the employer does so as a secondary activity; and
 - (c) such a credit agreement is offered:
 - (i) free of interest; or
 - (ii) at an *APRC* lower than those prevailing on the market and not offered to the public generally;

are excluded from the *MCD*.
- (4) Agreements where the credit is granted free of interest and without any other charges except those that recover costs directly related to the securing of the credit are excluded from the *MCD*.
- (5) An *MCD exempt overdraft loan* is excluded from the *MCD*.
- (6) Agreements which are the outcome of a settlement reached in court or before another statutory authority are excluded from the *MCD*.
- (7) An *MCD exempt bridging loan* is excluded from the *MCD*.
- (8) An *MCD exempt credit union loan* is excluded from the *MCD*.

What mortgages are covered by the Mortgage Credit Directive?: Borrower as consumer
What effect does article 4(4B) have on lenders?

4.10A.6 G To work out the effect of article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) on the *regulated activity* of entering into a regulated mortgage contract as lender, it is necessary to look at what a mortgage creditor means.

4.10A.7 G In relation to a *regulated mortgage contract*, mortgage creditor means a *person* who grants or promises to grant credit falling within the scope of the definition of a *regulated mortgage contract* in the course of its trade, business or profession.

4.10A.8 **G** Therefore, article 4(4B) means that the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to entering into a regulated mortgage contract as lender unless:

- (1) the *regulated mortgage contract* falls outside the *MCD* (see ■ PERG 4.10A.5 G); or
- (2) the lender is not acting in the course of his trade, business or profession.

The effect of article 4(4B) on arrangers: The basics

4.10A.9 **G** Article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) does not affect the *regulated activity of making arrangements with a view to regulated mortgage contracts*. This is because, in the *FCA's* view, the activities covered by this *regulated activity* are not covered by the *MCD*.

4.10A.10 **G** Article 4(4B) of the *Regulated Activities Order* disapplies the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) for the *regulated activity of arranging (bringing about) regulated mortgage contracts*, but only in relation to the credit intermediary activities described in ■ PERG 4.10A.12 G.

4.10A.11 **G** To work out the effect of article 4(4B) of the *Regulated Activities Order* on the *regulated activity of arranging (bringing about) regulated mortgage contracts*, it is necessary to look at what a credit intermediary (as referred to in ■ PERG 4.10A.2G (1)(b)) means.

The effect of article 4(4B) on arrangers: What does credit intermediary mean?: General

4.10A.12 **G** A credit intermediary means a *person* who:

- (1) is not acting as a creditor or notary; and
- (2) is not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary; and
- (3) carries out the following activities:
 - (a) presenting or offering *regulated mortgage contracts* to consumers;
 - (b) assisting consumers by undertaking preparatory work or other pre-contractual administration in respect of *regulated mortgage contracts*, other than as referred to in (a); or
 - (c) concluding *regulated mortgage contracts* with consumers on behalf of the creditor.
- (4) carries out those activities in the course of his trade, business or profession, for remuneration;

4.10A.13 **G** The remuneration in ■ PERG 4.10A.19 G may take a pecuniary form or any other agreed form of financial consideration.

- 4.10A.14** G
- (1) A *person* who merely introduces or refers a consumer to a creditor or credit intermediary does not act as a credit intermediary.
 - (2) An example of a *person* who merely introduces is someone who just indicates to a potential borrower:
 - (a) the existence of a creditor or credit intermediary; or
 - (b) a type of product provided by a particular creditor or credit intermediary;
 without further advertising or engaging in the presentation, offering, preparatory work or conclusion of the *regulated mortgage contract*.

The effect of article 4(4B) on arrangers: Conclusion about the effect on arranging (bringing about) regulated mortgage contracts

- 4.10A.15** G In the *FCA's* view, credit intermediation under the *MCD* covers the same activities as the *regulated activity of arranging (bringing about) regulated mortgage contracts*, except that:
- (1) credit intermediation only applies if the intermediary acts for remuneration; and
 - (2) the *MCD* does not cover the *regulated mortgage contracts* listed in ■ PERG 4.10A.5 G; and
 - (3) the *MCD* only applies to services provided to consumers;
 - (4) if the intermediary only acts for the creditor, the *MCD* intermediation activity is narrower, as described in ■ PERG 4.10A.17 G.

- 4.10A.16** G Except as described in ■ PERG 4.10A.15 G, the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to the *regulated activity of arranging (bringing about) regulated mortgage contracts*.

The effect of article 4(4B) on arrangers: Remuneration under the MCD

- 4.10A.17** G ■ PERG 5.4 (The business test for insurance distribution) has *guidance* on the meaning of remuneration in the *IDD*. That *guidance* is also applicable to the meaning of remuneration for the purpose of ■ PERG 4.10A.12 G.

- 4.10A.18** G Article 4(4B) is not relevant to an intermediary that carries on its activities by way of business (see ■ PERG 4.3.3 G to ■ PERG 4.3.9 G) but does not act for remuneration. The *FCA* does not expect this distinction to apply in practice.

The effect of article 4(4B) on arrangers: Acting for the creditor

- 4.10A.19** G
- (1) The *MCD* applies to credit intermediation activities performed for the creditor, as well as for the borrower.
 - (2) However, the activities carried out for the creditor are defined differently from the ones carried out for the borrower. They seem to

be narrower. The activities are limited to concluding *regulated mortgage contracts* with consumers on behalf of the creditor.

- (3) Just assisting the creditor by undertaking preparatory work or other pre-contractual administration is not enough on its own.
- (4) The activity covers actually entering into the *regulated mortgage contract* on behalf of the creditor.
- (5) The activity also covers activities that result in the lender entering into the *regulated mortgage contracts* if the role of the creditor and any *person* acting for the creditor is minimal.
- (6) When deciding whether the intermediary is acting for the creditor alone, the *FCA* will not just look at the contractual position. In particular, the *FCA* will also look at whether a separate intermediary is acting for the borrower.
- (7) The *guidance* in ■ PERG 4.5.4A G (*Guidance on making arrangements to enter into a regulated mortgage contract with a borrower on behalf of a lender*) applies here too.

The effect of article 4(4B) on advisers

- 4.10A.20 G To work out the effect of article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) on the *regulated activity of advising on regulated mortgage contracts*, it is necessary to look at what advisory services as referred to in ■ PERG 4.10A.2G (1)(c) means.
- 4.10A.21 G Advisory services mean the provision of personal recommendations to a consumer in respect of one or more transactions relating to *regulated mortgage contracts* covered by the *MCD*.
- 4.10A.22 G Where *advising on regulated mortgage contracts* falls within the *MCD*, the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to this activity. Advisers should note that:
 - (1) if the adviser does not act for remuneration, the *MCD* does not apply;
 - (2) the *MCD* does not cover the *regulated mortgage contracts* listed in ■ PERG 4.10A.5 G;
 - (3) the *MCD* only applies to advisory services provided to consumers;
 - (4) the *MCD* only applies to personal recommendations.
- 4.10A.23 G Giving personal recommendations is narrower than giving advice. The *guidance* on this point in relation to *MiFID* in Q18 to Q21 in ■ PERG 13.3 (*Investment Services and Activities*) is relevant here.
- 4.10A.24 G A *firm* that does not give personal recommendations is not affected by article 4(4B).

4.10A.25 **G** A *firm* can provide advisory services even though it does not act as a credit intermediary.

The effect of article 4(4B) on professional firms.....

4.10A.26 **G** Article 4(4B) does not apply to advising or arranging activities if:

- (1) they are carried out on an incidental basis in the course of professional activity;
- (2) that professional activity is regulated; and
- (3) the rules governing that professional activity do not prohibit the carrying out, on an incidental basis, of credit intermediation activities.

4.10A.27 **G** Work carried out by a *professional firm* which may reasonably be regarded as a necessary part of legal conveyancing services provided by that *professional firm* can still take advantage of the exclusion in article 67 (Activities carried on in the course of a profession or non-investment business).

4.10A.28 **G** Article 4(4B) does not cut back the *Part XX exemption*.

4.10B Regulation of buy to let lending

Introduction

- 4.10B.1 **G** Article 72I of the *Regulated Activities Order* (Registered consumer buy-to-let mortgage firms) excludes certain consumer buy-to-let credit business from the *Regulated Activities Order*. Instead that business is regulated under Part 3 of the *MCD Order*. This section provides more detail about the regulation of consumer-buy-to-let business.

Details about the Regulated Activities Order exclusion

- 4.10B.2 **G** Article 72I of the *Regulated Activities Order* excludes *CBTL business* from the regulated activities listed in ■ PERG 2.9.28G.
- 4.10B.3 **G** The exclusion only applies to a *person* included on the *FCA* register described in ■ PERG 4.10B.16.
- 4.10B.4 **G** There are three main conditions for regulated mortgage activities to be *CBTL* business:
- (1) the activities must relate to *buy-to-let credit agreements* (see ■ PERG 4.10B.5G);
 - (2) the borrower must be acting as a consumer (see ■ PERG 4.10B.10G(2)); and
 - (3) the activities must come within the definition of *CBTL business* (see ■ PERG 4.10B.8G).

What does buy-to-let credit agreement mean?

- 4.10B.5 **G** (1) A *buy-to-let credit agreement* means either:
- (a) a contract that at the time it is entered into has the following characteristics:
 - (i) a lender provides credit to an individual or trustees (the 'borrower');
 - (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the *United Kingdom*;
 - (iii) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling (or, where trustees are

- the borrower, by an individual who is a beneficiary of the trust or by a *related person*); and
 - (iv) provides that the land secured by the mortgage is subject to the requirements in (2); or
 - (b) is an *MCD article 3(1)(b) credit agreement* which provides that the land, or existing or projected building, to which it relates is subject to the requirements in (2).
- (2) The requirements are that the land, or existing or projected building (as applicable):
- (a) cannot at any time be occupied as a dwelling by the borrower or by a *related person*; and
 - (b) is to be occupied as a dwelling on the basis of a rental agreement.

4.10B.6 G *Related person* is described in ■ PERG 4.4.19.

4.10B.7 G ■ PERG 4.4.6AG explains why the requirement in ■ PERG 4.10B.5G that the borrower does not use the land as a dwelling does not take the contract out of the definition of *regulated mortgage contract* altogether without having to rely on the consumer buy-to-let exclusion described in this section.

Business covered by Part 3 of the Mortgage Credit Directive Order 2015: Introduction

4.10B.8 G *CBTL business* means the activities in the table in ■ PERG 4.10B.9G.

4.10B.9 G Table: Definition of consumer buy-to-let business

Activity	Explanation
Entering into, or promising to enter into, a <i>CBTL credit agreement</i> in the course of a trade, business or profession (acting as a <i>CBTL lender</i>)	See PERG 4.10B.11G(1)
Administering a <i>CBTL credit agreement</i> in the course of a trade, business or profession (acting as a <i>CBTL lender</i>)	See PERG 4.10B.11G(2)
Acting as a <i>CBTL arranger</i> in relation to a <i>CBTL credit agreement</i>	See PERG 4.10B.12G
Acting as a <i>CBTL adviser</i> in relation to a <i>CBTL credit agreement</i>	See PERG 4.10B.13
A <i>CBTL credit agreement</i> is explained in PERG 4.10B.10G	

Meaning of CBTL credit agreement

4.10B.10 G A *CBTL credit agreement* means a contract that meets the following conditions:

- (1) it meets the definition of a *buy-to-let credit agreement* in ■ PERG 4.10B.5G; and

- 4.10B.11 **G**
- (2) it is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.
 - (1) ■ PERG 4.4.32G explains when a borrower is regarded as entering into a *buy-to-let credit agreement* for the purpose of a business carried on, or intended to be carried on, by the borrower.
 - (2) A person administers a *CBTL credit agreement* if the person carries on *administering a regulated mortgage contract* in respect of the *CBTL credit agreement*, or would carry on that regulated activity in respect of the *CBTL credit agreement* if it was not a person included on the FCA register described in ■ PERG 4.10B.16.

Business covered by Part 3 of the Mortgage Credit Directive Order 2015: Credit intermediaries

- 4.10B.12 **G**
- A *person* is acting as a *CBTL arranger* if the person:
- (1) is not a lender as described in the first row of the table in ■ PERG 4.10B.9G;
 - (2) is not merely introducing, either directly or indirectly, a borrower to a lender or credit intermediary;
 - (3) is acting in the course of the *person's* trade, business or profession, for remuneration, which may take a pecuniary form or any other agreed form of financial consideration; and
 - (4) meets one or more of the following conditions:
 - (a) the *person* presents or offers *CBTL credit agreements* to consumers; or
 - (b) the *person* assists consumers by undertaking preparatory work or other pre-contractual administration in respect of *CBTL credit agreements* other than as referred to in (a); or
 - (c) the *person* concludes *CBTL credit agreements* with consumers on behalf of the lender.

Business covered by Part 3 of the Mortgage Credit Directive Order 2015: Advisers

- 4.10B.13 **G**
- Under article 6(1) of the *MCD Order* a *person* is acting as a *CBTL adviser* if in the course of that *person's* trade, business or profession, the *person* provides personal recommendations to a consumer in respect of one or more transactions relating to *CBTL credit agreements*.
- 4.10B.14 **G**
- Under article 6(2) of the *MCD order* a *person* who provides personal recommendations to a consumer in respect of one or more transactions relating to *CBTL credit agreements* is not acting as a *CBTL adviser* if the recommendations are provided:
- (1) in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of

ethics governing the profession which do not exclude the making of those recommendations; or

- (2) in the context of managing existing debt as an insolvency practitioner where that activity is regulated by legal or regulatory provisions or as part of public or voluntary debt advisory services which do not operate on a commercial basis.in the context of managing existing debt as an insolvency practitioner where that activity is regulated by legal or regulatory provisions or as part of public or voluntary debt advisory services which do not operate on a commercial basis.

Link to the legislation which implemented the Mortgage Credit Directive

4.10B.15 G

- (1) The definitions of *CBTL arranger* and *CBTL adviser* are largely the same as those under the legislation which implemented the *MCD*.
- (2) There is *guidance* on these terms in ■ PERG 4.10A (Activities within scope of the Mortgage Credit Directive).
- (3) The main difference between the definitions in this section and those in ■ PERG 4.10A is that this section only relates to CBTL credit agreements.

Registration of consumer buy-to-let mortgage firms

4.10B.16 G

Part 3 of the *MCD Order* has a procedure for the *FCA* to include a person carrying on one of the activities described in ■ PERG 4.10.9G in a register.

4.10B.17 G

There are two types of person subject to the regime:

- (1) *firms with Part 4A permissions* (including firms with an interim permission to carry on one or more regulated activities under article 56 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013)); and
- (2) *unauthorised persons* described in article 8(3) of the *MCD order*.

4.10B.18 G

- (1) There are detailed conditions for admission to the register that apply to an unauthorised *person* described in article 8(3) of the *MCD Order*.
- (2) These detailed conditions do not apply to a *firm* in ■ PERG 4.10B.17(1). The conditions for a firm in ■ PERG 4.10B.17(1) to be included on the register are simpler.

4.10B.19 G

Part 3 of the *MCD Order* has a detailed regulatory regime for firms subject to that regime.

Exempt consumer buy-to-let contracts

4.10B.20 G

There is another exclusion for buy-to-let contracts in addition to the one in article 72I of the *Regulated Activities Order* (see ■ PERG 4.10B.1G for article 72I).

4.10B.21 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it is a consumer buy-to-let mortgage contract within the meaning of the *MCD Order* (see ■ PERG 4.10B.10G for an explanation of what this means); and
- (2) it is either:
 - (a) of a kind outside the scope of the *MCD* by virtue of the exclusions summarised in ■ PERG 4.10A.5G(1) to (8); or
 - (b) a bridging loan (see ■ PERG 4.13.6G).

4.10B.22 **G** The *RAO* refers to the contract described in ■ PERG 4.10B.21G as an “exempt consumer buy-to- let mortgage contract”.

4.10B.23 **G** (1) The exclusion for exempt consumer buy-to-let mortgage contracts has the effect that a *person* whose business covers exempt consumer buy-to-let lending does not have to consider its position in respect of Part 3 of the *MCD Order* or consider the exclusion in ■ PERG 4.10B.2G.

(2) However, exempt consumer buy-to-let lending is not excluded from the regime in Part 3 of the *MCD Order* altogether. This is because the *Part 4A permission* of a *firm* that has *permission* to carry out any of the following activities:

- (a) *arranging (bringing about) regulated mortgage contracts*;
- (b) *making arrangements with a view to regulated mortgage contracts*;
- (c) *credit broking*;
- (d) *advising on regulated mortgage contracts*;
- (e) *entering into a regulated mortgage contract*;
- (f) *administering a regulated mortgage contract*;

is subject to a *requirement* that the *firm* does not carry on any activity that would constitute *CBTL business* as defined in ■ PERG 4.10B.9G unless the *firm* is registered as described in ■ PERG 4.10B.16.

(3) That *requirement* covers the exempt consumer buy-to-let lending referred to in (1).

4.10B.24 **G** Another purpose of the exclusion in ■ PERG 4.10B.2G is that it provides an exclusion in relation to *credit broking*.

Does all buy-to-let business fall under this regime?

4.10B.25 **G** Part 3 of the *MCD Order* does not apply to all mortgage contracts secured on buy-to-let property.

- 4.10B.26 **G** The regime is only relevant to credit secured on residential property. If a loan to a buy-to-let borrower is secured on commercial property, the loan is not a residential mortgage contract and this chapter does not apply.
- 4.10B.27 **G** The Part 3 regime is only relevant to consumer borrowers. Non-consumer borrowers fall outside Part 3. Many will be excluded from *regulated mortgage activities* altogether by the exclusions for loans to business borrowers in ■ PERG 4.4.17G to ■ PERG 4.4.21G.

4.11 Link between activities and the United Kingdom

Introduction

4.11.1 **G** Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a borrower is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on. This section describes the legislation that is relevant to this question and gives the *FCA's* views on various scenarios.

4.11.2 **G** Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the *Act* that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the *Act*) (see ■ PERG 8 (Financial promotion and related activities)), and on giving the impression that a *person* is authorised (section 24 (False claims to be authorised or exempt)).

Legislative provisions: definition of "regulated mortgage contract"

4.11.3 **G** A contract is only a *regulated mortgage contract* if the land is:

- (1) in relation to a contract entered into before *IP completion day*, land in the *United Kingdom* or [, if the contract was entered into on or after 21 March 2016,] within the territory of an *EEA State*; and
- (2) in relation to a contract entered into on or after *IP completion day*, land in the *United Kingdom*,

(see ■ PERG 4.4.5 G (Land)).

Legislative provisions: section 418 of the Act

4.11.4 **G** Section 418 of the *Act* deals with the carrying on of *regulated activities* in the *United Kingdom*. It extends the meaning that 'carry on a *regulated activity* in the *United Kingdom*' would ordinarily have by setting out additional cases. The *Act* states that in these cases a *person* who is carrying on a *regulated activity* but would not otherwise be regarded as carrying on

the activity in the *United Kingdom* is, for the purposes of the Act, to be regarded as carrying on the activity in the *United Kingdom*.

4.11.5 G For the purposes of *regulated mortgage activities*, sections 418(4), (5), and (6) are relevant, as follows:

- (1) [deleted]
- (2) Section 418(4) refers to the case where a UK-based *person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
- (3) Section 418(5) refers to the case where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an *establishment* maintained by him in the *United Kingdom*.
- (4) [deleted]
- (5) Section 418(6) makes it clear that for the purposes of sections 418(2) to (5A), it is irrelevant where the *person* with whom the activity is carried on is situated.

Legislative provisions: overseas persons exclusion.....

4.11.6 G The exclusions in article 72(5A) to (5F) of the *Regulated Activities Order* (Overseas persons) provide that an *overseas person* does not carry on the *regulated activities* of:

- (1) *arranging (bringing about) or making arrangements with view to a regulated mortgage contract;*
- (2) *entering into a regulated mortgage contract; or*
- (3) *administering a regulated mortgage contract;*

of the borrower (and each of them, if more than one) is an individual and is normally resident outside the *United Kingdom*. In the case of arranging a variation of, or administration of, an existing *regulated mortgage contract*, each borrower must be an individual who was normally resident outside the *United Kingdom* when he entered into the contract. In the FCA's view, normal residence for the purposes of this exclusion envisages physical presence with a degree of continuity, making allowance for occasional temporary absences (e.g. holiday). An *overseas person* under article 3 of the *Regulated Activities Order* (Interpretation) is a *person* who carries on certain *regulated activities* albeit not from a permanent place of business maintained by him in the *United Kingdom*.

4.11.6A G The exclusion for *overseas persons* described in ■ PERG 4.11.6 G does not apply where the *overseas person* is a mortgage intermediary whose *home Member State* is the *United Kingdom*. A mortgage intermediary is defined in ■ PERG 4.10A.3 G.

4.11.7 G An *overseas person* might advise a *person* in the *United Kingdom* on an *endowment assurance* at the same time as advising on a *regulated mortgage*

contract. If so, whilst the *overseas person* exclusion in article 72(5) will apply in relation to the advice on the *endowment assurance*, there will be no 'overseas persons exclusion' for the advice on the *regulated mortgage contract*.

Territorial scenarios: general

4.11.8 **G** The FCA's view of the effect of the Act and *Regulated Activities Order* in various territorial scenarios is set out in the remainder of this section. In those scenarios:

- (1) the term "service provider" is used to describe a *person* carrying on any of the *regulated mortgage activities*;
- (2) the term "borrower" refers to a borrower who is an individual and not a trustee; the position of a borrower acting as a trustee is not considered; and
- (3) it is assumed that the activity is not an *electronic commerce activity* (as to which, see ■ PERG 4.11.21 G (E-Commerce Directive)).

■ PERG 4.11.9 G contains a simplified tabular summary of those views, which should be used only in conjunction with the more detailed analysis.

4.11.9 **G** Simplified summary of the territorial scope of the regulated mortgage activities for contracts entered into on or after *IP completion day*, to be read in conjunction with the rest of this section.

[**Note:** readers wishing to understand the territorial scope of the regulated mortgage activities for contracts entered into before *IP completion day* may wish to refer to the version of this *guidance* as at the date on which the relevant contract was entered into.]

This table belongs to ■ PERG 4.11.8 G

		Individual borrower resident and located:	
		in the <i>United Kingdom</i>	outside the <i>United Kingdom</i>
Service provider carrying on regulated activity from establishment in the <i>United Kingdom</i>	land in the <i>United Kingdom</i>	Yes	Yes
	land outside the <i>United Kingdom</i>	No	No
Service provider carrying on regulated activity from establishment outside the <i>United Kingdom</i>	land in the <i>United Kingdom</i>	Yes	No
	land outside the <i>United Kingdom</i>	No	No

Yes = *authorisation* or exemption required
 No = *authorisation* or exemption not required

Service provider in the United Kingdom

4.11.10 **G** Where a *person* is carrying on any of the *regulated mortgage activities* from an establishment maintained by him in the *United Kingdom*, that *person* will be 'carrying on a *regulated activity* in the *United Kingdom*'. The location and residence of the borrower is irrelevant. That is the practical effect of sections 418(4), (5) and (6) of the *Act*.

4.11.11 **G** There may also be situations where a lender, who does not maintain an *establishment* in the *United Kingdom*, provides services in the *United Kingdom*. For instance, a lender might attend a property exhibition in the *United Kingdom* at which he sets up a loan with a borrower. A lender might also attend the offices of its *UK*-based lawyers, or appoint them as its agent, to enter into a contract with a borrower. In these cases, the overseas lender would only be carrying on a *regulated activity* in the *United Kingdom* if he subsequently enters into a *regulated mortgage contract* with a *UK* resident. This is because *arrangements* made with borrowers at the exhibition would be subject to the exclusion in article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) (see ■ PERG 4.5.7 G). As regards *entering into a regulated mortgage contract* with a borrower resident overseas, this would be subject to the *overseas persons* exclusion.

Service provider overseas: general

4.11.12 **G** If a service provider is overseas, the question of whether that *person* is carrying on a *regulated activity* in the *United Kingdom* will depend upon:

- (1) the type of *regulated activity* being carried on;
- (2) section 418 of the *Act*;
- (3) the residence and location of the borrower;
- (4) the application of the *overseas persons* exclusion in article 72(5A) to (5F) of the *Regulated Activities Order*; and
- (5) whether the service provider is carrying on an *electronic commerce activity*.

The factors in (1), (3) and (4) are considered in relation to each *regulated activity* in ■ PERG 4.11.13 G to ■ PERG 4.11.20 G. The factor in (5) is considered in ■ PERG 4.11.21 G.

4.11.12A **G** [deleted]

Service provider overseas: arranging regulated mortgage contracts

4.11.13 **G** When a *person* is *arranging (bringing about) regulated mortgage contracts* or *making arrangements with a view to regulated mortgage contracts* from overseas, the question of whether he will be carrying on *regulated activities* in the *United Kingdom* will depend on the relevant circumstances. In the *FCA*'s view, factors to consider include:

4.11.14

G

In the FCA's view:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the *United Kingdom*;
- (2) the *overseas persons* exclusion in article 72(5A) to (5C) of the *Regulated Activities Order*; and
- (3) where the arrangements are in fact made.

(1) if the borrower is *normally resident* in the *United Kingdom* and the land is in the *United Kingdom*, the clear territorial limitation in the definition of *regulated mortgage contract* carries most weight in determining where regulation should apply; it is likely that the arranger will be carrying on *regulated activities* in the *United Kingdom*;

(2) if the borrower is *normally resident* overseas, the arrangements are excluded by the *overseas persons* exclusion if the lender is an *overseas person*.

In the case of *arranging (bringing about) regulated mortgage contracts*, the normal residence of the borrower at the time the arrangements are made is the determining factor, except in the case of *arranging (bringing about) a variation of a contract*, in which case it is the normal residence of the borrower at the time that the *regulated mortgage contract* was entered into. In the case of *making arrangements with a view to regulated mortgage contracts*, the *normal residence* of the borrower at the time he participates in the arrangements is the determining factor.

Service provider overseas: advising on regulated mortgage contracts

4.11.15

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In the FCA's view, *advising on regulated mortgage contracts* is carried on where the borrower receives the advice. Accordingly:

- (1) if the borrower is located in the *United Kingdom*, a *person* advising that borrower on *regulated mortgage contracts* is carrying on a *regulated activity* in the *United Kingdom*; but
- (2) if the service provider and borrower are both located overseas, the *regulated activity* is not carried on in the *United Kingdom*.

Service provider overseas: entering into a regulated mortgage contract

4.11.16

G

The effect of article 72(5D) of the *Regulated Activities Order* is that an *overseas person* does not carry on the *regulated activity of entering into a regulated mortgage contract* if the borrower is resident overseas at the time the contract is entered into.

4.11.17

G

In the FCA's view, in circumstances other than those excluded by article 72(5D) of the *Regulated Activities Order*, the need for an overseas lender to

be *authorised* or to have an exemption will depend on the location of the land. This is because of:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation applies only if the land is in the *United Kingdom*;
- (2) the general principle and practice that contracts relating to land are usually governed by the law of the place where the land is situated; and
- (3) practical issues of conveyancing; a lender is likely to use the services of a lawyer or licensed conveyancer operating from the *United Kingdom*, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom*; and
- (4) the existence of the *overseas persons* exclusion in article 72(5D).

Service provider overseas: administering a regulated mortgage contract

4.11.18 G The effect of article 72(5E) and (5F) of the *Regulated Activities Order* is that an *overseas person* who administers a *regulated mortgage contract*, where the borrower was resident overseas at the time that the contract was entered into, does not carry on the *regulated activity* of *administering a regulated mortgage contract*.

4.11.19 G In the *FCA's* view, in circumstances other than those excluded by article 72(5E) of the *Regulated Activities Order*, the need for an overseas administrator to be *authorised* or to have an exemption will depend on the location of the land. This is because:

- (1) the territorial limitation in the definition of *regulated mortgage contract* means that regulation applies only if the land is in the *United Kingdom*;
- (2) when administrators notify borrowers resident in the *United Kingdom* of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom*;
- (3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his address in the *United Kingdom*;
- (4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom*, either to enforce *regulated mortgage contracts* subject to the jurisdiction of these courts or to register and enforce judgements obtained elsewhere, in the case of contracts subject to non-UK jurisdictions; and
- (5) of the existence of the exclusion in article 72(5E) (*Overseas persons*).

Service provider: agreeing to carry on a regulated activity

4.11.20 **G** In most cases, there will be no preliminary agreement to enter into a *regulated mortgage contract* in advance of entering into the contract itself. Moreover, the exclusions relevant to a *regulated activity* are taken into account to determine whether a *person* is *agreeing to carry on* that *regulated activity*. So, for example, agreeing to arrange *regulated mortgage contracts* in cases where borrower and service provider are overseas, would not be *regulated activities* because the activities themselves are outside the scope of regulation. Otherwise, in the *FCA's* view, the issue of where agreeing to carry on a *regulated activity* takes place will depend on such factors as a contractual analysis of where the agreement is entered into, including where appropriate the general position at common law (see, for example, ■ PERG 4.11.17 G).

4.11.21 **G** [deleted]

4.11.22 **G** [deleted]



4.12 Appointed representatives

What is an appointed representative?

4.12.1 **G** Section 39 of the Act makes provision exempting *appointed representatives* from the need to obtain *authorisation*. An *appointed representative* is a *person* who is a party to a contract with an *authorised person* which permits or requires the *appointed representative* to carry on certain regulated activities. ■ SUP 12 (Appointed representatives) contains *guidance* relating to *appointed representatives*.

4.12.2 **G** Unless a person has only a *limited permission* for certain *credit-related regulated activities*, a *person* who is an *authorised person* cannot be an *appointed representative* (see section 39(1) of the Act (Exemption of appointed representatives)).

Business for which an appointed representative is exempt

4.12.3 **G** An *appointed representative* can carry on only those *regulated activities* which are specified in the *Appointed Representatives Regulations*. As respects *regulated mortgage contracts*, these are *arranging (bringing about)*, *making arrangements with a view to* and *advising on regulated mortgage contracts* (as well as agreeing to do so).

Persons who are not already appointed representatives

4.12.4 **G** A *person* who is not already an *appointed representative* for *designated investment business* activities, and who may wish to become one in relation to the *regulated activities* of *arranging (bringing about)*, *making arrangements with a view to* or *advising on regulated mortgage contracts*, can do so. He must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities*, and who accepts responsibility for the *appointed representative's* actions when acting for him. ■ SUP 12.4 (What must a firm do when it appoints an appointed representative?) and ■ SUP 12.5 (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made.

Persons who are already appointed representatives

4.12.5 **G** Where a *person* is already an *appointed representative* (in relation to any non-mortgage activities) and he proposes to carry on any *regulated mortgage activities*, he will need to consider the following matters.

- (1) He must become *authorised* if his proposed mortgage activities include either *entering into a regulated mortgage contract* or

administering a regulated mortgage contract. These activities may not be carried on by *appointed representatives* and the *Act* does not permit any *person* to be exempt for some activities and *authorised* for others. Once *authorised*, the *person* may only carry on the *regulated activities* that are covered by his *permission*. He will therefore need to apply for a *permission* to cover all the *regulated activities* that he proposes to carry on.

- (2) If he proposes to carry on the *regulated activities of arranging (bringing about), making arrangements with a view to or advising on regulated mortgage contracts*, he may be able to do so as an *appointed representative*. But this will depend on a number of issues.
 - (a) He will need to be appointed by an *authorised person* who is prepared to accept responsibility for the *appointed representative's regulated mortgage activities* when acting for him. The *authorised person* must have *permission* to carry on these *regulated mortgage activities*.
 - (b) If these *regulated mortgage activities* are to be carried on for the same *authorised person* who has already appointed him for his non-mortgage regulated activities, the contract between them will need to be amended to reflect the additional activities. Other amendments to the contract may be required.
 - (c) It may be that these *regulated mortgage activities* are to be carried on for a different *person*.
 - (d) If the *regulated mortgage activities* relating to *arranging* are to be limited to making introductions, he may be able to operate within the exclusion for introducers described at ■ PERG 4.5.10 G. This is different from the exclusions for introductions relating to *securities* and *contractually based investments*, which are described at ■ PERG 8.33.

The mortgage register

4.12.6

G

■ SUP 12.4.10A R to ■ SUP 12.4.10C G explain some special requirements that apply to an *appointed representative* for an *MCD mortgage lender* or *MCD mortgage credit intermediary*. For example, it may be necessary for the *appointed representative* to be included in the *Financial Services Register*.

4.13 Other exemptions

4.13.1 **G** Certain named *persons* are exempted by the *Exemption Order* from the need to obtain *authorisation*. The following bodies have exemptions (which are explained in more detail in this section) in relation to carrying on by them of the *regulated mortgage activities*:

- (1) [deleted]
- (2) registered social landlords in England and Wales within the meaning of Part I of the Housing Act 1996 (paragraph 48(2)(a) of the Schedule to the *Exemption Order*) but not their subsidiaries;
- (3) registered social landlords in Scotland within the meaning of the Housing (Scotland) Act 2001 (paragraph 48(2)(b) of the Schedule to the *Exemption Order*) but not their subsidiaries;
- (4A) The Homes and Communities Agency (paragraph 48(2)(ca) of the Schedule to the *Exemption Order*);
- (5) Scottish Homes (paragraph 48(2)(d) of the Schedule to the *Exemption Order*);
- (6) The Northern Ireland Housing Executive (paragraph 48(2)(e) of the Schedule to the *Exemption Order*);
- (7) Communities Scotland (paragraph 48(2)(f) of the Schedule to the *Exemption Order*);
- (8) a housing association within the meaning of Part 2 of the Housing (Northern Ireland) Order 1992 (paragraph 48(2)(g) of the Schedule to the *Exemption Order*); and
- (9) a wholly-owned subsidiary of a registered social landlord within the meaning of Part I of the Housing Act 1996 (paragraph 48(3) of the Schedule to the *Exemption Order*).

4.13.2 **G** The bodies in ■ PERG 4.13.1 G are exempt in relation to the *regulated activity* of arranging the variation of a *regulated mortgage contract* (article 25A(1)(b) of the *Regulated Activities Order*).

4.13.3 **G** The bodies in ■ PERG 4.13.1 G are exempt in relation to the following *regulated activities*:

- (1) *arranging (bringing about) regulated mortgage contracts* (except in relation to variations) (article 25A(1)(a) and (2A));
- (2) *advising on regulated mortgage contracts* (article 53A);
- (3) *entering into a regulated mortgage contract* (article 61(1)); and
- (4) *administering a regulated mortgage contract* (article 61(2)).

4.13.4 **G** The exemption in ■ PERG 4.13.3 G only applies in relation to *regulated mortgage contracts* entered into before 21 March 2016 and to a limited range of *regulated mortgage contracts* entered into on or after that date. These are set out in the table in ■ PERG 4.13.5 G.

4.13.5 **G** Exempted regulated mortgage contracts

Type of <i>regulated mortgage contract</i>	Explanation
Out of scope of the <i>MCD</i> by virtue of article 3(2)	See PERG 4.10A.5G (1) to PERG 4.10A.5G (6)
Bridging loan	See PERG 4.13.6 G
Restricted public loan	See PERG 4.13.7 G

4.13.6 **G** A bridging loan is exempt if it meets the following conditions:

- (1) it is:
 - (a) either of no fixed duration; or
 - (b) is due to be repaid within 12 months; and
- (2) the borrower is:
 - (a) an individual; and
 - (b) acting for purposes which are outside their trade, business or profession; and
- (3) the loan is used by the borrower as a temporary financing solution while transitioning to another financial arrangement for the land.

4.13.7 **G** A loan is exempted as a restricted public loan if it meets the following conditions:

- (1) it is granted to a restricted public under a statutory provision with a general interest purpose; and
- (2) it meets the condition in (a) or (b):
 - (a) it is:
 - (i) free of interest; or
 - (ii) at lower borrowing rates than those prevailing on the market; or
 - (b) it meets the condition in (i) and (ii):

- (i) it is on other terms which are more favourable than those prevailing on the market; and
 - (ii) it is on other terms which are more favourable than those prevailing on the market; and
- (3) the borrower receives timely information on the main features, risks and costs of the loan at the pre-contractual stage; and
- (4) any advertising of the loan is fair, clear and not misleading.

4.14 Mortgage activities carried on by professional firms

Introduction

- 4.14.1** **G** *Professional firms* (broadly, firms of solicitors, accountants and actuaries) may carry on *regulated mortgage activities* in the course of their usual professional activities. The *regulated activities* of *advising on, arranging (bringing about), making arrangements with a view to and administering regulated mortgage contracts* are those most likely to be relevant.
- 4.14.2** **G** In the *FCA's* view, the following exclusions are likely, in many cases, to exclude the normal activities of *professional firms* from amounting to *regulated mortgage activities*:
- (1) article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business), which applies in relation to the advising and arranging activities (see ■ PERG 4.10.1 G);
 - (2) article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) which applies in relation to each of the *regulated mortgage activities* (see ■ PERG 4.10.5 G); and
 - (3) article 63 of the *Regulated Activities Order* (Administration pursuant to agreement with authorised person) which applies in relation to *administering a regulated mortgage contract* (see ■ PERG 4.8.7 G); in the *FCA's* view, this would exclude steps taken by a solicitor to recover payments due under a *regulated mortgage contract* if his instructions come from an *authorised person* with *permission* to administer a *regulated mortgage contract*.
- 4.14.2A** **G** ■ PERG 4.10A (Activities within scope of the Mortgage Credit Directive) explains that some of these exclusions do not apply to activities which fall within the scope of the *MCD*.
- 4.14.3** **G** In addition, a *professional firm* may, in certain circumstances, be able to use the *Part XX exemption* to avoid any need for *authorisation*. ■ PROF 2 (Status of exempt professional firm) contains general *guidance* on the *Part XX exemption*. In particular, ■ PROF 2.1.9 G explains that the Treasury have specified certain *regulated activities* to which the *Part XX exemption* cannot apply in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities Order 2001 ("the Non-Exempt Activities Order").

■ PERG 4.14.4 G to ■ PERG 4.14.6 G explain which of the *regulated activities* relating to *regulated mortgage contracts* have been so specified.

Part XX exemption: arranging regulated mortgage contracts

4.14.4

G

Arranging (bringing about) a regulated mortgage contract and making arrangements with a view to a regulated mortgage contract have not been specified in the *Non-Exempt Activities Order*. Accordingly, a *professional firm* may carry on these *regulated activities* without *authorisation*, provided the other conditions of the *Part XX exemption* are complied with.

Part XX exemption: advising on regulated mortgage contracts

4.14.5

G

Advising on regulated mortgage contracts has been specified in the *Non-Exempt Activities Order*. However, a *professional firm* is prevented from using the *Part XX exemption* to advise on *regulated mortgage contracts* only if the advice it gives consists of a recommendation. This will be the case if the recommendation is made to an individual to enter into a *regulated mortgage contract* with a lender who would, in entering into the contract, carry on the *regulated activity* of *entering into a regulated mortgage contract*, irrespective of whether the lender is an *authorised* or *exempt person* or would carry on the activity by way of business. However, a *professional firm* is allowed to give advice that involves a recommendation of this kind provided the advice endorses a corresponding recommendation given to the borrower by an *authorised person* who has *permission to advise on regulated mortgage contracts* or an *exempt person* whose exemption covers that activity.

Part XX exemption: entering into and administering a regulated mortgage contract

4.14.6

G

Entering into a regulated mortgage contract and administering a regulated mortgage contract have both been specified in the *Non-Exempt Activities Order*. As an exception, a *professional firm* is allowed under the *Part XX exemption* to carry on these *regulated activities* if the firm is acting as a trustee or personal representative. But this is provided that the borrower is a beneficiary under the trust, will or intestacy.

4.15 Mortgage activities carried on by 'packagers'

Introduction

4.15.1 **G** The term 'packagers' is used variously to describe a range of intermediaries and their different activities in the mortgage process. Depending on the nature of their activities, these intermediaries may carry on *regulated mortgage activities*. The *regulated activities* likely to be of most relevance are *arranging (bringing about) or making arrangements with a view to regulated mortgage contracts* (described in more detail at ■ PERG 4.5) and *advising on regulated mortgage contracts* (described in more detail at ■ PERG 4.6). It is important to note that it is the nature of the relevant activities and not an entity's own description of itself or its activities that will determine the need for *authorisation*. This section describes the activities of various types of 'packagers'.

Mortgage Clubs (sometimes called mortgage wholesalers)

4.15.2 **G** So-called 'mortgage clubs' or 'wholesalers' essentially act as a distribution function for lenders, providing information to intermediaries about current deals available from a range of lenders. They provide information (often through an electronic sourcing system) in a way that helps intermediaries search the market effectively and, as such, do not deal directly with individual borrowers. If only engaged in these activities and without direct contact with individual borrowers, in the FCA's view these entities are unlikely to carry on a *regulated mortgage activity* because they will not:

- (1) *arrange (bring about) regulated mortgage contracts*; their involvement is too indirect to bring about the contract;
- (2) *make arrangements with a view to regulated mortgage contracts*; borrowers will not be participating in the arrangements which they make; or
- (3) *advise on regulated mortgage contracts*, because they provide information not advice and the information is, in any event, directed to intermediaries rather than borrowers.

Mortgage packaging companies

4.15.3 **G** So-called 'mortgage packaging companies' may undertake certain parts of the mortgage process for lenders on an outsourced basis, ensuring that a complete set of documentation is collated and sent to the lender. This might include receiving application forms from intermediaries, undertaking credit reference checks and instructing a valuer. Other activities might include a

product placement service for other intermediaries who provide product advice or recommendations to their clients. In the *FCA's* view, mortgage packaging companies engaged in these activities are unlikely to be carrying on a *regulated activity* where they have no direct contact or contract with potential borrowers (for the reasons given in ■ PERG 4.15.2 G).

Broker packagers (sometimes called 'intermediary brokers')

4.15.4

G

The term 'broker packagers' is typically used to describe intermediaries who either market their services directly to borrowers or who offer other intermediaries a complete mortgage outsourcing service. They are often involved in the sales and advice process, including helping the borrower complete application forms. In the *FCA's* view, broker packagers carrying on these types of activity in direct contact with the borrower are likely to be carrying on the *regulated activities of arranging (bringing about) and making arrangements with a view to regulated mortgage contracts*. They may also be *advising on regulated mortgage contracts* depending on the circumstances.

4.16 Mortgage activities

Introduction

4.16.1 **G** It is common practice in the mortgage industry for the original lender which makes the loan to pass on ownership of the loan to a third party through *securitisation*. *Securitisation* transactions take different forms, but the essence is that the original lender sells the beneficial interest (with or without the legal interest) in a mortgage portfolio to a special purpose vehicle ('SPV'), which raises finance to pay for the portfolio by selling its own *securities*. The original lender may (or may not) retain the legal charge on each mortgage in the portfolio. There may also be other parties to the transaction, for example a security trustee to whom the SPV in turn charges the portfolio. Invariably, the SPV will also appoint either the original lender or a third party to administer the portfolio on its behalf. This section discusses whether, on a typical *securitisation* transaction, a SPV (and similarly a security trustee) carries on a *regulated mortgage activity*.

4.16.2 **G** The government's intention behind the regulatory regime for mortgages was "to ensure that, at any one time, it would be possible for each mortgage to be linked to one and only one authorised firm (with mortgage permission) to have the ongoing regulatory responsibility towards consumers" (HM Treasury, *Regulating Mortgages*, February 2002, paragraph 47). In other words, it should be possible to arrange a *securitisation* transaction so that the SPV and other third parties do not carry on *regulated activities*, so long as an *authorised person* (with appropriate *permission*) is involved.

Entering into a regulated mortgage contract

4.16.3 **G** A SPV does not carry on the *regulated activity of entering into a regulated mortgage contract* (or agreeing to do so), merely by acquiring the legal or beneficial interest in the contract from the original lender, or by providing funding to the original lender. If the contract is subsequently varied, a SPV should take care to avoid the original contract being replaced with a new *regulated mortgage contract* (see ■ PERG 4.4.4 G). The original lender is, of course, likely to require *authorisation*.

Administering, arranging and advising on a regulated mortgage contract

4.16.4 **G** If an unauthorised SPV arranges for an *authorised person* with *permission* to administer a *regulated mortgage contract* to administer its *regulated mortgage contracts*, it can avoid carrying on the *regulated activities* of:

- (1) *administering a regulated mortgage contract*, because of the exclusion in article 62 of the *Regulated Activities Order* (described in ■ PERG 4.8.4 G);
- (2) *arranging (bringing about) or making arrangements with a view to regulated mortgage contracts*, because any arrangements that may be made by the *authorised person* in *administering* the contract are excluded, for the SPV, by article 29A of the *Regulated Activities Order* (referred to at ■ PERG 4.5.9 G); in addition, making the original *securitisation* arrangements is unlikely to be a *regulated activity*, as it is unlikely to "bring about" the entering into of the contract and the borrower is unlikely to participate in the arrangements;
- (3) *advising on regulated mortgage contracts*, because any advice given by the *authorised person* in *administering* the contract is excluded, for the SPV, by article 54A of the *Regulated Activities Order* (referred to at ■ PERG 4.6.28 G); and
- (4) agreeing to carry on any of the activities in (1) to (3) because agreeing to carry on an activity is only a *regulated activity* if the activity to be carried on would itself be a *regulated activity*.

4.17 Interaction with the Consumer Credit Act and consumer credit regulated activities

Entering into and administering a regulated mortgage contract

- 4.17.1** G The cumulative effect of article 20(3) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (the 2013 Order) and Chapter 14A of Part 2 of the *Regulated Activities Order* is to essentially carve out *regulated mortgage contracts* from regulation under the CCA and from regulation as a *credit-related regulated activity*.
- 4.17.2** G Section 126(2) of the CCA (as inserted by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014) provides, however, that for the purposes of section 126(1) of the CCA (a land mortgage securing a *regulated credit agreement* is enforceable (so far as provided in relation to the agreement) on an order of the court only) and Part 9 of the CCA (judicial control) a *regulated mortgage contract* which would, but for the exemption in PERG 2.7.19CG(1), be a *regulated credit agreement* is to be treated as if it were a *regulated credit agreement*. This is subject to section 140A(5) of the CCA (unfair relationships between creditors and debtors), which provides that an order under section 140B of the CCA (powers of court in relation to unfair relationships) shall not be made in connection with a *credit agreement* which is an exempt agreement under ■ PERG 2.7.19C G. It therefore follows that, for example, the CCA provisions relating to time orders apply to *regulated mortgage contracts*.
- 4.17.3** G [deleted]
- 4.17.4** G Unsecured loans are not subject to carve-out described above and may be *regulated credit agreements* for the purposes of the CCA and the *credit-related regulated activities* for which a *person* may need *permission*.
- 4.17.5** G
- 4.17.6** G
- 4.17.7** G
- 4.17.8** G

4.17.9 **G**

4.17.10 **G**

4.17.11 **G**

4.17.12 **G**

4.17.13 **G**

4.17.14 **G**

Financial Promotion and advertisements

4.17.15 **G** Article 17 of the 2013 Order has the effect that the *controlled activity* of providing relevant consumer credit for the purposes of the *financial promotion* regime does not include *regulated mortgage contracts*.

4.17.16 **G** For more detailed *guidance* concerning the application of the *financial promotion* regime to *qualifying credit* and relevant consumer credit, see ■ PERG 8.17.17 G.

Consumer credit regulated activities

4.17.17 **G** Whether a business decides that this chapter does or does not apply to its mortgage activities, it should go on to consider whether the activities are consumer credit *regulated activities*. ■ PERG 2 has *guidance* on consumer credit *regulated activities*.

4.17.18 **G** A number of *Regulated Activities Order* exclusions from the consumer credit *regulated activities* are relevant to lenders under loans secured on land. These include:

- (1) article 60C(2) (*regulated mortgage contract* is an exempt *credit agreement*, as summarised in ■ PERG 2.7.19CG (1));
- (2) article 60C(3) (commercial lending, as summarised in ■ PERG 2.7.19CG (2));
- (3) article 60D (loans secured on non-residential property, as summarised in ■ PERG 2.7.19E G);
- (4) article 60F (loans with a limited number of repayments, as summarised in ■ PERG 2.7.19G G);
- (5) article 60H (high net worth borrowers, as summarised in ■ PERG 2.7.19J G); and

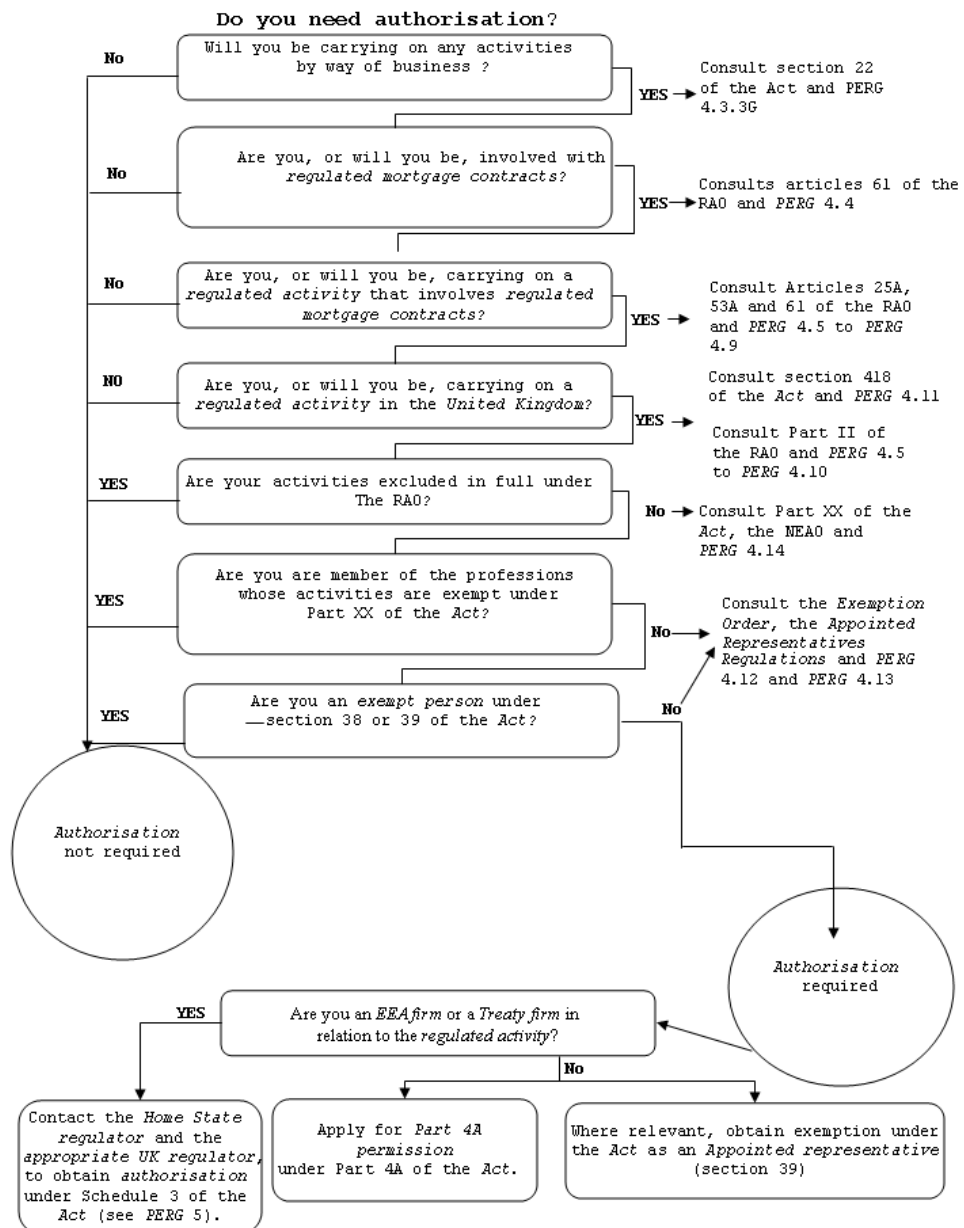
- (6) articles 36E and 39H (exclusions for lenders in relation to *credit broking, debt adjusting, debt counselling, debt collecting and debt administration*, as summarised in ■ PERG 2.8.6C G and ■ PERG 2.8.7C G).



4.18 Regulated activities related to mortgages: flowchart

Do you need authorisation?

4.18.1



Key to Abbreviations:

NEAO = The Financial Services and Markets Act 2001 (Professions)(Non Exempt Activities) Order 2001

RAO = The Financial Services and Markets Act 2001 (Regulated Activities) Order 2001

Chapter 5

Guidance on insurance distribution activities

5.1 Application and purpose

Application

- 5.1.1 **G** This chapter applies principally to any *person* who needs to know whether they carry on *insurance distribution activities* and are thereby subject to *FCA* regulation. As such it will be of relevance among others to:
- (1) insurance brokers;
 - (2) insurance advisers;
 - (3) *insurance undertakings*; and
 - (4) other *persons* involved in the sale and administration of *contracts of insurance*, even where these activities are secondary to their main business.

Purpose of guidance

- 5.1.2 **G** [not used]
- 5.1.3 **G** [not used]
- 5.1.4 **G** [not used]
- 5.1.5 **G** [not used]
- 5.1.6 **G** The purpose of this *guidance* is to help *persons* consider whether they need *authorisation* or a variation of their *Part 4A permission*. Businesses who act only as introducers of *insurance business* are directed in particular to ■ PERG 5.6.2 G to ■ PERG 5.6.9 G to help consider whether they require *authorisation*. This *guidance* also explains the availability to *persons* carrying on *insurance distribution activities* of certain exemptions from regulation, including the possibility of becoming an *appointed representative* (see ■ PERG 5.13(Appointed representatives)).

Effect of guidance

5.1.7 **G** This *guidance* is issued under section 139A of the *Act* (Guidance). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* and the circumstances contemplated by it, then the *FCA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates.

5.1.8 **G** Rights conferred on third parties cannot be affected by *guidance* given by the *FCA*. This *guidance* represents the *FCA's* view, and does not bind the courts, for example, in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (Enforceability of Agreements)).

5.1.9 **G** A *person* reading this *guidance* should refer to the *Act* and the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*. A *person* may need to seek his own legal advice.

5.1.10 **G** [not used]

Guidance on other activities

5.1.11 **G** A *person* may wish to carry on activities related to other forms of *investment* in connection with *contracts of insurance*, such as *advising on* and *arranging regulated mortgage contracts*. Such a *person* should also consult the *guidance* in ■ PERG 2 (Authorisation and Regulated Activities), ■ PERG 4 (Regulated activities connected with mortgages) and ■ PERG 8 (Financial Promotion and Related Activities). A *person* may also wish to carry on *regulated claims management activities* (where their activities are not *insurance distribution activities*, and they fall outside of the exclusion in article 89U of the *Regulated Activities Order*). Such a *person* should also consult the *guidance* in ■ PERG 2.7.20M and ■ PERG 2.7.20N.

5.2 Introduction

5.2.1 **G** [deleted]

5.2.2 **G** **Requirement for authorisation or exemption**
Any *person* who carries on a *regulated activity* in the *United Kingdom* by way of business must either be an *authorised person* or exempt from the need for *authorisation*. Otherwise, the *person* commits a criminal offence and certain agreements may be unenforceable. ■ PERG 2.2 (Authorisation and regulated activities) has further *guidance* on these consequences.

5.2.3 **G** **Questions to be considered to decide if authorisation is required**
A *person* who is concerned to know whether their proposed *insurance distribution activities* may require *authorisation* will need to consider the following questions:

- (1) will the activities relate to *contracts of insurance* (see ■ PERG 5.3(Contracts of insurance))?
- (2) if so, will I be carrying on any *insurance distribution activity* (see ■ PERG 5.5 (The regulated activities: dealing in contracts as agent) to ■ PERG 5.11 (Other aspects of exclusions))?
- (3) if so, will I be carrying on my activities by way of business (see ■ PERG 5.4 (The business test))?

- (4) if so, is there the necessary link with the *United Kingdom* (see ■ PERG 5.12 (Link between activities and the United Kingdom))?
- (5) if so, will any or all of my activities be excluded (see ■ PERG 5.3.7 G (Connected contracts of insurance) to ■ PERG 5.3.8 G (Large risks); ■ PERG 5.6.4AG (Exclusions for the provision of information: article 33B and 72C) to ■ PERG 5.6.23 G (Other exclusions); ■ PERG 5.7.7 G (Exclusions); ■ PERG 5.8.24 G (Exclusion: periodical publications, broadcasts and web-sites) to ■ PERG 5.8.26 G (Other exclusions); ■ PERG 5.11 (Other aspects of exclusions) and ■ PERG 5.12.9 G to ■ PERG 5.12.10 G (Overseas persons))?
- (6) if it is not the case that all of my activities are excluded, am I a *professional firm* whose activities are exempted under Part XX of the Act (see ■ PERG 5.14.1 G to ■ PERG 5.14.4 G (Professionals))?
- (7) if not, am I exempt as an *appointed representative* (see ■ PERG 5.13 (Appointed representatives))?
- (8) if not, am I otherwise an exempt *person* (see ■ PERG 5.14.5 G (Other exemptions))?

If a *person* gets as far as question (8) and the answer to that question is "no", that *person* requires *authorisation* and should refer to the FCA website page "How to apply for authorisation": www.fca.org.uk/firms/authorisation/apply-authorisation for details of the application process. The order of these questions considers firstly whether a *person* is carrying on *insurance distribution activities* before dealing separately with the questions "will I be carrying on my activities by way of business?" (3) and "if so, will any or all of my activities be excluded?" (5).

5.2.4

G

It is recognised pursuant to section 22 of the Act that a *person* will not be carrying on *regulated activities* in the first instance, including *insurance distribution activities*, unless the person is carrying on these activities by way of business. Similarly, where a *person's* activities are excluded that *person* cannot, by definition, be carrying on *regulated activities*. To this extent, the content of the questions above does not follow the scheme of the Act. For ease of navigation, however, the questions are set out in an order and form designed to help *persons* consider more easily, and in turn, issues relating to:

- (1) the *regulated activities*;
- (2) the business test; and
- (3) the exclusions.

Approach to implementation of the IDD

5.2.5

G

The *IDD* imposes requirements upon *EEA States* relating to the regulation of *insurance distribution* and *reinsurance distribution*. The *IDD* defines "*insurance distribution*" as including the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. It includes the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through

a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media. *Reinsurance distribution* is similarly defined (excluding the price comparison website activities). (The text of *IDD* articles 2.1(1), 2.1(2) and 2.2 is reproduced in full in ■ PERG 5.16.2G).

5.2.6 **G** The *United Kingdom* implemented the *IDD* (and the *IMD* before it), in part, through secondary legislation, which applies pre-existing *regulated activities* (slightly amended) in the *Regulated Activities Order* to the component elements of the *insurance distribution* and *reinsurance distribution* definitions in the *IDD* (see ■ PERG 5.2.5 G and the text of *IDD* articles 2.1(1), 2.1(2) and 2.2 in ■ PERG 5.16.2G).

5.2.7 **G** [deleted]

5.2.8 **G** As a result, each of the *regulated activities* below potentially applies to any *contract of insurance*:

- (1) *dealing in investments as agent* (article 21 (Dealing in investments as agent));
- (2) *arranging (bringing about) deals in investments* (article 25(1) (Arranging deals in investments));
- (3) *making arrangements with a view to transactions in investments* (article 25(2) (Arranging deals in investments));
- (4) *assisting in the administration and performance of a contract of insurance* (article 39A (Assisting in the administration and performance of a contract of insurance));
- (5) *advising on investments (except P2P agreements)* (article 53(1) (Advising on investments));
- (6) agreeing to carry on any of the above *regulated activities* (article 64 (Agreeing to carry on specified types of activity)).

5.2.9 **G** It is the scope of the *Regulated Activities Order* rather than the *IDD* which will determine whether a *person* requires *authorisation* or exemption. However, the scope of the activities set out in the *IDD* is relevant to the application of certain exclusions under the *Regulated Activities Order* (see, for example, the commentary on article 67 in ■ PERG 5.11.9 G (Activities carried on in the course of a profession or non-investment business)).

Financial promotion

5.2.10

G

An *unauthorised person* who intends to carry on activities connected with *contracts of insurance* will need to comply with section 21 of the Act (Restrictions on financial promotion). This *guidance* does not cover *financial promotions* that relate to *contracts of insurance*. Persons should refer to the general *guidance on financial promotion* in ■ PERG 8 (Financial promotion and related activities). (See in particular ■ PERG 8.17A (Financial promotions concerning insurance distribution activities) for information on *financial promotions* that relate to *insurance distribution activities*.)



5.3 Contracts of insurance

5.3.1 **G** A person who is concerned to know whether his proposed activities may require *authorisation* will wish to consider whether those activities relate to *contracts of insurance* or contracts of *reinsurance*, or to *insurance business* or reinsurance business, which is the business of *effecting* or *carrying out contracts of insurance* or *reinsurance as principal*.

Definition

5.3.2 **G** The *Regulated Activities Order* does not attempt an exhaustive definition of a 'contract of insurance'. Instead, article 3(1) of the order (Interpretation) makes some specific extensions and limitations to the general common law meaning of the concept. For example, article 3(1) expressly extends the concept to fidelity bonds and similar contracts of guarantee, which are not contracts of insurance at common law, and it excludes certain *funeral plan contracts*, which would generally be contracts of insurance at common law.

5.3.3 **G** One consequence of this is that common law judicial decisions about whether particular contracts amount to 'insurance' or their being effected or carried out amounts to 'insurance business' are relevant in defining the regulatory scope of the *Act*.

5.3.4 **G** As with any other contract, a *contract of insurance* that is not effected by way of a deed will only be legally binding if, amongst other things, it is entered into for valuable consideration. Determining what amounts to sufficient consideration in any given case is a matter for the courts. In practice, however, the legal definition of consideration is very wide. In particular, just because a *contract of insurance* is 'free' in the colloquial sense does not mean that there is no consideration for it. In the vast majority of cases, therefore, 'free' insurance policies (such as policies that act as loss leaders for an *insurance undertaking*) will be binding contracts and will amount to *specified investments* and therefore be subject to regulation under the *Act*.

5.3.5 **G** The *Regulated Activities Order* does not define a *reinsurance* contract. The essential elements of the common law description of a *contract of insurance* are also the essential elements of a *reinsurance* contract. Whilst the terms derived from the *IDD* address insurance and *reinsurance* separately, throughout this *guidance* the term 'contract of insurance' (italicised or otherwise) also applies to contracts of *reinsurance*.

5.3.6 **G** Guidance describing how the *FCA* identifies *contracts of insurance* is in ■ PERG 6 (Guidance on the Identification of Contracts of Insurance).

Connected contracts of insurance

5.3.7 **G** Article 72B of the *Regulated Activities Order* (Activities carried on by a provider of relevant goods or services) excludes from *FCA* regulation certain *regulated activities* carried on by providers of non-motor goods or services and services related to travel in relation to *contracts of insurance* that satisfy a number of conditions. Details about the scope of this exclusion can be found at ■ PERG 5.11.13 G to ■ PERG 5.11.14G (Activities carried on by a provider of relevant goods or services).

Large risks

5.3.8 **G** Large risks situated outside the *UK* are also excluded (described in more detail at ■ PERG 5.11.16 G (Large risks)). The location of the risk or commitment may be determined by reference to the State in which the risk is situated or the State of the commitment. Broadly put, this is:

- (1) for insurance relating to buildings and/or their contents, the State in which the property is situated;
- (2) for insurance relating to vehicles, the State of registration;
- (3) for policies of four months or less duration covering travel or holiday risks, where the *policy* was taken out;
- (4) in all other cases (including those determined by reference to the State of the commitment), the State where the policyholder has his habitual residence, or if the policyholder is a legal person, where his establishment, to which the contract relates, is situated.

Specified investments

5.3.9 **G** For an activity to be a *regulated activity*, it must be carried on in relation to 'specified investments' (see section 22 of the Act Regulated activities) and Part III of the *Regulated Activities Order* (Specified investments)). For the purposes of *insurance distribution activity*, *specified investments* include the following '*relevant investments*' defined in article 3(1) of the *Regulated Activities Order* (Interpretation):

- (1) rights under any *contract of insurance* (see article 75 (Contracts of insurance)); and
- (2) rights to or interests in rights under *life policies* (see article 89 (Rights to or interests in investments)).

'*Relevant investments*' is the term used in articles 21 (Dealing in investments as agent), 25 (Arranging deals in investments) and 53(1) (Advising on investments (except P2P agreements))

of the *Regulated Activities Order* to help define the types of investment to which the activities in each of these articles relate.

- 5.3.10 **G** A *person* will have rights under a *contract of insurance* when that *person* is a *policyholder*. The question of whether a *person* has rights under a *contract of insurance* may require careful consideration in the case of group policies (with reference to the *Glossary* definition of *policyholder*). In the case, in particular, of *general insurance contracts* and *pure protection contracts*, the existence or otherwise of rights under such policies may be relevant to whether a *person* is carrying on *insurance distribution activities*.
- 5.3.11 **G** A *person* may also have rights to or interests in rights under a *life policy* where he is not a *policyholder*, but this will again depend on the terms of the individual *policy*.



5.4 The business test

5.4.1 **G** A *person* will only need *authorisation* or exemption if carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated Activities)).

5.4.2 **G** There is power in the *Act* for the Treasury to specify the circumstances in which a *person* is or is not to be regarded as carrying on *regulated activities* by way of business. The *Business Order* has been made using this power (partly reflecting differences in the nature of the different activities). As such, the business test for *insurance distribution activity* is distinguished from the standard test for 'investment business' in article 3 of the *Business Order*. Under article 3(4) of the *Business Order*, a *person* is not to be regarded as carrying on by way of business any *insurance distribution activity* unless that *person* takes up or pursues that activity for remuneration. Accordingly, there are two principal elements to the business test in the case of *insurance distribution activities*:

- (1) does a *person* receive remuneration for these activities?
- (2) if so, does he take up or pursue these activities by way of business?

5.4.3 **G**

- (1) As regards **■** PERG 5.4.2G(1), the *Business Order* does not provide a definition of 'remuneration', however 'remuneration' is defined in the *IDD*. Article 2(1)(9) of the *IDD* defines 'remuneration' to mean any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities.
- (2) In the *FCA's* view, 'remuneration' in the *Business Order* follows the meaning of the *IDD* definition of remuneration, and:
 - (a) it has a broad meaning and covers both monetary and non-monetary rewards. This is regardless of who makes them. For example, where a *person* pays discounted premiums for their own insurance needs in return for bringing other business to an *insurance undertaking*, the discount would amount to remuneration for the purposes of the *Business Order*;
 - (b) it can also take the form of an economic benefit which the *person* expects to receive as a result of carrying on *insurance distribution activities*;

(c) it does not have to be provided or identified separately from remuneration for other goods or services provided. Nor is there a minimum level of remuneration.

5.4.4 **G** As regards **■ PERG 5.4.2G (2)**, in the *FCA's* view, for a *person* to take up or pursue *insurance distribution activity* by way of business, the *person* will usually need to be carrying on those activities with a degree of regularity. The *person* will also usually need to be carrying on the activities for commercial purposes. That is to say, the *person* will normally be expecting to gain a direct financial benefit of some kind. Activities carried on out of friendship or for altruistic purposes will not normally amount to a business. However, in the *FCA's* view:

- (1) it is not necessarily the case that services provided free of charge will not amount to a business; for example, advice (including advice available on a website) may be provided free of charge to potential *policyholders* but in the course of a business funded by commission payments; and
- (2) the 'by way of business' test may very occasionally be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done 'by way of business' in other respects, for example, because of the size of reward received or its relevance to other business activities).

5.4.5 **G** It follows that whether or not any particular *person* is acting 'by way of business' for these purposes will depend on that *person's* individual circumstances. However, a typical example of where the applicable business test would be likely to be satisfied by someone whose main business is not *insurance distribution activities*, is where a *person* recommends or arranges specific *insurance policies* in the course of carrying on that other business and receives a fee or commission for doing so.

5.4.6 **G** Some typical examples of where the business test is unlikely to be satisfied, assuming that there is no direct financial benefit to the arranger, include:

- (1) arrangements which are carried out by a *person* for their own benefit, or for members of the *person's* family;
- (2) where employers provide insurance benefits for staff; and
- (3) where affinity groups or clubs set up insurance benefits for members.

5.4.7 **G** **■ PERG 5.4.8 G** contains a table that summarises the main issues surrounding the business test as applied to *insurance distribution activities* and that may assist *persons* to determine whether they will need *authorisation* or exemption. The approach taken in the table involves identifying factors that, in the *FCA's* view, are likely to play a part in the analysis. Indicators are then given as to the significance of each factor to the *person's* circumstances. By analysing the indicators as a whole, a picture can be formed of the likely overall position. The table provides separate indicators for the two elements of remuneration and by way of business. As a *person* has to satisfy both elements, a clear overall indication against either element being satisfied should mean that the test is failed. This approach cannot be expected to

provide a clear conclusion for everyone. But it should enable *persons* to assess the relevant aspects of their activities and to identify where changes could, if necessary, be made so as to make their position clearer. The *person* to whom the indicators are applied is referred to in the table as 'P'.

5.4.8

G Table: Carrying on insurance distribution activities 'for remuneration' and 'by way of business'

Carrying on insurance distribution activities 'for remuneration' and 'by way of business'		
'For remuneration'		
Factor	Indicators that P <u>does not</u> carry on activities "for remuneration"	Indicators that P <u>does</u> carry on activities "for remuneration"
Direct remuneration, whether received from the customer or the insurer/broker (cash or benefits in kind such as tickets to the opera, a reduction in other insurance premiums, a remission of a debt or any other benefit capable of being measured in money's worth)	P does not receive any direct remuneration specifically identified as a reward for P's carrying on <i>insurance distribution activities</i> .	P receives direct remuneration specifically identified as being a reward for P's carrying on <i>insurance distribution activities</i> .
Indirect remuneration (such as any form of economic benefit as may be explicitly or implicitly agreed between P and the insurer/broker or P's customer – including, for example, through the acceptance of P's terms and conditions or mutual re-	P does not obtain any form of indirect remuneration through an economic benefit other than one which is not likely to have a material effect on P's ability to make a profit from P's other activities.	P obtains an economic benefit that: (a) is explicitly or implicitly agreed between P and the insurer/broker or P's customer; and (b) has the potential to go beyond mere cost recovery through fees or other benefits received for providing a package of services that includes <i>insurance distribution activities</i> but where no particular part of the fees is attributable to <i>insurance distribution activities</i> . This could include where <i>insurance distribution activities</i> are likely to: <ul style="list-style-type: none"> • play a material part in the success of P's other business activities or in P's ability to make a profit from them; or • provide P with a materially increased opportunity to provide other goods or services; or • be a major selling point for P's other business activities; or

<p>cognition of the economic benefit that is likely to accrue to P). An indirect economic benefit can include expectation of making a profit of some kind as a result of carrying on <i>insurance distribution activities</i> as part of other services.</p>	<ul style="list-style-type: none"> • be essential for P to provide other goods or services. <p>P charges customers a greater amount for other goods or services than would be the case if P were not also carrying on <i>insurance distribution activities</i> for those customers and this:</p> <ul style="list-style-type: none"> • is explicitly or implicitly agreed between P and the insurer/broker or P's customer; and • has the potential to go beyond mere cost recovery. 	
<p>Recovery of costs</p>	<p>P receives no benefits of any kind (direct or indirect) in respect of his <i>insurance distribution activities</i> beyond the reimbursement of his actual costs incurred in carrying on the activity (including receipt by P of a sum equal to the insurance premium that P is to pass on to the <i>insurer</i> or broker).</p>	<p>P receives benefits of any kind (direct or indirect) in respect of his <i>insurance distribution activities</i> which go beyond the reimbursement of his actual costs incurred in carrying on the activity.</p>
<p>'By way of business'</p>	<p>Indicators that P <u>does not</u> carry on activities "by way of business"</p>	<p>Indicators that P <u>does</u> carry on activities "by way of business"</p>
<p>Regularity/frequency</p>	<p>Involvement is one-off or infrequent (for instance, once or twice a year) provided that the transaction(s) is not</p>	<p>Involvement is frequent (for instance, once a week).</p> <p>Involvement is infrequent but the transactions are of such size or importance that they are essential to the success of P's other business activities.</p> <p>P has formal arrangements which envisage transactions taking place on a regular</p>

	<p>of such size and importance that it is essential to the success of P's other business activities.</p> <p>Transactions do not result from formal arrangements (for instance, occasional involvement purely as a result of an unsolicited approach).</p>	<p>basis over time (whether or not such transactions turn out in practice to be regular).</p>
Holding out	<p>P does not hold him or herself out as providing a professional service that includes <i>insurance distribution activities</i> ('professional' meaning 'not the services of a layman').</p>	<p>P holds him or herself out as providing a professional service that includes <i>insurance distribution activities</i>.</p>
Relevance to other activities/ business	<p><i>Insurance distribution activities</i>:</p> <ul style="list-style-type: none"> • have no relevance to P's other activities; or • have some relevance but could easily be ceased without causing P any difficulty in carrying on their main activities; or • would be unlikely to result in a material reduction in income from P's main activities if ceased. 	<p><i>Insurance distribution activities</i>:</p> <ul style="list-style-type: none"> • are essential to P in carrying on their main activities; or • would cause a material disruption to P carrying on their main activities if ceased; or • would be likely to reduce P's income by a material amount.

Commercial benefit

P receives no direct or indirect pecuniary or economic benefit.

P is a layman and acting in that capacity.

P would not obtain materially less income from P's main activities if they did not include *insurance distribution activities*.

P receives a direct or indirect pecuniary or economic benefit from carrying on *insurance distribution activities* – such as a fee, a benefit in kind or the likelihood of materially enhanced sales of other goods or services that P provides.

P would obtain materially less income from P's main activities if they did not include *insurance distribution activities*.



5.5 The regulated activities: dealing in contracts as agent

- 5.5.1** **G** Article 21 of the *Regulated Activities Order* (Dealing in investments as agent) makes dealing in *contracts of insurance* as agent a *regulated activity*. The activity is defined in terms of *buying, selling*, subscribing for or underwriting contracts as agent, that is, on behalf of another. Examples include:
- (1) where an intermediary, by accepting on the *insurance undertaking's* behalf to provide the insurance, commits an *insurance undertaking* to provide insurance for a prospective policyholder; or
 - (2) where the intermediary agrees, on behalf of a prospective *policyholder*, to *buy* an insurance policy.
- 5.5.2** **G** Intermediaries with delegated authority to bind *insurance undertakings* are likely to be *dealing in investments as agent*. It should be noted, in particular, that this is a *regulated activity*:
- (1) whether or not any advice is given (see ■ PERG 5.8 (The regulated activities: advising on contracts of insurance)); and
 - (2) whether or not the intermediary deals through an *authorised person* (for example, where he instructs another agent who is an *authorised person* to enter into a *contract of insurance* on his *client's* behalf).
- 5.5.3** **G** There are also certain exclusions which are relevant to whether a *person* is carrying on the activity of *dealing in investments as agent* (see ■ PERG 5.11 (Other aspects of exclusions)).

5.6 The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance

5.6.1 **G** Article 25 of the *Regulated Activities Order* (Arranging deals in investments) describes two types of *regulated activities* concerned with arranging deals in respect of *contracts of insurance*. These are:

- (1) *arranging (bringing about) deals in investments* (article 25(1) (Arranging deals in investments)); and
- (2) *making arrangements with a view to transactions in investments* (article 25(2) (Arranging deals in investments)).

Article 25(1): arranging (bringing about) deals in investments

5.6.2 **G** The activity in article 25(1) is carried on only if the arrangements bring about, or would bring about, the transaction to which the arrangement relates. This is because of the exclusion in article 26 of the *Regulated Activities Order* (Arrangements not causing a deal). Article 26 excludes from article 25(1) arrangements which do not bring about or would not bring about the transaction to which the arrangements relate. In the FCA's view, a *person* would bring about a *contract of insurance* if his involvement in the chain of events leading to the *contract of insurance* were important enough that, without it, there would be no policy. Examples of this type of activity would include negotiating the terms of the *contract of insurance* on behalf of the customer with the *insurance undertaking* and vice versa, or assisting in the completion of a proposal form and sending it to the *insurance undertaking*. Other examples include where an *insurance undertaking* enters into a *contract of insurance* as *principal* or an intermediary enters into a *contract of insurance* as agent.

Article 25(2): making arrangements with a view to transactions in investments

5.6.3 **G** The activity within article 25(2) contrasts with article 25(1) in that it is not limited by the requirement that the arrangements would bring about the transaction to which they relate.

5.6.4 **G** Article 25(2) may, for instance, include activities of *persons* who help potential *policyholders* fill in or check application forms in the context of ongoing arrangements between these *persons* and *insurance undertakings*. A further example of this activity would be a *person* introducing customers to

an intermediary either for advice or to help arrange an insurance *policy*. The introduction might be oral or written. By contrast, the *FCA* considers that a mere passive display of literature advertising insurance (for example, leaving leaflets advertising insurance in a dentist's or vet's waiting room and doing no more) would not amount to the article 25(2) activity.

Exclusions for provision of information: article 33B and 72C

5.6.4A **G** Articles 33B and 72C of the *Regulated Activities Order* provide exclusions relating to the provision of information from the *regulated activity of arranging*.

Exclusion: article 33B (Provision of information – contracts of insurance)

5.6.4B **G** In broad terms, article 33B of the *Regulated Activities Order* excludes from article 25 (*arranging*) activities that consist of:

- (1) the provision of information about a potential policyholder to:
 - (a) a relevant insurer (as defined in article 39B(2) of the *Regulated Activities Order*) or
 - (b) an insurance intermediary (as defined in article 33B(4) of the *Regulated Activities Order*) or
 - (c) an *IDD reinsurance intermediary*; or
- (2) the provision of information to a potential policyholder about:
 - (a) a *contract of insurance*; or
 - (b) a relevant insurer (as defined in article 39B(2) of the *Regulated Activities Order*) or insurance intermediary (as defined in article 33B(4) of the *Regulated Activities Order*) or *IDD reinsurance intermediary*,

where the provider of the information does not take any step other than the provision of information to assist in the conclusion of a *contract of insurance*.

5.6.4C **G** The exclusion in ■ PERG 5.6.4BG will be of assistance to persons who would otherwise be carrying on the *regulated activity of arranging*. This exclusion was introduced to give effect to article 2.2 of the *IDD* (the text of which is reproduced in ■ PERG 5.16.2G(2)) which refers to the 'mere' provision of this information without taking any additional steps not being considered to constitute *insurance distribution*. In the *FCA's* view, the effect of this, and the reference in article 2.2(c) of the *IDD* to 'data and information on potential policyholders', is that the exclusion in ■ PERG 5.6.4BG covers those situations where a *person* provides existing information they hold on potential policyholders (for example their name and contact details) but does not extend to information they obtain from other means such as pre-purchase questioning.

5.6.4D **G** A *person* seeking to rely on article 33B cannot provide information other than the information specified in that article. That person also cannot take a step other than the provision of the specified information where such a step would assist in the conclusion of a *contract of insurance*. For example, a *person* who forwards a proposal form to an *insurance undertaking* would

not be able to benefit from the exclusion. Similarly, where a *person* does more than provide information (for example, by helping a potential policyholder fill in an application form) they would be unable to rely on this exclusion.

5.6.4E G This exclusion does not cover the activity of advising a customer under article 53(1) of the *Regulated Activities Order* (Advising on investments (other than P2P agreements)) (see ■ PERG 5.8 and ■ PERG 8.24).

Exclusion: article 72C (Provision of information on an incidental basis)

5.6.5 G Article 72C of the *Regulated Activities Order* provides another potential exclusion in relation to article 25, however, only for *persons* whose principal business is other than *insurance distribution activities*. In contrast to article 33B, article 72C also provides an exclusion for *regulated activities* other than *arranging*.

5.6.6 G In broad terms, article 72C of the *Regulated Activities Order* excludes from the activities of *arranging* and *assisting in the administration and performance of a contract of insurance* activities that:

- (1) consist of the provision of information to the *policyholder* or potential *policyholder*;
- (2) are carried on by a *person* carrying on any profession or business which does not otherwise consist of *regulated activities*; and
- (3) amount to the provision of information that may reasonably be regarded as being incidental to that profession or business.

5.6.7 G In the *FCA's* view, 'incidental' in this context means that the activity must arise out of, be complementary to or otherwise be sufficiently closely connected with the profession or business. In other words, there must be an inherent link between the activity and the firm's main business. For example, introducing dental insurance may be incidental to a dentist's activities; introducing pet insurance would not be incidental to his activities. In addition, to be considered 'incidental', in the *FCA's* view, the activity must not amount to the carrying on of a business in its own right.

5.6.8 G This exclusion applies to a *person* whose profession or business does not otherwise consist of *regulated activities*. In the *FCA's* view, the fact that a *person* may carry on *regulated activities* in the course of the carrying on of a profession or business does not, of itself, mean that the profession or business consists of *regulated activities*. This is provided that the main focus of the profession or business does not involve *regulated activities* and that the *regulated activities* that are carried on arise in a way that is incidental and complementary to the carrying on of the profession or business. So, the exclusion may be of relevance to *exempt professional firms*. It might also, for example, be relied on by doctors, vets and dentists as well as many businesses in the non-financial sector, even if they have *permission* to carry on *regulated activities* or are *appointed representatives*. This is assuming that their activities for which they are seeking to use the exclusion in article 72C are limited to providing information in a way which is incidental to their

main profession or business. In contrast to article 33B, this exclusion only extends to information given to the *policyholder* or potential *policyholder* and not to the *insurance undertaking*. Unlike article 33B, article 72C does not specify what information may be provided within the scope of the exclusion. An intermediary who forwards a proposal form to an *insurance undertaking* would not be able to take the benefit of the exclusion. Similarly, where a *person* does more than provide information (for example, by helping a potential *policyholder* fill in an application form), they cannot take the benefit of this exclusion. Nor does it cover the activity of advising a customer under article 53 of the *Regulated Activities Order* (Advising on investments).

5.6.9 G The exclusion may be of assistance to introducers who would otherwise be carrying on the *regulated activity* of *making arrangements with a view to transactions in investments*. Introducers may also find the *guidance* at ■ PERG 5.9.2 G (The regulated activities: agreeing to carry on a regulated activity) and ■ PERG 5.6.4BG to ■ PERG 5.6.4EG helpful. ■ PERG 5.6.17 G (Exclusion from article 25(2) for introducing) has *guidance* to assist *persons* to determine whether their introducing activities amount to *making arrangements with a view to transactions in investments*.

Exclusion from article 25(2): arrangements enabling parties to communicate

5.6.10 G Article 27 of the *Regulated Activities Order* (Enabling parties to communicate) contains an exclusion that applies to arrangements which might otherwise bring within article 25(2) those who merely provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties. Simply providing the means by which parties to a transaction (or potential transaction) are able to communicate with each other is excluded from article 25(2) only. This will ensure that *persons* such as internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to fall within article 25(2)).

5.6.11 G In the *FCA's* view, the crucial element of the exclusion in article 27 is the inclusion of the word 'merely'. When a publisher, broadcaster or internet website operator goes beyond what is necessary for him to provide its service of publishing, broadcasting or otherwise facilitating the issue of promotions, it may well bring itself within the scope of article 25(2). Further detailed *guidance* relating to the scope of the exclusion in article 27 is contained in ■ PERG 2.8.6G (2) (Arranging deals in investments and arranging a home finance transaction) and ■ PERG 8.32.6 G to ■ PERG 8.32.11 G (Arranging deals in investments).

Exclusion from article 25(2): transactions to which the arranger is a party

5.6.12 G Article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) excludes from the *regulated activities* in article 25(1) and 25(2) arrangements made for or with a view to *contracts of insurance* when:

- (1) the *person* (P) making the arrangements is the only *policyholder*; or
- (2) P, as a result of the transaction, would become the only *policyholder*.

5.6.13 **G** Market makers in traded endowment policies may be able to rely on this exclusion to avoid the need to be authorised. They must ensure, however, that where they are carrying on the *regulated activity* of *dealing in investments as principal* (article 14) they are also able to rely on the exclusions in articles 15 or 16 (see the *guidance* in ■ PERG 2.8.4 G (Dealing in investments as principal)).

5.6.14 **G** *Insurance undertakings* do not fall within the terms of this exclusion and so will be *arranging contracts of insurance*, in addition to effecting and *carrying out contracts of insurance*.

5.6.15 **G** In some cases, a *person* may make arrangements to enter into a *contract of insurance as policyholder* on its own behalf and also arrange that another *person* become a *policyholder* under the same *contract of insurance*. If so, the *person* should be aware that the effect of the narrower exclusion in article 28 as part of implementation of the *IDD* is that they may be *arranging* on behalf of the other *policyholder*. This may be relevant, for example, to a *company* which arranges insurance for itself (not *arranging*) as well as other *companies* in a *group* or loan syndicate (potentially *arranging*).

5.6.16 **G** The restriction in the scope of article 28 raises an issue where there is a trust with co-trustees, where each trustee will be a *policyholder* with equal rights and obligations. If the activities of one of the trustees include *arranging* in respect of *contracts of insurance*, that trustee could be viewed as *arranging* on behalf of his co-trustees who will also be *policyholders*. Similar issues also arise in respect of trustees *assisting in the administration and performance of a contract of insurance*. The *FCA* is of the view, however, that trustees should not be regarded as carrying on *regulated activities* where they are acting as joint *policyholders* in *arranging* or *assisting in the administration and performance of a contract of insurance*. In this respect, trustees differ from *policyholders* under a group policy, where each *person* covered under the group policy may make claims on the policy in relation to his own risks. In that situation, a *policyholder* who is providing services to other *policyholders* of *arranging* or *assisting in the administration and performance of a contract of insurance* will be carrying on a *regulated activity*.

Exclusion from article 25(2) for introducing.....

5.6.17 **G** Article 33 of the *Regulated Activities Order* (Introducing) excludes arrangements which would otherwise fall under article 25(2) where:

- (1) they are arrangements under which *persons* will be introduced to another *person*;
- (2) the *person* to whom introductions are to be made is:
 - (a) an *authorised person*; or
 - (b) an *exempt person* acting in the course of business comprising a *regulated activity* in relation to which they are exempt; or

(c) a *person* who is not unlawfully carrying on *regulated activities* in the *United Kingdom* and whose ordinary business involves the *person* in engaging in certain activities;

(3) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to *investments* generally or in relation to any class of *investments* to which the arrangements relate; and

(4) the arrangements do not relate to transactions relating to *contracts of insurance*.

5.6.18

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The effect of ■ PERG 5.6.17G (4) is that some *persons* who, in making introductions, are *making arrangements with a view to transactions in investments* under article 25(2) of the *Regulated Activities Order*, cannot use the introducing exclusion. This is usually the case if the arrangements for making introductions relate to *contracts of insurance* (■ PERG 5.6.19 G has further *guidance* on when arrangements for introductions may be regarded as relating to *contracts of insurance*). However, this does not mean that all introducers whose introductions relate directly or indirectly to *contracts of insurance* will necessarily require *authorisation* if they cannot use the exclusions in articles 33B or 72C of the *Regulated Activities Order* for merely passing information. For a *person* to need *authorisation*, they must first be carrying on the business of *making arrangements with a view to transactions in investments*. In the *FCA's* view, the following points will be relevant in determining whether this is the case.

(1) Article 25(2) applies to ongoing arrangements made with a view to transactions taking place from time to time as a result of *persons* having taken part in the arrangements. So, they will not apply to one-off introductions or introductions that are not part of an ongoing pre-existing arrangement between introducer and introducee. An introducer who merely suggests to a *person* that he seeks advice or assistance from an *authorised person* or an *exempt person* with whom the introducer has no pre-existing agreement that anticipates introductions will be made, will not be making arrangements at all. He will simply be offering general advice or information.

(2) The purpose of the arrangements must be for the *person* who is introduced to, in general terms, enter into a transaction to *buy or sell securities or relevant investments*. So, arrangements for introducing *persons* for advice only will not be caught (for example, introductions to a financial planner or to the publisher of an investment newsletter). In other cases, it may be likely that transactions will be entered into following the provision of advice. Provided the introducer is completely indifferent as to whether or not a *contract of insurance* may ultimately be bought (or sold) as a result of the advice given to the *person* he has introduced, the introducer will not be *making arrangements with a view to transactions in investments*. This is likely to be the case where the introducer does not receive any pecuniary reward that is linked to the volume of business done as a result of his introductions.

5.6.19

G

Where a *person* is *making arrangements with a view to transactions in investments* by way of making introductions, and he is not completely

indifferent to whether or not transactions may result, it may still be the case that the exclusion in article 33 will apply. In the *FCA's* view, this is where:

- (1) the introduction is for independent advice on *investments* generally; and
- (2) the introducer is indifferent as to whether or not a *contract of insurance* may ultimately be bought (or sold) rather than any other type of *investment*.

This is because the arrangements for making introductions do not specifically relate to a *contract of insurance* or to any other type of *investment* but to *investments* generally. Whether or not a *person* is making arrangements for introductions for the purpose of the provision of independent advice on *investments* generally will depend on the facts in any particular case. But, in the *FCA's* view, it is very unlikely that article 33 could apply where introductions are made to a *person* for the purposes of that *person* giving advice on and then *arranging* general insurance.

5.6.20 G The table in ■ PERG 5.6.21 G has examples of the application of article 33 to arrangements for making introductions.

5.6.21 G Application of article 33 to arrangements for making introductions. This table belongs to ■ PERG 5.6.20 G.

	Type of introduction	Applicability of exclusion
1	Introductions are purely for the purpose of the provision of independent advice – Introducer is completely indifferent to whether or not transactions take place after advice has been given.	Exclusion not relevant as introducer is not <i>arranging</i> under article 25(2).
2	Introduction is one-off or otherwise not part of pre-existing ongoing arrangements that envisage such introduction being made.	Exclusion not relevant as introducer is not <i>arranging</i> under article 25(2).
3	Introducer is not indifferent to whether or not transactions take place after advice has been given, but is indifferent to whether or not the transactions may involve a <i>contract of insurance</i> .	Exclusion will be available provided the introduction was made with a view to the provision of independent advice on <i>investments</i> generally.
4	Introducer is not indifferent to whether or not transactions take place after advice has been given (for example, because he expects to receive a percentage of the commission), and introductions specifically relate to <i>contracts of insurance</i> .	Exclusion is not available. If introducer is an <i>unauthorised person</i> , he will need <i>authorisation</i> or exemption as an <i>appointed representative</i> . If introducer is an <i>authorised person</i> (such as an IFA introducing to a general insurance broker), he will need to vary his <i>Part IV permission</i> accordingly. If introducer is an <i>appointed represent</i>

Type of introduction	Applicability of exclusion
	<i>ative</i> , he will need to ensure that his agreement covers making such arrangements.

Exclusion from article 25(2): arrangements for the provision of finance

5.6.22 G An *unauthorised person* who makes arrangements with a view to a *person* who participates in the arrangements *buying or selling contracts of insurance* may be excluded from article 25(2) by article 32 of the *Regulated Activities Order* (Provision of finance). This is provided the sole purpose of the arrangements is the provision of finance to enable the *person* to *buy* the *contract of insurance*. Premium finance companies may be able to rely on this exclusion provided the arrangements they put in place, taken as a whole, have as their sole purpose the provision of finance to fund premiums.

Other exclusions

5.6.23 G The *Regulated Activities Order* contains some other exclusions which have the effect of narrowing or limiting the application of *regulated activities* within article 25 by preventing certain activities from amounting to *regulated activities*. These are referred to in ■ PERG 5.11.8 G (Exclusions applying to more than one regulated activity).

5.7 The regulated activities: assisting in the administration and performance of a contract of insurance

- 5.7.1** G The *regulated activity of assisting in the administration and performance of a contract of insurance* (article 39A) relates, in broad terms, to activities carried on by intermediaries after the conclusion of a *contract of insurance* and for or on behalf of *policyholders*, in particular in the event of a claim. Loss assessors acting on behalf of *policyholders* in the event of a claim are, therefore, likely in many cases to be carrying on this *regulated activity*. By contrast, managing claims on behalf of certain insurers is not a *regulated activity* (see ■ PERG 5.7.7 G (Exclusions)).
- 5.7.2** G Neither assisting in the administration nor assisting in the performance of a contract alone will fall within this activity. Generally, an activity will either amount to assisting in the administration or assisting in the performance but not both. Occasionally, however, an activity may amount to both *assisting in the administration and performance of a contract of insurance*. For example, where a *person* assists a claimant in filling in a claims form, in the *FCA's* view this amounts to assisting in the administration of a *contract of insurance*. In some instances, however, this may also amount to assisting in the performance of a *contract of insurance*. In the *FCA's* view, an example of when a *person* may be assisting in the performance of a contract is where a *person* fills in the whole or a significant part of a claims form on behalf of a claimant. This is because, by helping complete a claims form, a *person* may be assisting the *policyholder* to perform his contractual obligation to notify the *insurance undertaking* in the event of a claim and provide details of the claim in the manner and form required by the contract.
- 5.7.3** G Put another way, where an intermediary's assistance in filling in a claims form is material to whether performance takes place of the contractual obligation to notify claims, it is more likely to amount to *assisting in the administration and performance of a contract of insurance*. Conversely, in the *FCA's* view, a *person* who merely gives pointers about how to fill in the claims form or merely supplies information in support of a claim will not be assisting in the performance of a *contract of insurance*. Instead, the *person* will only be facilitating rather than assisting in the performance of a *contract of insurance*.
- 5.7.4** G More generally, an example of an activity that, in the *FCA's* view, is likely to amount to assisting a *policyholder* in both the administration and the performance of a *contract of insurance* is notifying a claim under a *policy* and then providing evidence in support of the claim, or helping negotiate its

settlement on the *policyholder's* behalf. Notifying an *insurance undertaking* of a claim assists the *policyholder* in discharging his contractual obligation to do so (assisting in the performance); providing evidence in support of the claim or negotiating its settlement assists management of the claim (assisting in the administration).

5.7.5 **G** On the other hand, where a *person* does no more than advise a *policyholder* generally about making a claim or provide evidence in support of a claim, this is unlikely to amount to both assisting in the administration and performance. Similarly, the mere collection of premiums from *policyholders* is unlikely, without more, to amount to *assisting in the administration and performance of a contract of insurance*. The collection of premiums from customers or clients at the pre-contract stage, however, may amount to *arranging* (see example in ■ PERG 5.15.4 G (Types of activity – are they regulated activities and, if so, why?)).

5.7.6 **G** Where a *person* receives funds on behalf of a *policyholder* in settlement of a claim, in the FCA's view, the act of receipt is likely to amount to assisting in the performance of a contract. By giving valid receipt, the *person* assists the *insurance undertaking* to discharge its contractual obligation to provide compensation to the *policyholder*. He may also be assisting the *policyholder* to discharge any obligations he may have under the contract to provide valid receipt of funds, upon settlement of a claim. Where a *person* provides valid receipt for funds received on behalf of the *policyholder*, he is also likely to be assisting in the administration of a *contract of insurance* (for example, making prior arrangements relating to transmission and receipt of payment).

Exclusions

5.7.7 **G** By article 39B of the *Regulated Activities Order* (Claims management on behalf of an insurer etc):

- (1) loss adjusting on behalf of a relevant insurer (see ■ PERG 5.7.8 G);
- (2) expert appraisal; and
- (3) managing claims for a relevant insurer;

are also excluded from the *regulated activity of assisting in the administration and performance of a contract of insurance*. This is where the activity is carried on in the course of carrying on any profession or business (see also ■ PERG 5.14 (Exemptions)). In determining whether they are carrying on the *regulated activity of assisting in the administration and performance of a contract of insurance*, therefore, *persons* should consider whether they are acting on behalf of the relevant insurer and not the *policyholder*.

5.7.8 **G** A 'relevant insurer' for the purposes of article 39B means:

- (1) an *authorised person* who has *permission* for *effecting and carrying out contracts of insurance*; or
- (2) a member of the Society of Lloyd's or the members of the Society of Lloyd's taken together; or

(3) [deleted]

(4) a reinsurer, being a *person* whose main business consists of accepting risks ceded by a *person* falling under (1) or (2) or a *person* who is established outside the *United Kingdom* and who carries on the activity of *effecting and carrying out contracts of insurance*.

So, a *person* whose activities are excluded under article 12 of the *Regulated Activities Order* (Breakdown insurance) will not be a relevant insurer for these purposes and any *person* who performs loss adjusting or managing claims

on behalf of such a *person* will not be able to use the exclusion in article 39B.



5.8 The regulated activities: advising on contracts of insurance

- 5.8.1** **G** Article 53(1) of the *Regulated Activities Order* (Advising on Investments (except P2P agreements)) makes advising on *contracts of insurance* a *regulated activity*. This covers advice which is both:
- (1) given to a *person* in his capacity as an insured or potential insured, or as agent for an insured or a potential insured; and
 - (2) advice on the merits of the insured or his agent:
 - (a) *buying, selling*, subscribing for or underwriting a particular *contract of insurance*; or
 - (b) exercising any right conferred by a *contract of insurance* to *buy, sell*, subscribe for or underwrite a *contract of insurance*.
- 5.8.2** **G** For advice to fall within article 53(1), it must:
- (1) relate to a particular *contract of insurance* (that is, one that a *person* may enter into);
 - (2) be given to a *person* in his capacity as an investor or potential investor;
 - (3) be advice (that is, not just information); and
 - (4) relate to the merits of a *person buying, selling*, subscribing for or underwriting (or exercising any right to do so) a *contract of insurance* or rights to or interests in *life policies*.
- 5.8.3** **G** Each of these aspects is considered in greater detail in the table in **■ PERG 5.8.5 G**. Where an activity is identified as not amounting to *advising on investments (except P2P agreements)* it could still form part of another *regulated activity*. This will depend upon whether a *person's* activities, viewed as a whole, amount to *arranging*. Additionally, it should be borne in mind that the provision of advice or information may involve the communication of a *financial promotion* (see **■ PERG 8** (Financial promotion and related activities)).
- 5.8.3A** **G**
- (1) The scope of the *regulated activity of advising on investments (except P2P agreements)* is narrower for a *person* who is authorised for the purposes of the *Act* to carry on certain *regulated activities* (as set out in (2)) than as described in **■ PERG 5.8.1G** and **■ PERG 5.8.2G**.

5.8.3B

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- (2) The narrower scope of *advising on investments (except P2P agreements)* referred to in (1) applies to a *person* who is authorised for the purposes of the Act to carry on any *regulated activity* other than (or in addition to):
 - (a) *advising on investments (except P2P agreements)*; or
 - (b) the *regulated activity of agreeing to carry on a regulated activity* in relation to (a).
- (3) A *person* in (2) is not *advising on investments (except P2P agreements)* except to the extent that they are providing a *personal recommendation*.
- (4) ■ PERG 8.24 explains in more detail when *advising on investments (except P2P agreements)* is limited to providing *personal recommendations*.
- (5) ■ PERG 8.30B (Personal recommendations) explains what a *personal recommendation* is.

5.8.4

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Advice must relate to a particular contract of insurance

Advice about *contracts of insurance* will come within the *regulated activity* in article 53(1) of the *Regulated Activities Order* only if it relates to a particular *contract of insurance*. So, generic or general advice will not fall under article 53(1). In particular:

- (1) advice would come within article 53(1) if it took the form of a recommendation that a *person* should *buy* the ABC Insurers motor insurance;
- (2) advice would not relate to a particular contract if it consists of a recommendation only that a *person* should take out insurance of a particular class without identifying any particular *insurance undertaking*;
- (3) the table in ■ PERG 5.8.5 G identifies several typical recommendations and indicates whether they will be regarded as advice under article 53(1).

5.8.5

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Typical recommendations and whether they will be regulated as advice on contracts of insurance under article 53(1) of the *Regulated Activities Order*. This table belongs to ■ PERG 5.8.4 G.

Recommendation	Regulated under article 53(1) or not?
I recommend you take the ABC Insurers motor insurance <i>policy</i>	Yes. This is even the case if ABC Insurers has many different motor insurance policies, as explained in PERG 4.6.6 G. Although PERG 4.6.6 G is about mortgages the same reason applies to insurance.
I recommend that you take out the GHI Insurers life insurance <i>policy</i>	Yes
I recommend that you do not take out the ABC Insurers motor insurance <i>policy</i>	Yes. See the entry in this table for the recommendation to take out the ABC Insurers motor insurance <i>policy</i> .
I recommend that you do not take out the GHI Insurers life insurance <i>policy</i>	Yes
I recommend that you take out either the ABC Insurers motor insurance <i>policy</i> or the DEF Insurers motor insurance <i>policy</i>	Yes
I recommend that you take out either the GHI Insurers life insurance <i>policy</i> or the JKL Insurers life insurance <i>policy</i>	Yes
I recommend that you take out (or do not take out) contents insurance	No, unless a specific insurance <i>policy</i> is implied by the context
I recommend that you take out (or do not take out) life insurance	No, unless a specific insurance <i>policy</i> is implied by the context

Advice given to a person in their capacity as an investor or potential investor

5.8.6

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For the purposes of article 53(1), advice must be given to a *person* in that *person's* capacity as an investor or potential investor (which, in the context of *contracts of insurance*, will mean as *policyholder* or potential

policyholder). So, article 53(1) will not apply where advice is given to *persons* who receive it as:

- (1) an adviser who will use it only to inform advice they give to others; or
- (2) a journalist or broadcaster who will use it only for journalistic purposes.

5.8.7 G Advice will still be covered by article 53(1) even though it may not be given to any particular *policyholder* (for example, advice given in a periodical publication or on a website). Such advice would, however, be unlikely to be a *personal recommendation* (see ■ PERG 5.8.3AG, ■ PERG 8.24.1G and ■ PERG 8.30BG).

Advice or information

5.8.8 G In the *FCA's* view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of facts or figures.

5.8.9 G In general terms, simply giving information, without making any comment or value judgement on its relevance to decisions which a *person* may make, is not advice. In this respect, it is irrelevant that a *person* may be providing information on a single *contract of insurance* or on two or more. This means that a *person* may provide information on a single *contract of insurance* without necessarily being regarded as giving advice on it. ■ PERG 5.8.11 G has *guidance* on the circumstances in which information can assume the form of advice.

5.8.10 G In the case of article 53(1), information relating to *buying or selling contracts of insurance* may often involve one or more of the following:

- (1) an explanation of the terms and conditions of a *contract of insurance* whether given orally or in writing or by providing leaflets and brochures;
- (2) a comparison of the features and benefits of one *contract of insurance* compared to another;
- (3) the production of pre-purchase questions for a *person* to use in order to exclude options that would fail to meet his requirements; such questions may often go on to identify a range of *contracts of insurance* with characteristics that appear to meet the *person's* requirements and to which he might wish to give detailed consideration (pre-purchase questioning is considered in more detail in ■ PERG 5.8.15 G to ■ PERG 5.8.19 G (Pre-purchase questioning (including decision trees)));
- (4) tables that compare the costs and other features of different *contracts of insurance*;
- (5) leaflets or illustrations that help *persons* to decide which type of *contract of insurance* to take out; and

- (6) the provision, in response to a request from a *person* who has identified the main features of the type of *contract of insurance* he seeks, of several leaflets together with an indication that all the *contracts of insurance* described in them have those features.

5.8.11

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In the *FCA's* opinion, however, such information is likely to take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. Examples of situations where information provided by a *person* (P) might take the form of advice are given below.

- (1) P may provide information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of a *person*. This may arise where P offers to provide information about *contracts of insurance* that contain features specified by the *person*, but then exercises discretion as to which complying *contract of insurance* to offer to that *person*.
- (2) P may, as a result of going through the sales process, discuss the merits of one *contract of insurance* over another, resulting in advice to enter into a particular one. In contrast, advice on how to complete an application form, without an explicit or implicit recommendation on the merits of *buying or selling the contract of insurance* whilst 'advice' in the general sense of the word, is not, in the view of the *FCA*, advice within the meaning of article 53(1). Such advice may, however, amount to *arranging* (for which see ■ PERG 5.6.1 G to ■ PERG 5.6.4 G (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance)).

Advice must relate to the merits (of buying or selling a contract of insurance)

5.8.12

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Advice under article 53(1) relates to the advantages and disadvantages of *buying, selling, subscribing for or underwriting a particular contract of insurance*. It is worth noting that, in this context, '*buying*' and '*selling*' are defined widely under article 3 of the *Regulated Activities Order* (Interpretation). '*Buying*' includes acquiring for valuable consideration, and '*selling*' includes surrendering, assigning or converting rights under a *contract of insurance*.

5.8.13

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The requirements imposed by the *IDD* (see ■ PERG 5.2.5 G (Approach to implementation of the *IMD*)) and the text of article 2.3 *IDD* articles 2.1(1), 2.1(2) and 2. 2 in ■ PERG 5.16.1 G are narrower than the scope of the *Regulated Activities Order* (see ■ PERG 5.2.7 G (Approach to implementation of the *IDD*)). Unlike the *Regulated Activities Order*, they do not relate to the assignment of *contracts of insurance*. This is of relevance to, amongst others, *persons* involved in the 'second-hand' market for *contracts of insurance* such as traded endowment policies and certain viatical instruments (that is, arrangements by which a terminally ill person can obtain value from their *life policy*) (see also ■ PERG 5.6.12 G (Exclusion from article 25(2): transactions to which the arranger is a party)). *Persons* advising on or arranging assignments of these *contracts of insurance* are therefore potentially carrying on *regulated activities* although they may be able to take the benefit of article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) in certain circumstances (see

■ PERG 5.11.9 G to ■ PERG 5.11.12 G (Activities carried on in the course of a profession or non-investment business)).

5.8.14 G Generally speaking, advice on the merits of using a particular *insurance undertaking*, broker or adviser in their capacity as such, does not amount to advice for the purpose of article 53(1). It is not advice on the merits of *buying or selling* a particular *contract of insurance* (unless, in the circumstances, the advice amounts to an implied recommendation of a particular *policy*).

Pre-purchase questioning (including decision trees)

5.8.15 G Pre-purchase questioning involves putting a sequence of questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a *contract of insurance* or other product that meets his needs. A decision tree is an example of pre-purchase questioning. The process of going through the questions will usually narrow down the range of options that are available.

5.8.16 G A key issue for those *firms* proposing to use pre-purchase questioning is whether the specific questioning used may amount to advice. There are two main aspects:

- (1) advice must relate to a particular *contract of insurance* (see ■ PERG 5.8.4 G (Advice must relate to a particular contract of insurance)); and
- (2) the distinction between information and advice (see ■ PERG 5.8.8 G to ■ PERG 5.8.11 G (Advice or information)).

Whether or not pre-purchase questioning in any particular case is advising on *contracts of insurance* will depend on all the circumstances. The process may involve identifying one or more particular *contracts of insurance*. If so, to avoid advising on *contracts of insurance*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the *person* as, assisting the *person* to make his own choice of product which has particular features which the *person* regards as important. The questioner will need to avoid providing any judgement on the suitability of one or more products for that *person* and in this respect should have regard to the factors set out in ■ PERG 5.8.2 G to ■ PERG 5.8.4 G (Advice must relate to a particular contract of insurance) and the table in ■ PERG 5.8.5 G. See also ■ PERG 5.8.12 G to ■ PERG 5.8.14 G (Advice must relate to the merits (of buying or selling a contract of insurance)) for other matters that may be relevant.

5.8.17 G The potential for variation in the form, content and manner of pre-purchase questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, the amount of the cover). In the *FCA's* view, this does not itself amount to advising on *contracts of insurance*, if it involves the provision of information rather than advice. There are various possible scenarios, including the following:

- (1) the questioner may go on to identify one or more particular *contracts of insurance* which match features identified by the pre-purchase

questioning; provided these are selected in a balanced and neutral way (for example, they identify all the matching *contracts of insurance* available without making a recommendation as to a particular one) this need not involve advising on *contracts of insurance*; and

- (2) the questioner may go on to advise a *person* on the merits of one particular *contract of insurance* over another; this would be advising on *contracts of insurance*.

5.8.18

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The second type of pre-purchase questioning involves providing questions and answers incorporating opinion, judgement or recommendation. There are various possible scenarios, including the following:

- (1) the pre-purchase questioning may not lead to the identification of any particular *contract of insurance*; in this case, the questioner has provided advice, but it is generic advice and does not amount to advising on *contracts of insurance*; and
- (2) the pre-purchase questioning may lead to the identification of one or more particular *contracts of insurance*; the key issue then is whether the advice can be said to relate to a particular *contract of insurance* (see further ■ PERG 5.8.4 G (Advice must relate to a particular contract of insurance)).

5.8.19

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In the case of ■ PERG 5.8.18G (2) and similar scenarios, the *FCA* considers that it is necessary to look at the process and outcome of pre-purchase questioning as a whole. It may be that the element of advice incorporated in the questioning can properly be viewed as generic advice if it were considered in isolation. But although the actual advice may be generic, the process has ended in identifying one or more particular *contracts of insurance*. The combination of the generic advice and the identification of a particular or several particular *contracts of insurance* to which it leads may well, in the *FCA's* view, cause the questioner to be advising on *contracts of insurance*. Factors that may be relevant in deciding whether the process involves advising on *contracts of insurance* may include:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the stage in the questioning at which the opinion is offered and is significant;
- (4) the role played by the questioner who guides a *person* through the pre-purchase questions;
- (5) the outcome of the questioning (whether particular *contracts of insurance* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (6) whether the pre-purchase questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the *person* understand

what the questions or options are and how to determine which option applies to his particular circumstances.

Medium used to give advice

5.8.20

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With the exception of:

- (1) periodicals, broadcasts and other news or information services (see ■ PERG 5.8.24 G to ■ PERG 5.8.25 G (Exclusion: periodical publications, broadcasts and web-sites)); and
- (2) situations involving an overseas element (see, generally, ■ PERG 5.12 (Link between activities and the United Kingdom) and, in particular, ■ PERG 5.12.8 G (Where is insurance distribution carried on?)),

the use of the medium itself to give advice should make no material difference to whether or not the advice is caught by article 53(1).

5.8.21

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Advice can be provided in many ways including:

- (1) face to face;
- (2) orally to a group;
- (3) by telephone;
- (4) by correspondence (including e-mail);
- (5) in a publication, broadcast or web-site; and
- (6) through the provision of an interactive software system.

5.8.22

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Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problem. The same principles apply as with a paper version (see ■ PERG 5.8.15 G to ■ PERG 5.8.19 G (Pre-purchase questioning (including decision trees))).

5.8.23

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Advice in publications, broadcasts and web-sites is subject to a special regime (see ■ PERG 5.8.24 G (Exclusion: periodical publications, broadcasts and web-sites) and ■ PERG 7 (Periodical publications, news services and broadcasts: applications for certification)).

Exclusion: periodical publications, broadcasts and website

5.8.24

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An important exclusion from advising on *contracts of insurance* relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies if the principal purpose of the publication or service taken as a whole (including any advertising content) is neither to give advice of a kind mentioned in article 53 (Advising on investments) or article 53A (Advising on regulated mortgage activities) nor to lead or enable *persons* to *buy, sell, subscribe for or underwrite relevant investments* or, as borrower, to enter into or vary the terms of a *regulated mortgage contract*.

5.8.25 **G** This is explained in greater detail, together with the provisions on the granting of certificates by the FCA on the application of the proprietor of a periodical publication or news or information service or broadcast, in ■ PERG 7 (Periodical publications, news services and broadcasts: applications for certification).

5.8.25A **G**

- (1) Where the definition of *advising on investments (except P2P agreements)* is limited to providing *personal recommendations*:
 - (a) the exclusion described in ■ PERG 5.8.24G does not apply; but
 - (b) advice given in a publication issued to the general public, in a broadcast or on a website accessible to the general public will generally not involve a *personal recommendation* and hence will not involve *advising on investments (except P2P agreements)*.
- (2) ■ PERG 7 and ■ PERG 8.30B (Personal recommendations) give more details.

Other exclusions
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5.8.26 **G** The *Regulated Activities Order* contains other limited exclusions which have the effect of preventing certain activities from amounting to advice on *contracts of insurance*. These are referred to in ■ PERG 5.11.8 G (Exclusions applying to more than one regulated activity) to ■ PERG 5.11.16 G (Large risks).

5.9 The Regulated Activities: agreeing to carry on a regulated activity

5.9.1 **G** Under article 64 of the *Regulated Activities Order* (Agreeing to carry on specified kinds of activity), in addition to the *regulated activities* of:

- (1) *dealing in investments as agent;*
- (2) *arranging (bringing about) deals in investments;*
- (3) *making arrangements with a view to transactions in investments;*
- (4) *assisting in the administration and performance of a contract of insurance; and*
- (5) *advising on investments;*

agreeing to do any of these things is itself a *regulated activity*. In the FCA's opinion, this activity concerns the entering into of a legally binding agreement to provide the services to which the agreement relates. So, a *person* is not carrying on a *regulated activity* under article 64 merely because he makes an offer to do so.

5.9.2 **G** To the extent that an exclusion applies in relation to a *regulated activity*, 'agreeing' to carry on an activity within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order* (Specified activities: general). So, for example, a vet can, without carrying on a *regulated activity*, enter into an agreement with an *insurance undertaking* to distribute marketing literature provided that the vet can rely on the exclusion in article 72C (Provision of information on an incidental basis) in relation to the activity of distributing the literature (see also ■ PERG 5.6.6 G and ■ PERG 5.6.9 G (Exclusion: article 72C (Provision of information on an incidental basis) or article 33B (Provision of information – contracts of insurance) in relation to the activity of distributing the literature (see also ■ PERG 5.6.4AG to ■ PERG 5.6.9G which cover exclusions for the provision of information).



5.10 Renewals

5.10.1

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It must be emphasised that activities which concern invitations to renew *policies* and the subsequent effecting of renewal of *policies* are likely to fall within *insurance distribution activity*. Those considering the need for *authorisation* or variation of their *permissions* will wish to consider whether a process of tacit renewal operates: that is, where a *policyholder* need take no action if they wish to maintain their insurance cover by having their *policy* 'renewed'. This process will typically result in the issue of a new *contract of insurance*, not an extension of the period of the existing one. It may involve the activities of *advising on investments*, *arranging* and *dealing in investments as agent*. More specifically, preparing a 'tacit renewal' letter on behalf of an *insurance undertaking* is likely to amount to *arranging*. Where it contains a recommendation to renew existing cover this is likely to constitute *advising on investments (except P2P agreements)* (under article 53(1) of the *Regulated Activities Order*). If the contract takes effect on the date stipulated in the renewal letter, a contract is concluded with the effect that the letter writer may be *dealing in investments as agent*. The process may also involve a *regulated activity* under article 64 (Agreeing to carry on a regulated activity).



5.11 Other aspects of exclusions

5.11.1 **G** This part of the *guidance* deals with:

- (1) exclusions which are disapplied where the *regulated activity* relates to *contracts of insurance*;
- (2) exclusions which are disapplied where a *person* carries on *insurance distribution*; and
- (3) the following exclusions applying to more than one *regulated activity*:
 - (a) activities carried on in the course of a profession or non-investment business (article 67 (Activities carried on in the course of a profession or non-investment business));
 - (b) activities carried on by a provider of relevant goods or services (article 72B (Activities carried on by a provider of relevant goods or services));
 - (c) large risks (article 72D (Large risks contracts where risk situated outside the *United Kingdom*));
 - (d) activities carried on by *firms* with a *Part 4A permission to manage a UK UCITS or manage an AIF* (article 72AA (Managers of UCITS and AIFs));
 - (e) activities carried on by a *local authority* (article 72G); and
 - (f) activities carried on by a *person* acting as an insolvency practitioner (article 72H).

5.11.2 **G** Several exclusions that would have the effect of restricting the scope of the *regulated activities* referred to in this *guidance* are disapplied or modified. This was in order to properly implement *IDD*.

Exclusions disapplied where activities relate to contracts of insurance

5.11.3 **G** The following exclusions do not apply if they concern transactions relating to *contracts of insurance*:

- (1) *dealing in investments as agent* with or through *authorised persons* (article 22 of the Regulated Activities Order (Deals with or through authorised persons));

- (2) *arranging* transactions to which the *arranger* is to be a party, where the *arranger* enters into or is to enter into the transaction:
 - (a) as agent for another *person*; or
 - (b) as *principal*, unless the *arranger* is the only *policyholder* or will, as a result of the transaction, become the only *policyholder* (article 28 (Arranging transactions to which the arranger is a party));
- (3) arranging deals with or through *authorised persons* (article 29 (Arranging deals with or through authorised persons));
- (4) introducing (article 33 (Introducing));
- (5) activities carried on in connection with the sale of goods and supply of services (article 68 (Activities carried on in connection with the sale of goods and supply of services));
- (6) *groups and joint enterprises* (article 69 (Groups and joint enterprises)) (see ■ PERG 5.11.6 G); and
- (7) activities carried on in connection with the sale of a *body corporate* (article 70 (Activities carried on in connection with the sale of a body corporate)).

5.11.4

G

The restrictions placed on the exclusions listed in ■ PERG 5.11.3 G have the following effects:

- (1) *Unauthorised persons* who:
 - (a) introduce clients or customers to an independent financial adviser with a view to a transaction; or
 - (b) deal as agent on behalf of their clients or customers with or through an *authorised person*; or
 - (c) arrange for their clients or customers to enter into a transaction with or through an *authorised person*;

will not be able to rely on articles 29 or 33 to avoid the need for *authorisation* where the transaction relates to a *contract of insurance*.
- (2) *Unauthorised persons* may, however, be able to rely on the exclusions for the provision of information in article 33B or provision of information on an incidental basis in article 72C to avoid the need for *authorisation* (see ■ PERG 5.6.4AG to ■ PERG 5.6.9G which cover exclusions for the provision of information).
- (3) *Authorised persons* who themselves introduce clients or customers to others for the purposes of *buying* or *selling* any kind of *contract of insurance* are likely to require *permission* to carry out *arranging activities*, as neither article 33 nor generally, article 72C (see ■ PERG 5.6.5 G to ■ PERG 5.6.9 G (Exclusion: article 72C (Provision of information on an incidental basis))) will apply. Article 33B could apply, but the *authorised person* would need to be merely providing information and taking no additional steps to assist in the conclusion of the *contract of insurance*.

- 5.11.5 **G** *Insurance undertakings* are referred to ■ MIPRU 5 (Insurance distributors and home finance providers using insurance distribution or home finance mediation services) as regards their obligations relating to the use of intermediaries generally.
- 5.11.6 **G**
- (1) The exclusion for *groups* and *joint enterprises* in article 69 of the *Regulated Activities Order* (Groups and joint enterprises) does not apply to transactions relating to *contracts of insurance*. This will affect a *company* providing services for:
 - (a) other members of its *group*; or
 - (b) other participants in a *joint enterprise* of which it is a participant.
 - (2) Such *companies* might typically provide risk or treasury management or administration services which may include *regulated activities* relating to a *contract of insurance*. If so, such companies will need *authorisation* or exemption if they conduct the activities by way of business (see ■ PERG 5.4 (The business test) generally and (3) and (4)). This is unless another exclusion applies.
 - (3) In the *FCA's* view, particular issues arise in applying the 'by way of business' test to group companies. Recital 11 of the *IDD* states that the Directive should apply to *persons* whose activity consists in providing insurance or reinsurance distribution services to third parties. This Recital 11 suggests that the Directive is intended to apply only where the service is provided to a third party. The expression 'third party' is not defined in the Directive. The *FCA* considers that a group *company* that is providing services solely for the benefit of other group *companies* would not normally be regarded as providing services to a third party. The group *company* also needs to be receiving remuneration for the activities (see ■ PERG 5.4.2G(1)). The *FCA* also considers that a group *company* providing services solely for the benefit of other group *companies* should not normally be regarded as satisfying the requirement that it be remunerated for providing insurance distribution services to third parties. Were a group *company* to be remunerated other than by another group *company*, however, the situation may be different. For example, if the group *company* receives commission from an insurer or broker, the fact would tend to suggest that the *company* has been rewarded for providing a service to the insurer or broker. In the *FCA's* view, it is appropriate to apply this principle to a *group* as defined in section 421 (Group) of the *Act*.
 - (4) The *FCA* considers that similar principles to those applied to a group *company* in (2) may be applied to the participants in a *joint enterprise*. This would be where one participant in the *joint enterprise* is providing services solely for the benefit of another participant and for the purposes of the *joint enterprise* and who provides insurance distribution services to one or more participants for the purposes of or in connection with the *joint enterprise*.

Exclusions disapplied in connection with insurance distribution

- 5.11.7 **G** Article 4(4A) of the *Regulated Activities Order* (Specified activities: general) disapplies certain exclusions where a *person*, for remuneration, takes up or pursues *insurance distribution* or *reinsurance distribution* (as defined in

articles 2.1(1), 2.1(2) and 2.2 of the *IDD*) and ■ PERG 5.16.2G) in relation to a risk or commitment located in the *United Kingdom*. In relation to a *contract of insurance* entered into before IP completion day, article 4(4A) applies in relation to a risk or commitment located in the *United Kingdom* or an *EEA State*. The relevant exclusions which are disapplied are:

- (1) arrangements in connection with lending on the security of insurance policies (article 30 of the *Regulated Activities Order* (Arranging transactions in connection with lending on the security of insurance policies));
- (2) activities carried on by trustees, nominees and personal representatives (article 66 (Trustees, nominees and personal representatives)); and
- (3) activities carried on in the course of a profession or non-investment business (article 67 (Activities carried on in the course of a profession or non-investment business)) (This exclusion is considered in further detail in ■ PERG 5.11.9 G to ■ PERG 5.11.12 G (Activities carried on in the course of a profession or non-investment business)).

Exclusions applying to more than one regulated activity

5.11.8 G Chapter XVII of the *Regulated Activities Order* (Exclusions applying to several specified kinds of activity) contains various exclusions applying to several kinds of activity. Five exclusions of relevance in relation to *contracts of insurance* are dealt with in this section and a sixth, *overseas persons*, in ■ PERG 5.12 (Link between activities and the United Kingdom).

Activities carried on in the course of a profession or non-investment business

5.11.9 G Article 67 excludes from the activities of *dealing as agent, arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, assisting in the administration and performance of a contract of insurance* and *advising on investments*, any activity which:

- (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of *regulated activities* in the *United Kingdom*; and
- (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business.

In the *FCA's* view, the fact that a *person* may carry on *regulated activities* in the course of the carrying on of a profession or business does not, of itself, mean that the profession or business consists of *regulated activities*. This is provided that the main focus of the profession or business does not involve *regulated activities* and that the *regulated activities* that are carried on arise in a way that is incidental and complementary to the carrying on of the profession or business.

5.11.10 G Although the article 67 exclusion is disapplied (by article 4(4A) of the *Regulated Activities Order* (Specified investments: general)) when a *person* takes up or pursues *insurance distribution* or *reinsurance distribution* as defined by articles 2.1(1), 2.1(2) and 2.2 of the *IDD*, there may be cases

where a *person* is not carrying on activities that amount to *insurance distribution*. For example, where a *person's* activities amount simply to the provision of information on an incidental basis in the context of another professional activity, these may fall outside the scope of article 2.1(1) and 2.1(2) of the *IDD* (see ■ PERG 5.16.2G) and the exclusion in article 67 may then operate to exclude these activities. Also, it is possible that a professional *person's* activities may not amount to a *regulated activity* at all. For example, a doctor who provides a medical report to an *insurer* may be regarded as making arrangements with a view to providing an expert medical opinion rather than with a view to transactions in *contracts of insurance*. In such cases, article 67 will not be needed.

5

5.11.11 G Article 67 may also apply to activities relating to assignments of insurance *policies*, as, in the *FCA's* view, article 2.1(1) of the *IDD* applies essentially to the creation of new *contracts of insurance* and not the assignment of rights under existing *policies*. As such, where a solicitor or licensed conveyancer arranges an assignment of a *contract of insurance*, the exclusion in article 67 remains of potential application. For similar reasons, trustees advising on or arranging assignments of *contracts of insurance* may, in certain circumstances, be able to rely on the exclusions in article 66 of the *Regulated Activities Order*.

5.11.12 G For article 67 to apply in these cases, in addition to ■ PERG 5.11.9G (1) and ■ (2), the activity in question must not be remunerated separately from other services (article 67(2) of the *Regulated Activities Order*).

Activities carried on by a provider of relevant goods or services

5.11.13 G Article 72B (see also ■ PERG 5.3.7 G (Connected contracts of insurance)) may be of relevance to *persons* who supply non-motor goods or services or provide services related to travel in the course of carrying on a profession or business which does not otherwise consist of carrying on *regulated activities*. In the *FCA's* view, the fact that a *person* may carry on *regulated activities* in the course of the carrying on of a profession or business does not, of itself, mean that the profession or business consists of *regulated activities*. This is provided that the main focus of the profession or business does not involve *regulated activities* and that the *regulated activities* that are carried on arise in a way that is incidental and complementary to the carrying on of the profession or business. For example, a travel agent might carry on *insurance distribution activities* in relation to some *contracts of insurance* that satisfy the conditions of the article 72B and some that do not. The former contracts will be excluded from regulation even though the travel agent must seek *authorisation* or become an *appointed representative* to be permitted to sell the latter contracts. The exclusion applies to *insurance distribution activities* when carried on in relation to 'connected contracts of insurance'. In broad terms, a 'connected contract of insurance' is a *contract of insurance* which:

- (1) is not a contract of long-term insurance (as defined by article 3 of the *Regulated Activities Order* (Interpretation));
- (2) [deleted]
- (3) has an annual *premium* of:
 - (a) €600 euro or less (calculated on a pro rata annual basis); or

- (b) 200 euro or less, where the *contract of insurance* is complementary to a service being provided by the provider and the duration of that service is equal to or less than three *months*, or equivalent amounts of sterling or another currency;
- (4) covers:
 - (a) the risk of breakdown, loss of, or damage to, non-motor goods supplied by the provider;
 - (b) travel risks; or
 - (c) the risk of the non-use of services;
- (5) does not cover any liability risks (except, in the case of a contract which covers travel risks, where the cover is ancillary to the main cover provided by the contract); and
- (6) is complementary to the non-motor goods being supplied or service being provided by the provider.
- (7) [deleted]

5.11.13A G

- (1) There are two types of travel risks covered by ■ PERG 5.11.13G (4)(b). The first type covers damage to, or loss of, baggage and other risks linked to the travel booked with the provider where that travel relates to attendance at an event organised or managed by that provider and the party seeking insurance is not an individual (acting in his private capacity) or a small business.
- (2) "Small business" means a sole trader, *body corporate*, *partnership* or unincorporated association which had a turnover in the last financial year of less than £1,000,000. But if the small business is a member of a group within the meaning of section 262(1) of the Companies Act 1985 (and after the repeal of that section, within the meaning of section 474(1) of the Companies Act 2006), reference to its turnover means the combined turnover of the group. Turnover means the amounts derived from the provision of goods and services falling within the business's ordinary activities, after deduction of trade discounts, value added tax and any other taxes based on the amounts so derived.
- (3) The second type of travel risk is damage to, or loss of, baggage and other risks linked to the hire from the insurance provider of an aircraft, vehicle or vessel which does not provide sleeping accommodation.
- (4) ■ PERG 5.11.13G (4)(a) does not apply to the hire of an aircraft, vehicle or vessel but does cover hire purchase and similar agreements.

5.11.14 G

In the FCA's view, the liability risks referred to in ■ PERG 5.11.13G (5) cover risks in relation to liabilities that the *policyholder* might have to others (that is, third party claims). Many *policies* will provide this sort of cover and so fall outside the scope of the exclusion. For example, a *policy* that covers the cost of unauthorised calls made when a mobile telephone is stolen includes 'liability risks' and would not be a 'connected contract of insurance'. By contrast, travel *policies* which provide cover in respect of the *policyholder's*

personal liability while travelling may fall within the exclusion by virtue of ■ PERG 5.11.13G (5), where sold as part of a package by event organisers.

5.11.15 **G** [deleted]

Large risks

5.11.16 **G** Article 72D (Large risks contracts where risk situated outside the EEA) provides an exclusion for large risks situated outside the EEA. Broadly speaking, these are risks relating to:

- (1) railway rolling stock, aircraft, ships, goods in transit, aircraft liability and shipping liability;
- (2) credit and suretyship where relating to the *policyholder's* commercial or professional liability;
- (3) land vehicles, fire and natural forces, property damage, motor vehicle liability where the *policyholder* is a business of a certain size.

For a fuller definition of *contracts of large risks* see the definition in the *Glossary*.

Managers of UCITS and AIFs

5.11.17 **G** Article 72AA of the *Regulated Activities Order* (Managers of UCITS and AIFs) contains an exclusion relating to *firms* with a *Part 4A permission* to *manage a UK UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G).

5.11.18 **G** Article 72G (Local authorities) excludes from the activities of *dealing in investments as agent, arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, assisting in the administration and performance of a contract of insurance* and *advising on investments* any activity carried on by a *local authority* which relates to a *contract of insurance* which is not a *life policy*.

5.11.19 **G** Article 72H (Insolvency Practitioners) excludes from the activities of *dealing in investments as agent, arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, assisting in the administration and performance of a contract of insurance* and *advising on investments* any activity carried on by a *person* acting as an *insolvency practitioner*.



5.12 Link between activities and the United Kingdom

Introduction

5.12.1 **G** Section 19 of the Act (The general prohibition) provides that the requirement to be *authorised* under the Act only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But, when there is a cross-border element, for example because a *customer* is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may need careful consideration.

5.12.2 **G** Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the Act that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the Act) (see ■ PERG 8 (Financial promotion and related activities)), and on giving the impression that a *person* is *authorised* (section 24 (False claims to be authorised or exempt)).

5.12.3 **G** The table in ■ PERG 5.12.4 G is a very simplified summary of territorial issues relating to overseas insurance intermediaries carrying on the business of *insurance distribution activities* in or into the *United Kingdom* for remuneration.

5.12.4 **G** Table Territorial issues relating to overseas insurance intermediaries carrying on *insurance distribution activities* in or into the *United Kingdom*

	Needs Part 4A permission	Overseas persons exclusion available
Third country intermediary operating from branch in the UK	Yes	No
Third country intermediary providing services in (or into) the UK	Yes unless overseas persons exclusion applies	Potentially available

Where are insurance distribution activities carried on?

5.12.5 **G** *Persons carrying on insurance distribution activities from a registered office or head office in the United Kingdom will clearly be carrying on regulated activities in the United Kingdom. However, a person may be considered to be carrying on regulated activities in the United Kingdom even where not carrying on the activity from a registered office or head office in the United Kingdom. This is explained further in ■ PERG 5.12.6 G to ■ PERG 5.12.8 G.*

5.12.6 **G** In determining the location of an activity, and hence whether it is carried on in the *United Kingdom*, various factors need to be taken into account in turn, notably:

- (1) section 418 of the *Act* (Carrying on regulated activities in the United Kingdom);
- (2) the nature of the activity; and
- (3) the *overseas persons* exclusion (see ■ PERG 5.12.9 G to ■ PERG 5.12.10 G (Overseas persons)).

5.12.7 **G** Section 418 of the *Act* extends the meaning that 'carry on regulated activity in the United Kingdom' would normally have by setting out additional cases in which a *person* who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is to be regarded as doing so. Each of the following cases thus amounts to carrying on a *regulated activity* in the *United Kingdom*:

- (1) [deleted]
- (2) where a *UK-based person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*;
- (3) where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment maintained by him in the *United Kingdom*; and
- (4) [deleted]

In each of these cases it is irrelevant where the *person* with whom the activity is carried on is situated.

5.12.8 **G** Otherwise, where the cases in ■ PERG 5.12.7G (1) do not apply, it is necessary to consider further the nature of the activity in order to determine where *insurance distribution* is carried on. *Persons* that arrange *contracts of insurance* will usually be considered as carrying on the activity of *arranging* in the location where these activities take place. As for dealing activities, the location of the activities will depend on factors such as where the acceptance takes place, which in turn will depend on the method of communication used. In the case of advising, this is generally considered to take place where the advice is received.

Overseas persons

5.12.9 **G** Article 72 of the *Regulated Activities Order* (Overseas persons) provides a potential exclusion for *persons* with no permanent place of business in the *United Kingdom* from which *regulated activities* are conducted or offers to conduct *regulated activities* are made. Where these *persons* carry on *insurance distribution activities* in the *United Kingdom*, they may be able to take advantage of the exclusions in article 72 of the *Regulated Activities Order*. In general terms, these apply where the *overseas person* either:

- (1) deals or arranges deals with or through authorised or *exempt persons* only; or
- (2) enters into deals with (or on behalf of) a *person* in the *United Kingdom* or gives advice on investments in the *United Kingdom*, in each case as a result of a 'legitimate approach'.

A 'legitimate approach', for the purposes of (2), is one that results from an unsolicited approach by a *person* (for example, a *customer*) or otherwise is a result of an approach by, or on behalf of, an *overseas person* which complies with the restriction on *financial promotion* under section 21 of the *Act* (see ■ PERG 8.3.1 G (Financial promotion)).

5.12.10 **G** The *overseas person* exclusion is available to *persons* who do not have a permanent place of business in the *United Kingdom* and so is of relevance to third country intermediaries who carry on *insurance distribution activities* in, or into, the *United Kingdom* (for example with or through authorised insurance brokers and insurance *undertakings* operating in the Lloyd's market).

How should persons be authorised?

5.12.11 **G** *UK-based persons* must obtain *Part 4A permission* in relation to their *insurance distribution activities* in the *United Kingdom* as one of the following:

- (1) a *body corporate* whose registered office is situated in the *United Kingdom*; or
- (2) a *partnership* or unincorporated association whose head office is situated in the *United Kingdom*; or
- (3) an individual (that is, a sole trader) whose residence is situated in the *United Kingdom*.

5.12.12 **G** Non-*UK-based persons* wishing to carry on *insurance distribution activities* in the *United Kingdom* must:

- (1) [deleted]
- (2) make use of the *overseas persons* exclusion (which then has the effect that activities are deemed not to be *regulated activities* carried on in the *United Kingdom*); or
- (3) seek *Part 4A permission*.

Passporting

5.12.13 **G** [deleted]

5.12.14 **G** Non-UK-based insurance intermediaries wishing to establish a branch in the UK for the purpose of carrying on *insurance distribution activities* may only do so with *Part 4A permission*.

E-Commerce Directive

5.12.15 **G** [deleted]

5.12.16 **G** [deleted]

5.12.17 **G** [deleted]



5.13 Appointed representatives

What is an appointed representative?

5.13.1 **G** Section 39 of the Act (Exemption of appointed representatives) exempts *appointed representatives* from the need to obtain *authorisation* (or, in relation to an *appointed representative* with a *limited permission*, provides that sections 20(1) and (1A) and 23(1A) of the Act do not apply in relation to the carrying on of the *regulated activity* which is comprised in the business for which his *principal* has accepted responsibility and for which he does not have *limited permission*). An *appointed representative* is a *person* who is party to a contract with an *authorised person* which permits or requires him to carry on certain *regulated activities* (see *Glossary* for full definition).
 ■ SUP 12 (Appointed representatives) contains *rules* and *guidance* relating to *appointed representatives*.

5.13.2 **G** Unless a *person* has only a *limited permission* for certain *credit-related regulated activities*, a *person* who is an *authorised person* cannot be an *appointed representative* (see section 39(1) of the Act (Exemption of appointed representatives)).

Business for which an appointed representative is exempt

5.13.3 **G** An *appointed representative* can carry on only those *regulated activities* which are specified in the *Appointed Representatives Regulations*. The *regulated activities* set out in the table in ■ PERG 5.13.4 G are included in those regulations. As set out in the table, the *insurance distribution activities* that can be carried on by an *appointed representative* differ depending on the type of *contracts of insurance* in relation to which the activities are carried on.

5.13.4 **G** Insurance insurance distribution activities activities able to be carried on by an appointed representative. This table belongs to ■ PERG 5.13.3 G.

Type of contract of insurance	Regulated activities an appointed representative can carry on
<i>General insurance contract</i>	<ul style="list-style-type: none"> • <i>dealing in investments as agent;</i> • <i>arranging;</i> • <i>assisting in the administration and performance of a contract of insurance;</i> • <i>advising on investments;</i> and • <i>agreeing to carry on these regulated activities.</i>

Type of contract of insurance	Regulated activities an appointed representative can carry on
Pure protection contract	<ul style="list-style-type: none"> • <i>dealing in investments as agent</i> (but only where the contract is not a <i>long-term care insurance contract</i>); • <i>arranging</i>; • <i>assisting in the administration and performance of a contract of insurance</i>; • <i>advising on investments</i>; and • agreeing to carry on these <i>regulated activities</i>.
Life policy	<ul style="list-style-type: none"> • <i>arranging</i>; • <i>assisting in the administration and performance of a contract of insurance</i>; • <i>advising on investments</i>; and • agreeing to carry on these <i>regulated activities</i>

Becoming an appointed representative

5.13.5

G

A person may wish to become an *appointed representative* in relation to one or more of the *insurance distribution activities* specified in the *Appointed Representatives Regulations* (see table in ■ PERG 5.13.4 G). If so, the person must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities* and who accepts responsibility for the *appointed representative's* actions when acting for them. ■ SUP 12.4 (What must a firm do when it appoints an appointed representative or an FCA registered tied agent?) and ■ SUP 12.5 (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made. In particular, an *appointed representative* will not be able to commence an *insurance distribution activity* until that *appointed representative* is included on the *Financial Services Register* for such activities.

Persons who are already appointed representatives

5.13.6

G

Where a person (A), who is already an *appointed representative*, proposes to start to carry on any *insurance distribution activities*, A will need to consider the following matters.

- (1) A must become *authorised* if the *insurance distribution activities* that A proposes to carry on include activities that do not fall within the table in ■ PERG 5.13.4 G (for example, *dealing as agent in pure protection contracts*). The Act does not permit any person to be exempt for some activities and *authorised* for others (although a person with only a *limited permission* for certain *credit-related regulated activities* may also be an *appointed representative* for other *regulated activities* specified in the *Appointed Representatives Regulations* (see ■ SUP 12.2.3 G)). A will, therefore, need to apply for *permission* to cover all the *regulated activities* that A proposes to carry on.
- (2) If A proposes to carry on *regulated activities* that are specified in the *Appointed Representatives Regulations* in relation to *contracts of insurance* (see the table in ■ PERG 5.13.4 G), A may be able to do so as an *appointed representative* bearing in mind the following.
 - (a) A will need to be appointed by an *authorised person* prepared to accept responsibility for A's *insurance distribution activities* when

acting for the *authorised person*. The *authorised person* must have *permission* to carry on these *regulated activities*.

- (b) If these *insurance distribution activities* are to be carried on for the same *authorised person* who has already appointed A for other *regulated activities*, the contract between them will need to be amended to reflect the additional activities. Other amendments to the contract will be required (see ■ SUP 12.5.6A R).
- (c) A cannot commence an *insurance distribution activity* until A is included on the *Financial Services Register* as carrying on such activities.
- (d) An *appointed representative* would be entitled to have more than one *principal* subject to certain restrictions. In relation to *non-investment insurance contracts* (*general insurance contracts* and *pure protection contracts*), an *appointed representative* may have an unlimited number of *principals*. In relation to *regulated mortgage contracts* and *designated investment business*, an *appointed representative* is limited in the number of *principals* he may have. In any case where an *appointed representative* has multiple *principals*, those *principals* are required to enter into a multiple- *principal* agreement (see ■ SUP 12.4.5D G to ■ SUP 12.4.5G G (Appointment of an appointed representative (other than an introducer appointed representative))).
- (e) If A's activities are limited to introducing, A should consider the specific *Handbook* provisions relating to *introducer appointed representatives* (see ■ SUP 12 (What must a firm do when it appoints an appointed representative or an FCA registered tied agent?)).

5.14 Exemptions

Professionals

- 5.14.1** G *Professional firms* (broadly firms of solicitors, accountants and actuaries) may carry on *insurance distribution activities* in the course of their professional activities. *Exempt professional firms* carrying on *insurance distribution activities* may continue to be able to use the *Part XX exemption* to avoid any need for *authorisation*. ■ PROF 2 (Status of exempt professional firm) contains *guidance* on the *Part XX exemption*. They will, however, need to be shown on the *Financial Services Register* as carrying on *insurance distribution activities*, in order to benefit from this exemption. The task of registration is the responsibility of the *designated professional bodies* who will need to inform the *FCA* both of member firms carrying on *insurance distribution activities* and individuals within firms' management responsible for these activities.
- 5.14.2** G *Professional firms* with practices that involve acting for claimants in litigation against *insurance undertakings* are likely to be carrying on the *regulated activity of assisting in the administration and performance of a contract of insurance*. *Exempt professional firms* whose practices contain a material element of such activity should consider whether they can continue to take advantage of the *Part XX exemption* to avoid any need for *authorisation*, having regard to the relevant provisions of the *Act*, in particular section 327 (Exemption from the general prohibition) and the *guidance* in ■ PROF 2.1.14 G (Exempt regulated activities).
- 5.14.3** G *Professional firms* should be aware of the disapplication of the exclusions for trustees (article 66) and activities carried on in the course of a profession or non-investment business (article 67) outlined in ■ PERG 5.11.7 G (Exclusions disappplied in connection with insurance distribution) where their activities would amount to *insurance distribution*. Where they do not, they will still be able to rely upon article 67. Otherwise, the *Non-Exempt Activities Order* imposes limitations on the extent to which *professional firms* can give advice to individuals. In particular, a *professional firm* cannot make a recommendation to a private client to buy a life policy, unless it is endorsing a corresponding recommendation given to the *client*. The recommendation it endorses must be one given by an *authorised person* permitted to advise on *life policies*, or an *exempt person* for these purposes. No such restrictions apply, however, in relation to *contracts of insurance* other than *life policies*.
- 5.14.4** G As indicated in ■ PERG 5.6.8 G, the article 72C exclusion (Provision of information on an incidental basis) is potentially available to unauthorised *professional firms* including *exempt professional firms*. This may be relevant

to *professional firms* arranging *contracts of insurance* for *clients* on an individual basis.

Other exemptions

5.14.5

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In addition to certain named *persons* exempted by the *Exemption Order* from the need to obtain *authorisation*, the following bodies are exempt in relation to *insurance distribution activities* that do not relate to *life policies*:

- (1) [deleted]
- (2) registered social landlords in England and Wales within the meaning of Part I of the Housing Act 1996 but not their subsidiaries;
- (3) registered social landlords in Scotland within the meaning of the Housing (Scotland) Act 2001 but not their subsidiaries;
- (4) the Office of Tenants and Social Landlords (known as the Tenant Services Authority);
- (4A) the Homes and Communities Agency;
- (5) Scottish Homes; and
- (6) The Northern Ireland Housing Executive.

5.15 Illustrative tables

5.15.1 **G** [deleted]

5.15.2 **G** [deleted]

5.15.3 **G** The table in **■ PERG 5.15.4 G** is designed as a short, user-friendly guide but should be read in conjunction with the relevant sections of the text of this *guidance*. It is not a substitute for consulting the text of this *guidance* or seeking professional advice as appropriate (see **■ PERG 5.1.6 G** on the effect of this *guidance*). References in this table to articles are to articles of the *Regulated Activities Order*. In this table, it is assumed that each of the activities described is carried on by way of business (see **■ PERG 5.4**). Save where otherwise indicated, it is assumed that the intermediary is carrying on activities in respect of *policies* where the intermediary is not the *policyholder*. Also, that this table does not provide an exhaustive list of all of the exclusions or exemptions that are of relevance to each type of activity. For a full explanation of the exclusions and exemptions under the *Regulated Activities Order* and their applicability see generally **■ PERG 5.3.7 G** to **■ PERG 5.3.8 G**, **■ PERG 5.6.4AG** to **■ PERG 5.6.23 G**, **■ PERG 5.7.7 G**, **■ PERG 5.8.24 G** to **■ PERG 5.8.26 G**, **■ PERG 5.11**, **■ PERG 5.12.9 G** to **■ PERG 5.12.10 G**, **■ PERG 5.13** and **■ PERG 5.14**. This table is referred to in **■ PERG 5.7.5 G** (The regulated activities: assisting in the administration and performance of a contract of insurance).

5.15.4 **G** Types of activity – are they regulated activities and, if so, why?

Type of activity	Is it a regulated activity?	Rationale
MARKETING AND EFFECTING INTRODUCTIONS		
Passive display of information -for example, medical insurance brochures in doctor’s surgery (whether or not remuneration is received for this activity)	No.	Merely displaying information does not constitute making arrangements under article 25(2) (see PERG 5.6.4 G).
Providing a customer with contact details or information about a broker / <i>insurance undertaking</i> (whether by phone, fax, e-mail, face-to-face or any	Yes, but articles 33B or 72C may be available.	This will constitute making arrangements under article 25(2). But, the exclusions in articles 33B or 72C will apply if all the intermediary does is supply informa-

Type of activity	Is it a regulated activity?	Rationale
other means of communication)		tion to the customer and the relevant conditions of those exclusions are otherwise met (see PERG 5.6.4AG to PERG 5.6.9 G). Generally, this will not amount to advice under article 53(1) unless there is an implied recommendation of a particular <i>policy</i> (see PERG 5.8.4 G), in which case articles 33B and 72C would not be available.
Providing an <i>insurance undertaking</i> /broker with contact details of customer	Yes, but article 33B may be available.	This will constitute making arrangements under article 25(2) when undertaken in the context of regular or ongoing arrangements for introducing customers. Article 33B applies to the provision of information about a potential policyholder to an <i>insurance undertaking</i> or an insurance or reinsurance intermediary, and so may apply here if the relevant conditions are met. It will only apply if the provider of the customer information does not take any step other than providing the information to assist in the conclusion of a <i>contract of insurance</i> .
Marketing on behalf of <i>insurance undertaking</i> to intermediaries only (for example, broker consultants)	Yes.	This amounts to work preparatory to the conclusion of <i>contracts of insurance</i> and so constitutes making arrangements under article 25(2). Article 33B does not apply because the information provided to the intermediary doesn't relate to a potential policyholder, and isn't provided to a policyholder. Article 72C is not available because this activity does not involve provision of information to the <i>pol-</i>

Type of activity	Is it a regulated activity?	Rationale
Telemarketing services (that is, companies specialising in marketing an <i>insurance undertaking's</i> products/services to prospective customers)	Yes.	<i>icyholder</i> or potential <i>policyholder</i> only. This amounts to introducing and/or other work preparatory to the conclusion of <i>contracts of insurance</i> and so constitutes making arrangements under article 25(2). This could also involve article 25(1) <i>arranging</i> where the telemarketing company actually <i>sells</i> a particular <i>policy</i> and could involve <i>advising on investments</i> . Article 33B is unlikely to apply, as the telemarketing company is likely to be actively persuading the customer rather than merely providing information. Article 72C will not be available where the provision of information is more than incidental to the telemarketing company's main business. Articles 33B and 72C will not be available where the telemarketing company is <i>advising on investments</i> .
PRE-PURCHASE DISCUSSIONS WITH CUSTOMERS AND ADVICE		
Discussion with client about need for insurance generally/need to take out a particular type of insurance	Generally, no. Articles 33B or 72C available if needed.	Not enough, of itself, to constitute making arrangements under article 25(2), but you should consider whether, viewed as a whole, your activities might amount to <i>arranging</i> . If so, articles 33B or 72C might be of application (see PERG 5.6.5 G to PERG 5.6.9 G).
Advising on the level of cover needed	Generally, no. Articles 33B or 72C available if needed.	Not enough, of itself, to constitute making arrangements under article 25(2), but you should consider whether, viewed as a whole, your activities might amount to making arrangements under article 25(2) (see PERG 5.8.3 G). If so, articles 33B or 72C might

Type of activity	Is it a regulated activity?	Rationale
Pre-purchase questioning in the context of filtered sales (intermediary asks a series of questions and then suggests several <i>policies</i> which suit the answers given)	Yes. Subject to article 72 C exclusion where available.	be of application (see PERG 5.6.4AG to PERG 5.6.9 G). This will constitute <i>arranging</i> although article 72C may be of application (see PERG 5.6.4AG to PERG 5.6.9 G). If there is no express or implied recommendation of a particular <i>policy</i> , this activity will not amount to advice under article 53(1) (see PERG 5.8.15 G to PERG 5.8.19 G).
Explanation of the terms of a particular <i>policy</i> or comparison of the terms of different policies	Possibly. Article 72C available.	This is likely to amount to making arrangements under article 25(2). In certain circumstances, it could involve <i>advising on investments (except P2P agreements)</i> (see PERG 5.8.8 G (Advice or information)). Where the explanation is provided to the potential <i>policyholder</i> , and does not involve <i>advising on investments (except P2P agreements)</i> , article 72C may be of application (see PERG 5.6.5 G to PERG 5.6.9 G), and where information is provided by a professional in the course of a profession, article 67 may apply (see PERG 5.11.9 G to PERG 5.11.12 G). Article 33B will not be available where this involves taking steps other than the provision of information.
Advising that a customer take out a particular <i>policy</i>	Yes.	This amounts to advice on the merits of a particular <i>policy</i> under article 53(1) (see PERG 5.8.4 G to PERG 5.8.5 G).
Advising that a customer does not take out a particular <i>policy</i>	Yes.	This amounts to advice on the merits of a particular <i>policy</i> under article 53(1) (see PERG 5.8.4 G to PERG 5.8.5 G).
Advice by journalists in	Generally, no because	Article 54 provides an

Type of activity	Is it a regulated activity?	Rationale
newspapers, broadcasts etc.	of the article 54 exclusion.	exclusion for advice given in newspapers etc (see PERG 5.8.24 G to PERG 5.8.25 G).
Giving advice to a customer in relation to <i>buying</i> a consumer product, where insurance is a compulsory secondary purchase and/or a benefit that comes with <i>buying</i> the product	Not necessarily but depends on the circumstances.	Where the advice relates specifically to the merits of the consumer product, it is possible that references to the accompanying insurance may be seen to be information and not advice. If, however, the advice relates, in part, to the merits of the insurance element, then it will be <i>regulated activity</i> .
ASSISTING CUSTOMERS WITH COMPLETING/SENDING APPLICATION FORMS		
Providing information to customer who fills in application form	Possibly. Subject to article 67 or 72C, and article 33B, exclusions where available.	This activity may amount to <i>arranging</i> although the exclusions in article 67 (see PERG 5.11.9 G to PERG 5.11.12 G) and article 72C (see PERG 5.6.4AG to PERG 5.6.9 G) may be of application. Article 33B could also apply, depending on the type of information provided.
Helping a potential <i>policyholder</i> fill in an application form	Yes.	This activity amounts to <i>arranging</i> . Articles 33B and 72C will not apply because this activity goes beyond the mere provision of information to a <i>policyholder</i> or potential <i>policyholder</i> (see PERG 5.6.4AG to PERG 5.6.9 G).
Receiving completed proposal forms for checking and forwarding to an <i>insurance undertaking</i> (for example, an administration outsourcing service provider that receives and processes proposal forms)	Yes.	This amounts to <i>arranging</i> . Articles 33B and 72C do not apply because this activity goes beyond the mere provision of information to a <i>policyholder</i> or potential <i>policyholder</i> (see PERG 5.6.4AG to PERG 5.6.9 G).
Assisting in completion of proposal form and sending to <i>insurance undertaking</i>	Yes.	This activity amounts to <i>arranging</i> . Articles 33B and 72C do not apply because this activity goes beyond the mere provision of informa

Type of activity	Is it a regulated activity?	Rationale
tion (see PERG 5.6.4AG to PERG 5.6.9 G).		
NEGOTIATING AND CONCLUDING CONTRACTS OF INSURANCE		
Negotiating terms of <i>policy</i> on behalf of a customer with the <i>insurance undertaking</i>	Yes.	This activity amounts to <i>arranging</i> (see PERG 5.6.2 G).
Negotiating terms of <i>policy</i> on behalf of <i>insurance undertaking</i> with the customer and signing proposal form on his behalf	Yes.	These activities amount to both <i>arranging</i> and <i>dealing in investments as agent</i> .
Concluding a <i>contract of insurance</i> on insurance company's behalf, for example, motor dealer who has authority to conclude insurance contract on behalf of <i>insurance undertaking</i> when <i>selling a car</i>	Yes.	A <i>person</i> carrying on this activity will be <i>dealing in investments as agent</i> . He will also be <i>arranging</i> (as the article 28 exclusion only applies in the limited circumstances envisaged under article 28(3)) (see PERG 5.6.12 G).
Agreeing, on behalf of a prospective <i>policyholder</i> , to <i>buy a policy</i> .	Yes.	A <i>person</i> who, with authority, enters into a <i>contract of insurance</i> on behalf of another is <i>dealing in investments as agent</i> under article 21, and will also be <i>arranging</i> .
Providing compulsory insurance as a secondary purchase	Yes. It will amount to <i>dealing in investments as agent or arranging</i> .	The fact that the insurance is secondary to the primary product does not alter the fact that arranging the package involves <i>arranging</i> the insurance.
COLLECTION OF PREMIUMS		
Collection of cheque for premium from the customer at the pre-contract stage.	Yes (as part of <i>arranging</i>).	This activity is likely to form part of <i>arranging</i> . But the mere collection/ receipt of premiums from the customer is unlikely, without more, to amount to <i>arranging</i> .
Collection of premiums at post-contract stage	No.	The mere collection of premiums from <i>policyholders</i> is unlikely, without more, to amount to <i>assisting in the administration and performance of a contract of insurance</i> .
MID-TERM ADJUSTMENTS AND ASSIGNMENTS		

Type of activity	Is it a regulated activity?	Rationale
Solicitors or licensed conveyancers discharging client instructions to assign <i>contracts of insurance</i> .	Not where article 67 applies.	As the assignment of rights under a <i>contract of insurance</i> (as opposed to the creation of new <i>contracts of insurance</i>) does not fall within <i>insurance distribution</i> , article 67 is of potential application (see PERG 5.11.9 G to PERG 5.11.12 G).
Making mid-term adjustments to a <i>policy</i> , for example, property manager notifies changes to the names of the leaseholders registered as “interested parties” in the <i>policy</i> in respect of the property.	Yes.	Assuming the freeholder (as <i>policyholder</i>) is obliged under the terms of the <i>policy</i> to notify the <i>insurance undertaking</i> of changes to the identity of the leaseholders, the property manager is likely to be <i>assisting in the administration and the performance of the contract of insurance</i> .
TRADED ENDOWMENT POLICIES (“TEPs”)		
Making introductions for the purposes of <i>selling</i> TEPs	Yes, unless article 72C applies.	Making introductions for these purposes is <i>arranging</i> unless article 72C applies (see PERG 5.6.5 G to PERG 5.6.9 G). The exclusions in article 29 (Arranging deals with or through authorised persons) and 33 (Introducing) no longer apply to <i>arranging contracts of insurance</i> .
Market makers in TEPs	Yes, although the exclusion in article 28 may apply.	Unauthorised market makers can continue to make use of the exclusions in articles 15 (Absence of holding out etc.) and 16 (Dealing in contractually based investments), where appropriate. In order to avoid the need for <i>authorisation</i> in respect of <i>arranging</i> they may be able to rely upon article 28 (see PERG 5.6.12 G).
ASSISTING POLICYHOLDER WITH MAKING A CLAIM		
Merely providing information to the in	No.	Of itself, this is likely to amount to assisting in

Type of activity	Is it a regulated activity?	Rationale
<p>Insured to help him complete a claim form</p>		<p>the administration but not the performance of a <i>contract of insurance</i>. In the FCA's view, the provision of information in these circumstances is more akin to facilitating performance of a <i>contract of insurance</i> rather than assisting in the performance (see PERG 5.7.3 G to PERG 5.7.5 G)</p>
<p>Completion of claim form on behalf of insured</p>	<p>Potentially.</p>	<p>This activity amounts to assisting in the administration of a <i>contract of insurance</i>. Whether this activity amounts to <i>assisting in the administration and performance of a contract of insurance</i> will depend upon whether a person's assistance in filling in a claims form is material to whether performance of the contractual obligation to notify a claim takes place (see PERG 5.7.2 G to PERG 5.7.3 G).</p>
<p>Notification of claim to <i>insurance undertaking</i> and helping negotiate its settlement on the <i>policyholder's</i> behalf</p>	<p>Yes.</p>	<p>This activity amounts to <i>assisting in the administration and performance of a contract of insurance</i> (see PERG 5.7.4 G).</p>
<p>ASSISTING INSURANCE UNDERTAKING WITH CLAIMS BY POLICYHOLDERS</p>		
<p>Negotiation of settlement of claims on behalf of an <i>insurance undertaking</i></p>	<p>No.</p>	<p>Managing claims on behalf of an <i>insurance undertaking</i> does not amount to <i>assisting in the administration and performance of a contract of insurance</i> by virtue of the exclusion in article 39B (see PERG 5.7.7 G).</p>
<p>Providing information to an <i>insurance undertaking</i> in connection with its investigation or assessment of a claim</p>	<p>No.</p>	<p>This activity does not amount to <i>assisting in the administration and performance of a contract of insurance</i>.</p>
<p>Loss adjusting and managing claims (for example, by administra-</p>	<p>Potentially.</p>	<p>These activities may amount to <i>assisting in the administration and</i></p>

Type of activity	Is it a regulated activity?	Rationale
tion outsourcing providers)		<i>performance of a contract of insurance</i> . Article 39B excludes these activities, however, when undertaken on behalf of an <i>insurance undertaking</i> only (see PERG 5.7.7 G).
Providing an expert appraisal of a claim	No.	This activity does not amount to <i>assisting in the administration and performance of a contract of insurance</i> whether carried out on behalf of an <i>insurance undertaking</i> or otherwise.
Jeweller repairs customer's jewellery pursuant to a <i>policy</i> which permits the jeweller to carry out repairs	No.	This activity does not amount to <i>assisting in the administration and performance of a contract of insurance</i> . It amounts to managing claims on behalf of an <i>insurance undertaking</i> and so falls within the exclusion in article 39B (see PERG 5.7.7 G).

5.15.5 G [deleted]

5.15.6 G [deleted]

5.15.7 G [deleted]

5.15.8 G [deleted]



5.16 Meaning of 'insurance distribution' and 'reinsurance distribution'

5.16.1 G ■ PERG 5.16.2 G sets out the text of article 2.1(1), 2.1(2) and 2.2 of the *IDD*. It is referred to in ■ PERG 5.2.5 G and ■ PERG 5.2.6R (Approach to implementation of the *IDD*), ■ PERG 5.8.13G (Advice must relate to the merits of buying or selling a contract of insurance), ■ PERG 5.11.7 G (Exclusions disapplied in connection with insurance distribution) and ■ PERG 5.11.10 G (Activities carried on in the course of a profession or non-investment business).

5.16.2 G

- (1) Text of article 2.1(1) of the Insurance Distribution Directive

“Insurance distribution’ means the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.
- (2) Text of article 2.1(2) of the Insurance Distribution Directive

“Reinsurance distribution’ means the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of reinsurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim”.
- (3) Text of article 2.2 of the Insurance Distribution Directive

“For the purposes of points (1) and (2) of paragraph 1, the following shall not be considered to constitute insurance distribution or reinsurance distribution:

 - (a) the provision of information on an incidental basis in the context of another professional activity where:
 - (i) the provider does not take any additional steps to assist in concluding or performing an insurance contract;
 - (ii) the purpose of that activity is not to assist the customer in concluding or performing a reinsurance contract;

- (b) the management of claims of an insurance undertaking or of a reinsurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims;
- (c) the mere provision of data and information on potential policyholders to insurance intermediaries, reinsurance intermediaries, insurance undertakings or reinsurance undertakings where the provider does not take any additional steps to assist in the conclusion of an insurance or reinsurance contract;
- (d) the mere provision of information about insurance or reinsurance products, an insurance intermediary, a reinsurance intermediary, an insurance undertaking or a reinsurance undertaking to potential policyholders where the provider does not take any additional steps to assist in the conclusion of an insurance or reinsurance contract."

Chapter 6

Guidance on the Identification of Contracts of Insurance



6.1 Application

6.1.1

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This chapter is relevant to any *person* who needs to know what activities fall within the scope of the *Act*.



6.2 Purpose of guidance

6.2.1

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The purpose of this *guidance* is to set out:

- (1) at ■ PERG 6.5 the general principles; and
- (2) at ■ PERG 6.6 the range of specific factors;

that the *FCA* regards as relevant in deciding whether any arrangement is a *contract of insurance*.

6.2.2

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This *guidance* includes (at ■ PERG 6.7) a number of examples, showing how the factors have been applied to reach conclusions with respect to specific categories of business. Further examples may be published from time-to-time.

6.3 Background

- 6.3.1** **G** The business of *effecting or carrying out contracts of insurance* is subject to prior *authorisation* under the *Act* and regulation by the *FCA* and *PRA*. (There are some limited exceptions to this requirement, for example, for breakdown insurance.)
- 6.3.2** **G** The *Regulated Activities Order*, which sets out the activities for which *authorisation* is required, does not attempt an exhaustive definition of a '*contract of insurance*'. Instead, it makes some specific extensions and limitations to the general common law meaning of the concept. For example, it expressly extends the concept to fidelity bonds and similar contracts of guarantee, which are not *contracts of insurance* at common law, and it excludes certain *funeral plan contracts*, which would generally be *contracts of insurance* at common law. Similarly, the *Exemption Order* excludes certain trade union provident business, which would also be insurance at common law. One consequence of this is that common law judicial decisions about whether particular contracts amount to 'insurance' or 'insurance business' are relevant in defining the scope of the *FCA's authorisation* and regulatory activities, as they were under predecessor legislation.
- 6.3.3** **G** The courts have not fully defined the common law meaning of 'insurance' and 'insurance business', since they have, on the whole, confined their decisions to the facts before them. They have, however, given useful guidance in the form of descriptions of *contracts of insurance*.
- 6.3.4** **G** The best established of these descriptions appears in the case of *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658. This case, read with a number of later cases, treats as insurance any enforceable contract under which a 'provider' undertakes:
- (1) in consideration of one or more payments;
 - (2) to pay money or provide a corresponding benefit (including in some cases services to be paid for by the provider) to a 'recipient';
 - (3) in response to a defined event the occurrence of which is uncertain (either as to when it will occur or as to whether it will occur at all) and adverse to the interests of the recipient.



6.4 Limitations of this guidance

- 6.4.1** **G** Although what appears below is the *FCA's* approach, it cannot state what the law is, as that is a matter for the courts. Accordingly, this *guidance* is not a substitute for adequate legal advice on any transaction.
- 6.4.2** **G** The list of principles and factors is not closed and this *guidance* by no means covers all types of insurance-like business.
- 6.4.3** **G** The *FCA* will consider each case on its facts and on its merits.
- 6.4.4** **G** In some cases transactions with the same commercial purpose or economic effect may be classified differently, ie some as insurance and some as non-insurance.

6.5 General principles

- 6.5.1** **G** The starting point for the identification of a *contract of insurance* is the case of *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658, from which the description set out in ■ PERG 6.3.4 G is drawn. Any contracts that fall outside that description are unlikely to be *contracts of insurance*.
- 6.5.2** **G** The *FCA* will interpret and apply the description in ■ PERG 6.3.4 G in the light of applicable legislation and common law, including case law.
- 6.5.3** **G** In particular, if the common law is unclear as to whether or not a particular contract is a *contract of insurance*, the *FCA* will interpret and apply the common law in the context of and in a way that is consistent with the purpose of the *Act* as expressed in the *FCA*'s statutory objectives.
- 6.5.4** **G** The *FCA* will apply the following principles of construction to determine whether a contract is a *contract of insurance*.
- (1) In applying the description in ■ PERG 6.3.4 G, more weight attaches to the substance of the contract, than to the form of the contract. The form of the contract is relevant (see ■ PERG 6.6.8 G (3) and ■ (4)) but not decisive of whether a contract is a *contract of insurance*: *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1997] Ch. 173 (C.A.).
 - (2) In particular, the substance of the provider's obligation determines the substance of the contract: *In re Sentinel Securities* [1996] 1 WLR 316. Accordingly, the *FCA* is unlikely to treat the provider's or the customer's intention or purpose in entering into a contract as relevant to its classification.
 - (3) The contract must be characterised as a whole and not according to its 'dominant purpose' or the relative weight of its 'insurance content': *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1997] Ch. 173 (C.A.).
 - (4) Since only contracts of marine insurance and certain *contracts of insurance* effected without consideration are required to be in writing, a *contract of insurance* may be oral or may be expressed in a number of documents.

6.6 The factors

6.6.1 **G** Contracts under which the provider has an absolute discretion as to whether any benefit is provided on the occurrence of the uncertain event, are not *contracts of insurance*. This may be the case even if, in practice, the provider has never exercised its discretion so as to deny a benefit: *Medical Defence Union v. Department of Trade and Industry* [1979] 2 W.L.R. 686. The degree of discretion required and the matters to which it must relate are illustrated in ■ PERG 6.7.1 G (Example 1: discretionary medical schemes).

6.6.2 **G** The 'assumption of risk' by the provider is an important descriptive feature of all *contracts of insurance*. The 'assumption of risk' has the meaning in (1) and (3), derived from the case law in (2) and (4) below. The application of the 'assumption of risk' concept is illustrated in ■ PERG 6.7.2 G (Example 2: disaster recovery business).

- (1) Case law establishes that the provider's obligation under a *contract of insurance* is an enforceable obligation to respond (usually, by providing some benefit in the form of money or services) to the occurrence of the uncertain event. This *guidance* describes the assumption of that obligation as the 'assumption' by the provider of (all or part of) the insured risk. 'Transfer of risk' has the same meaning in this *guidance*.
- (2) The case law referred to in (1) is *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658, read with *Hampton v. Toxteth Co-operative Provident Society Ltd* [1915] 1 Ch. 721 (C.A.), *Department of Trade and Industry v. St Christopher Motorists Assoc. Ltd* [1974] 1 All E.R. 395, *Medical Defence Union v. Department of Trade and Industry* [1979] 2 W.L.R. 686 and *Wooding v. Monmouthshire and South Wales Mutual Indemnity Soc. Ltd* [1939] 4 All E.R. 570 (H.L.).
- (3) The *FCA* recognises that there is a line of case law in relation to *long-term insurance business* that establishes that a contract may be a *contract of insurance* even if, having effected that contract, the provider 'trades without any risk'. The *FCA* accepts that the insurer's risk of profit or loss from insurance business is not a relevant descriptive feature of a *contract of insurance*. But in the *FCA*'s view that is distinct from and does not undermine the different proposition in (1).
- (4) The case law referred to in (3) is *Flood v. Irish Provident Assurance Co. Ltd* [1912] 2 Ch. 597 (C.A.), *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1995] Ch. 122, *Re Barrett; Ex parte Young v. NM Superannuation Pty Ltd*, (1992) 106 A.L.R. 549, *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1997] Ch. 173 (C.A.).

- 6.6.3 **G** Contracts, under which the amount and timing of the payments made by the recipient make it reasonable to conclude that there is a genuine pre-payment for services to be rendered in response to a future contingency, are unlikely to be regarded as insurance. In general, the *FCA* expects that this requirement will be satisfied where there is a commercially reasonable and objectively justifiable relationship between the amount of the payment and the cost of providing the contract benefit.
- 6.6.4 **G** Contracts under which the provider undertakes to provide periodic maintenance of goods or facilities, whether or not any uncertain or adverse event (in the form of, for example, a breakdown or failure) has occurred, are unlikely to be *contracts of insurance*.
- 6.6.5 **G** Contracts under which, in consideration for an initial payment, the provider stands ready to provide services on the occurrence of a future contingency, on condition that the services actually provided are paid for by the recipient at a commercial rate, are unlikely to be regarded as insurance. Contrast **■ PERG 6.7.21 G** (Example 7: solicitors' retainers) with **■ PERG 6.7.22 G** (Example 8: time and distance cover).
- 6.6.6 **G** The recipient's payment for a *contract of insurance* need not take the form of a discrete or distinct premium. Consideration may be part of some other payment, for example the purchase price of goods (*Nelson v. Board of Trade* (1901) 17 T.L.R. 456). Consideration may also be provided in a non-monetary form, for example as part of the service that an employee is contractually required to provide under a contract of employment (*Australian Health Insurance Assoc. Ltd v. Esso Australia Pty Ltd* (1993) 116 A.L.R. 253).
- 6.6.7 **G** Under most commercial contracts with a *customer*, a provider will assume more than one obligation. Some of these may be insurance obligations, others may not. The *FCA* will apply the principles in **■ PERG 6.5.4 G**, in the way described in (1) to (3) to determine whether the contract is a *contract of insurance*.
- (1) If a provider undertakes an identifiable and distinct obligation that is, in substance an insurance obligation as described in **■ PERG 6.5.4 G**, then, other things being equal, the *FCA* is likely to find that by undertaking that obligation the provider has effected a *contract of insurance*.
 - (2) The presence of an insurance obligation will mean that the contract is a *contract of insurance*, whether or not that obligation is 'substantial' in comparison with the other obligations in the contract.
 - (3) The presence of an insurance obligation will mean that the contract is a *contract of insurance*, whether or not entering into that obligation forms a significant part of the provider's business. The *FCA* generally regards a provider as undertaking an obligation 'by way of business' if he takes on an obligation in connection with or for the purposes of his core business, to realise a commercial advantage or benefit.

6.6.8

G The following factors are also relevant.

- (1) A contract is more likely to be regarded as a *contract of insurance* if the amount payable by the recipient under the contract is calculated by reference to either or both of the probability of occurrence or likely severity of the uncertain event.
- (2) A contract is less likely to be regarded as a *contract of insurance* if it requires the provider to assume a speculative risk (ie a risk carrying the possibility of either profit or loss) rather than a pure risk (ie a risk of loss only).
- (3) A contract is more likely to be regarded as a *contract of insurance* if the contract is described as insurance and contains terms that are consistent with its classification as a *contract of insurance*, for example, obligations of the utmost good faith.
- (4) A contract that contains terms that are inconsistent with obligations of good faith may, therefore, be less likely to be classified as a *contract of insurance*; however, since it is the substance of the provider's rights and obligations under the contract that is more significant, a contract does not cease to be a *contract of insurance* simply because the terms included are not usual insurance terms.

6.7 Examples

Example 1: discretionary medical schemes

6.7.1 **G** Medical schemes under which an employer operates or contributes to a fund, from which the employee has a right to a benefit (for example, a payment) on the occurrence of a specified illness or injury, are likely to be insurance schemes. This will be the case whether the employee makes any contribution to the fund, or the scheme is funded by the employer as an emolument. The scheme would not be insurance, however, if the employer has an absolute discretion whether or not to provide any benefit to the employee. Absolute discretion requires, for example, that the employer has an unfettered discretion both as to whether the employee will receive a benefit and as to the amount of that benefit. The absolutely discretionary nature of the benefits should also be clear from the terms of the scheme and any literature published about or in relation to it. If these requirements are met, it may not be relevant that, in practice, the employer has never refused to meet a valid claim under the scheme.

Example 2: disaster recovery business

6.7.2 **G** The disaster recovery provider sets up and maintains a range of IT and related facilities (PABX etc). The disaster recovery contracts so far considered by the *FCA* give the recipient, subject to certain conditions including an up front payment, priority access to all or a specified part of these facilities if a 'disaster' causes the failure of a similar business system on which the recipient relies. The provider sells access to the same facilities to a number of different recipients, both for use in response to 'disasters' and, more usually, for use in testing and refining the recipient's ability to switch to alternative systems in the event of a disaster.

6.7.3 **G** In principle, a significant part of disaster recovery business could potentially fall within the description of a *contract of insurance* set out in ■ PERG 6.3.4 G. The provider undertakes, in consideration of a payment, to provide the recipient with services (alternative facilities) in response to a defined event (a disaster), which is adverse to the interests of the recipient and the occurrence of which is uncertain. The risk dealt with under the disaster recovery contract is a pure risk (see ■ PERG 6.6.8 G (2)) and, at least at the commencement of the contract, the provider assumes that risk, within the terms of ■ PERG 6.6.2 G.

6.7.4 **G** However, the disaster recovery contracts considered by the *FCA* had two key features.

- (1) Priority access to facilities in the event of a disaster was expressed to be on a 'first come, first served' basis. The contracts provided expressly that if the facilities needed by recipient A were already in use, following an earlier invocation by recipient B, the provider's obligation to recipient A was reduced to no more than an obligation of 'best endeavours' to meet A's requirements. The entry into additional contracts of this kind did not increase the probability that the provider's existing resources would be inadequate to meet all possible claims. The terms of the contract were such that there was no pattern of claims that would cause the provider to have to pay claims from its own resources.
- (2) In general, the contracts were priced so that the total consideration collected from the recipient over the life of the contract bore a reasonable and justifiable relationship to the commercial cost of the services actually provided to the recipient (see ■ PERG 6.6.5 G). This was achieved, for example, by post-invocation charges levied according to the actual usage of services.

6.7.5 **G** Based on these features, the *FCA* reached the conclusion, with which the other terms of the contracts were consistent (■ PERG 6.6.8 G (3)), that these disaster recovery contracts were not *contracts of insurance*.

6.7.6 **G** An important part of the conclusion in ■ PERG 6.7.5 G was that, although the provider assumed a risk at the outset of the contract, looking at the contract as a whole and interpreting the common law in the context of the *FCA* objectives (see ■ PERG 6.5.2 G and ■ PERG 6.5.3 G) there was no relevant assumption of risk.

- (1) The presence or absence of an assumption of risk is an important part of the statutory rationale for the prudential regulation of insurance.
- (2) In *Medical Defence Union v. Department of Trade and Industry* [1979] 2 W.L.R. 686, the court accepted that since there was no common law definition of a *contract of insurance*, the meaning of the term 'fell to be construed in its context according to the general law'. The court recognised that in deciding whether a contract was a *contract of insurance* for the purposes of the Insurance Companies Act 1974, the 'context' included the purpose of the regulatory statute.
- (3) Accordingly, when the common law is unclear, the *FCA* will assess the desirability of regulating a particular contract as insurance in the light of the statutory objectives in the *Act*. The *FCA* will use that assessment as an indicator of whether or not a sufficient assumption of risk is present for the contract to be classified as a *contract of insurance* at common law.
- (4) In the case of disaster recovery contracts, the fact that there was no pattern of claims that would cause the provider to have to pay claims from its own resources led the *FCA* to conclude that there was no relevant assumption of risk by the disaster recovery provider.

Example 3: manufacturers' and retailers' warranties

6.7.7 **G** Under a simple manufacturer's or retailer's warranty the purchase price of the goods includes an amount, in consideration of which the manufacturer undertakes an obligation (the warranty) to respond (without further expense to the purchaser) to specified defects in the product that emerge within a defined time after purchase. When the warranty operates, the manufacturer or retailer provides repairs or replacement products in response to a defined event (the emergence of a latent defect in the product), which is adverse to the interests of the purchaser and the occurrence of which is uncertain. In summary, therefore, a simple manufacturer's or retailer's warranty is an identifiable and distinct obligation that is similar to and capable of being described as an insurance obligation in substance under ■ PERG 6.3.4 G.

6.7.8 **G** Notwithstanding ■ PERG 6.7.7 G, the FCA's view is that an obligation that is of the same nature as a seller's or supplier's usual obligations as regards the quality of the goods or services is unlikely to be an insurance obligation in substance.

6.7.9 **G** The FCA is unlikely to classify a contract containing a simple manufacturer's or retailer's warranty as a *contract of insurance*, if the FCA is satisfied that the warranty does no more than crystallise or recognise obligations that are of the same nature as a seller's or supplier's usual obligations as regards the quality of the goods or services.

6.7.10 **G** For the purpose of ■ PERG 6.7.9 G, an obligation is likely to be of the same nature as the seller's or supplier's usual obligations as regards the quality of goods or services if it is an obligation of the seller to the buyer, assumed by the seller in consideration of the purchase price, which:

- (1) implements, or bears a reasonable relationship to, the seller's statutory or common law obligations as regards the quality of goods or services of that kind; or
- (2) is a usual obligation relevant to quality or fitness in commercial contracts for the sale of goods or supply of services of that kind.

Example 4: separate warranty transactions and extended warranties

6.7.11 **G** It follows from ■ PERG 6.7.10 G that the FCA is unlikely to be satisfied that an obligation in a contract of sale or supply is of the same nature as the seller's or supplier's usual obligations as regards the quality of goods or services, if that obligation has one or more of the following features:

- (1) it is assumed by a person other than the seller or supplier (a 'third party'); or
- (2) it is significantly more extensive in content, scope or duration than a seller's usual obligations as to the quality of goods or services of that kind.

6.7.12 **G** Other things being equal, the FCA is likely to classify a contract of sale containing a warranty that has one or more of the features in ■ PERG 6.7.11 G

as a *contract of insurance*. The features in ■ PERG 6.7.11 G (1) and ■ (2) typically distinguish a 'third party' warranty and an 'extended warranty' from a 'simple' manufacturer's or retailer's warranty.

6.7.13 **G** If a warranty is provided by a third party, the *FCA* will usually treat this as conclusive of the fact that there are different transactions and an assumption or transfer of risk. This conclusion would not usually depend on whether the provider is (or is not) a part of the same group of companies as the manufacturer or retailer. But it will be the third party (who assumes the risk) that is potentially effecting a *contract of insurance*.

6.7.14 **G** A manufacturer or retailer may undertake a warranty obligation to his customer in a separate contract with the customer, distinct from the contract of sale or supply of goods or services. The *FCA* will examine the separate contract to see if it is a *contract of insurance*. But the mere existence of a separate warranty contract is unlikely to be conclusive by itself.

6.7.15 **G** A manufacturer or retailer may undertake an obligation to ensure that the customer becomes a party to a separate *contract of insurance* in respect of the goods sold. This would include, for example, a contract for the sale of a freezer, with a simple warranty in relation to the quality of the freezer, but also providing insurance (underwritten by an *insurer* and in respect of which the customer is the *policyholder*) covering loss of frozen food if the freezer fails. The *FCA* is unlikely to treat a contract containing an obligation of this kind as a *contract of insurance*. However, the manufacturer or retailer may be in the position of an intermediary and may be liable to regulation in that capacity.

6.7.16 **G** The *FCA* distinguishes the contract in ■ PERG 6.7.15 G from a contract under which the manufacturer or retailer assumes the obligation to provide the customer with an indemnity against loss or damage if the freezer fails, but takes out insurance to cover the cost of having to provide the indemnity to the customer. The obligation to indemnify is of a different nature from the seller's or supplier's usual obligations as regards the quality of goods or services and is an insurance obligation. By assuming it, other things being equal, the manufacturer or retailer effects a *contract of insurance*. The fact that the manufacturer or retailer may take out insurance to cover the cost of having to provide the indemnity is irrelevant.

Example 5: typical warranty schemes administered by motor dealers

6.7.17 **G** The following are examples of typical warranty schemes operated by motor dealers. Provided that, in each case, the *FCA* is satisfied that the obligations assumed by the dealer are not significantly more extensive in content, scope or duration than a dealer's usual obligations as to the quality of motor vehicles of that kind, the *FCA* would not usually classify the contracts embodying these transactions as *contracts of insurance*.

- (1) The dealer gives a verbal undertaking to the purchaser that during a specified period (usually 3 months) he will rectify any fault occurring with the vehicle. No money changes hands, and the dealer is responsible for meeting the warranty obligation.

- (2) The dealer undertakes warranty obligations to his customer. The warranty obligations are either included in the contract for the sale of the vehicle or are set out in a separate contract between dealer and customer at the time of sale. The dealer administers his own warranty scheme and does not employ a separate company (for example a subsidiary) to run the scheme. In the event of a fault, the purchaser must contact the dealer, who is responsible for meeting the warranty obligation. The dealer decides whether or not to put money aside to meet potential claims.
- (3) The dealer purchases proprietary warranty booklets issued by an administration company. These booklets contain 'terms and conditions' under which the dealer undertakes warranty obligations to the customer. The dealer sells these 'products' to his customer under a separate contract or inflates the price of the vehicle to include them as part of the sale of the vehicle. The administration company administers any claims that arise. The financial arrangements are that the dealer charges his customer for the warranty, passing a fee to the administration company for the purchase of the booklet and any administration relating to the processing of claims. The dealer retains all monies (less administration fee) received from the sale of the warranties and keeps any surplus after claims have been paid. The dealer is responsible for meeting the warranty obligation.
- (4) The dealer undertakes warranty obligations to his customer. The warranty obligations are either included in the contract for the sale of the vehicle or are set out in a separate contract between dealer and customer at the time of sale. The dealer employs an administration company to handle all the claims and associated administrative work. The administration company usually has access to a bank account, funded by the dealer and specifically set aside to meet warranty claims. The administration company authorises and pays warranty claims from the bank account in accordance with the dealer's instructions. The dealer ultimately decides on the amount of claims payable from this account and retains all surplus monies. The dealer is responsible for meeting the warranty obligation.

Example 6: tax investigation schemes

- 6.7.18 G When self-assessment for income tax was first introduced, a number of providers set up schemes connected with their tax accounting and tax advisory services. In consideration of an annual fee, the provider undertakes to deal with any enquiries or investigations that HM Revenue and Customs might launch into the self-assessment that the provider completes for the recipient. The event covered by these schemes (an investigation) is both uncertain and adverse to the interests of the recipient, who would, if the scheme were not in place, have to devote resources to dealing with the investigation. Accordingly, these schemes fall within the description of a *contract of insurance* (see ■ PERG 6.3.4 G).
- 6.7.19 G Some providers argued that these schemes amount to nothing more than a 'manufacturer's warranty' of their own work, within the scope of ■ PERG 6.7.7 G (Example 3: manufacturers' and retailers' warranties). However, HM Revenue and Customs is expected to make a significant number of random checks of self-assessment forms, irrespective of the quality of the

work done by the provider. These random checks are also covered by the schemes. The *FCA* concluded, therefore, that these schemes were not analogous to manufacturers' warranties and that the better view was that they were *contracts of insurance*.

Example 7: solicitors' retainers

6.7.20 **G** A contract under which a provider undertakes, in consideration of an initial payment, to stand ready to provide, or to procure the provision of, legal services on the occurrence of an uncertain event (for example, if the recipient is sued), is capable of being construed as a *contract of insurance* (see ■ PERG 6.3.4 G). Indeed, *legal expenses* insurance is commonplace.

6.7.21 **G** If, however, a contract of this kind were structured so that the recipient was charged at a commercial rate for any legal services in fact provided, the *FCA's* approach will be to treat the arrangement as non-insurance. This is principally because, by taking on obligations of this kind, the provider does not assume a relevant risk (see ■ PERG 6.7.6 G). The position might be different if the solicitor carries the additional obligation to pay for alternative legal services to be provided if the solicitor is unable to act. In that case, the *FCA's* approach will be to examine all the elements of the contract to determine whether the substance of the solicitor's obligation (see ■ PERG 6.5.4 G (2)) is to insure, or to give legal advice for a fee.

Example 8: contracts providing for ultimate repayment of any indemnity ('time and distance cover')

6.7.22 **G** A contract under which a provider agrees to meet a specified obligation on behalf of the recipient (for example an obligation to pay for the re-purchase of shares or to meet a debt) immediately that obligation falls due, subject to later reimbursement by the recipient, would be a *contract of insurance* if in all other respects it fell within the description of such contract (see ■ PERG 6.3.4 G). This is principally because the provider assumes the risk that an immediate payment will be required and, depending on the terms of the contract, may also assume the risk that the recipient will be unable to make future repayments (see ■ PERG 6.6.2 G).

Chapter 7

Periodical publications, news services and broadcasts: applications for certification

7.1 Application and purpose

Application

- 7.1.1 **G** This chapter applies to anyone involved in publishing periodicals, or in providing news services or broadcasts, who gives (or proposes to give) advice about *securities, structured deposits, relevant investments, P2P agreements, home finance transactions* or certain pension transfers or conversions and who wishes to determine whether he will be carrying on the *regulated activities of advising on investments, advising on regulated credit agreements for the acquisition of land or advising on a home finance transaction or advising on conversion or transfer of pension benefits*.

Purpose

- 7.1.2 **G** The purpose of this chapter is to provide *guidance* as to:
- (1) when a *person* involved in publishing periodicals, or in providing news services or broadcasts, requires *authorisation* to carry on the *regulated activities of advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* (see ■ PERG 7.3 (Does the activity require authorisation));
 - (2) if he does, whether he qualifies for the exclusion from those activities that applies to a periodical publication, a regularly updated news or information service or a television or radio service (see ■ PERG 7.4 (Does the article 54 exclusion apply));
 - (3) if he does, whether his circumstances are an appropriate case for a certificate given by the *FCA* as conclusive evidence that he does qualify (see ■ PERG 7.5 (When is it appropriate to apply for a certificate));
 - (4) how to apply for a certificate (see ■ PERG 7.6.1 G to ■ PERG 7.6.5 G); and
 - (5) how the *FCA* will use its power to give certificates (see ■ PERG 7.6.6 G to ■ PERG 7.6.10 G).

- 7.1.3 **G** This *guidance* is issued under section 139A of the *Act*. The *guidance* represents the *FCA*'s views and does not bind the courts, for example in relation to an action for damages brought by a *private person* for breach of a *rule* (see section 138D of the *Act* (Actions for damages)), or in relation to the enforceability of a contract where there has been a breach of section 19 (The general prohibition) of the *Act* (see section 26 of the *Act* (Enforceability of agreements)). Although the *guidance* does not bind the courts, it may be of persuasive effect for a court considering whether it would be just and

equitable to allow a contract to be enforced (see section 28(3) of the *Act*). Anyone reading this *guidance* should refer to the *Act* and to the Financial Services and Markets Act 2000 (Regulated activities) Order 2001 (SI 2001/544) (the *Regulated activities Order*) to find out the precise scope and effect of any particular provision referred to in the *guidance* and should consider seeking legal advice if doubt remains. If a *person* acts in accordance with the *guidance* in the circumstances contemplated by it, then the *FCA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

7.2 Introduction

Exclusion for advice given in certain publications and services

7.2.1 **G** Advice is excluded by article 54 of the *Regulated Activities Order* from the *regulated activities* of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, *advising on a home finance transaction* and *advising on conversion or transfer of pension benefits* if:

- (1) the advice is given in a publication or service that is in one of three formats (see ■ PERG 7.4.3 G and ■ PERG 7.4.4 G); and
- (2) the principal purpose of the particular format is neither to give certain advice nor to lead to (or enable) certain transactions to be carried out (see ■ PERG 7.4.5 G and ■ PERG 7.4.10 G).

Certificate that the exclusion applies

7.2.2 **G** If a *person* would, but for the exclusion, be carrying on the *regulated activities* of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, *advising on a home finance transaction* or *advising on conversion or transfer of pension benefits*, or any or each of them, and will be doing so as a business in the *United Kingdom* (see ■ PERG 7.3), he may wish to apply to the *FCA* for a certificate that the exclusion applies (see ■ PERG 7.6). However, a *person* does not need a certificate to get the benefit of the exclusion. In many cases it will be clear that the exclusion in article 54 applies and a certificate is not called for. A certificate may be appropriate, however, where the exclusion appears to apply but there may be an element of doubt. The granting of a certificate would remove any such doubt.

Certificates under the Financial Services Act 1986

7.2.3 **G** Certificates given under paragraph 25 of Schedule 1 to the *Financial Services Act 1986* (Exclusion for periodical publications giving investment advice) ceased to have effect on 1 December 2001. Holders of such certificates must consider their position under the terms of the new exclusion. If a *person* considers that a certificate might be appropriate, a new application must be made.



7.3 Does the activity require authorisation?

Regulated advice

7.3.1

G

- (1) Article 53(1) of the *Regulated Activities Order* (Advising on investments) deals with giving advice in relation to a *security*, a *structured deposit* or a *relevant investment*.
- (2) A summary can be found in ■ PERG 8.24 (Advising on investments). ■ PERG 8.25 to ■ PERG 8.30B give more detail.
- (3) As described in ■ PERG 8.24, for certain *firms*, the *regulated activity* only covers giving *personal recommendations*.

7.3.1-A

G

Under article 53(2) of the *Regulated Activities Order* (Advising on investments), advising a *person* is a specified kind of activity if:

- (1) the advice is given to the *person* in their capacity as a *lender* or potential *lender* under a relevant article 36H agreement (defined in article 53(4) of the *Regulated Activities Order*) or as an agent for a *lender* or potential *lender* under such an agreement; and
- (2) it is advice on the merits of their doing any of the following (whether as principal or agent):
 - (a) entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law; or
 - (b) providing instructions to a *P2P platform operator* with a view to entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law, where the instructions involve:
 - (i) accepting particular parameters for the terms of the agreement presented by a *P2P platform operator*; or
 - (ii) choosing between options governing the parameters of the terms of the agreement presented by a *P2P platform operator*; or
 - (iii) specifying the parameters of the terms of the agreement by other means; or
 - (c) enforcing or exercising the *lender's* rights under a relevant article 36H agreement; or
 - (d) assigning rights under a relevant article 36H agreement.

- 7.3.1A** **G** Under article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a borrower or potential borrower; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *regulated mortgage contract*; or
 - (b) varying the terms of a *regulated mortgage contract* entered into by him after mortgage day in such a way as to vary his obligations under that contract.
- 7.3.1B** **G** Under article 53B of the *Regulated Activities Order* (Advising on regulated home reversion plans), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a *reversion occupier* or reversion provider or as a potential *reversion occupier* or reversion provider; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *home reversion plan*; or
 - (b) varying the terms of a *home reversion plan* entered into by him as *reversion occupier* or as reversion provider (but only where the plan was originally entered into on or after 6 April 2007) in such a way as to vary his obligations under that plan.
- 7.3.1C** **G** Under article 53C of the *Regulated Activities Order* (Advising on regulated home purchase plans), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a *home purchaser* or potential *home purchaser*; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *home purchase plan*; or
 - (b) varying the terms of a *home purchase plan* entered into by him on or after 6 April 2007 in such a way as to vary his obligations under that plan.
 - (3) Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:

- 7.3.1CA** **G** Under article 53D of the Regulated Activities Order (Advising on regulated sale and rent back agreements), advising a person is a specified kind of activity if:
- 7.3.1D** **G** Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as an *SRB agreement seller* or *SRB agreement provider* or as a potential *SRB agreement seller* or *SRB agreement provider*; and
 - (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *regulated sale and rent back agreement*; or
 - (b) varying the terms of a *regulated sale and rent back agreement* entered into by him on or after 1 July 2009 in such a way so as to vary his obligations under that agreement.
- 7.3.1DA** **G** Under article 53DA of the *Regulated Activities Order* (Advising on regulated credit agreements for the acquisition of land), advising a *person* ("P") is a specified kind of activity if:
- (1) the advice is given to P in P's capacity as a recipient of credit, or potential recipient of credit, under a *regulated credit agreement*;
 - (2) P intends to use the credit to acquire or retain property rights in *land* or in an existing or projected building; and
 - (3) the advice consists of the provision of personal recommendations to P in respect of one or more transactions relating to *regulated credit agreements*.
- 7.3.1E** **G** Under article 53E of the *Regulated Activities Order* (Advising on conversion or transfer of pension benefits), advising a *person* ("P") is a specified kind of activity if the advice:
- (1) is given to P in their capacity as:
 - (a) a *member of a pension scheme*; or
 - (b) a *survivor of a member of a pension scheme*;where P has *subsisting rights* in respect of any *safeguarded benefits*; and
 - (2)
 - (a) convert any of the *safeguarded benefits* into different benefits that are *flexible benefits* under the scheme; or
 - (b) make a transfer payment in respect of any of the *safeguarded benefits* with a view to acquiring a right or entitlement to *flexible benefits* for P under another pension scheme; or
 - (c) pay a lump sum that would be an *uncrystallised funds pension lump sum* in respect of any of the *safeguarded benefits*.

7.3.2 **G** Articles 53, 53A, 53B, 53C, 53D 53DA and 53E of the *Regulated Activities Order* contain a number of elements, all of which must be present before a *person* will require *authorisation*. For *guidance* on whether a *person* is carrying on these *regulated activities*, see ■ PERG 8 (Financial promotion and related activities), ■ PERG 4 (Guidance on regulated activities connected with mortgages), ■ PERG 12.6 (Advising on conversion or transfer of pension benefits), , ■ PERG 14.3, ■ PERG 14.4 and ■ PERG 14.4A (Guidance on home reversion, home purchase and regulated sale and rent back agreement activities). Guidance on the activity in article 53DA (*advising on regulated credit agreements for the acquisition of land*) of the *Regulated Activities Order* is in ■ PERG 2.7.16F G.

Advice in publications and broadcasts and MiFID

7.3.2A **G** Advice about *financial instruments* in a newspaper, journal, magazine, publication, internet communication or radio or television broadcast should not normally be a *personal recommendation* under *MiFID* (see ■ PERG 13, Q18 to Q21).

Carrying on the regulated activity by way of business

7.3.3 **G** Under section 22 of the *Act* (Regulated activities), for an activity to be a *regulated activity* it must be carried on 'by way of business'. There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. It has exercised this power (through the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177) (the Business Order), as amended from time to time.

7.3.3A **G** The result of the amendments made to the meaning of the business test in section 22 of the *Act* is that the test differs depending on the activity in question. Where the *regulated activities* of *advising on investments* and *advising on a home finance transaction* are concerned, the business test is not to be regarded as satisfied unless a *person* carries on the business of engaging in those activities. This is a narrower test than that of carrying on *regulated activities* by way of business (as required by section 22 of the *Act*), as it requires the *regulated activities* to represent the carrying on of a business in their own right. Where the advice relates to a *contract of insurance*, the business test is not to be regarded as satisfied unless the *person* carrying on the activity of giving the advice is taking up or pursuing the activity for remuneration. ■ PERG 2.3 (The Business element) and ■ PERG 2.4 (Link between activities and the United Kingdom) together with ■ PERG 5.4 (The business test) provide further detail on this.

7.3.4 **G** In the *FCA's* view, for a *person* to be carrying on the business of *advising on investments* or *advising on a home finance transaction* he will usually need to be doing so with a degree of regularity and for commercial purposes – that is to say, he will normally be expecting to gain some kind of a direct or indirect financial benefit. But, in the *FCA's* view it is not necessarily the case that advice provided free of charge will not amount to a business. Advice is

often given 'free' by a journalist or presenter, or in a publication or website, in the sense that no charge is made or commission received. For example, a newspaper may reply to readers' letters to generate goodwill or to generate a supply of further material that it can publish or a website that is 'free' to the user will be sponsored or paid for by advertising. In such cases, if advice on *securities, structured deposits, relevant investments, P2P agreements or home finance transactions* is given, then, in the FCA's view, the business of *advising on investments or advising on a home finance transaction* is being carried on. In addition, non-commercial motives may be relevant in determining whether a *person* can be said to be carrying on the business of giving advice. For example, an investigative journal or journalist may occasionally feel that it is necessary to warn investors against the purchase of a particular *investment* because there are suspicions of fraud in connection with that *investment*. The FCA takes the view that, in such circumstances, the journal or journalist would not be regarded as carrying on the business of *advising on investments or advising on a home finance transaction* as he would be acting to prevent crime rather than in the carrying on of a business.

- 7.3.4A **G** For persons carrying on *advising on regulated credit agreements for the acquisition of land* the by the way of business test is set out in **■** PERG 2.3.2G (4)

Carrying on the regulated activity in the United Kingdom.....

- 7.3.5 **G** Advice given in periodicals published from an establishment in the *United Kingdom* is regarded by the FCA as given in the *United Kingdom*. A similar approach is taken to advice given in, or by way of, a service provided from such an establishment.

- 7.3.6 **G** In other circumstances, advice issued remotely may still be given in the *United Kingdom*. For example, the FCA considers that advice is given in the *United Kingdom* if:

- (1) it is contained in a non-UK periodical that is posted in hard copy to *persons* in the *United Kingdom*;
- (2) it is contained in a non-UK periodical (or given in or by way of a service) which is made available electronically to such *persons*.

- 7.3.7 **G** But even if advice is given in the *United Kingdom*, the *general prohibition* will not be contravened if the giving of advice does not amount to the carrying on, in the *United Kingdom*, of the business of *advising on investments, advising on regulated credit agreements for the acquisition of land, or advising on conversion or transfer of pension benefits advising on a home finance transaction*. Also, the *general prohibition* will not be contravened if the exclusion for *overseas persons* in article 72 of the *Regulated Activities Order* (*Overseas persons*) applies. That exclusion applies in relation to the giving of advice on *securities, structured deposits or relevant investments* by an *overseas person* as a result of a 'legitimate approach' (defined in article 72(7)). In many cases where publications or services are provided from outside the *United Kingdom* it is likely that they will fall within the terms of this exclusion. For example, this will exclude any advice in a publication or service from being a *regulated activity* if it is given

in response to an approach that has not been solicited in any way. It should be noted, however, that the exclusions in article 72 do not apply to the regulated activities that involve *advising on a home finance transaction, advising on regulated credit agreements for the acquisition of land or advising on conversion or transfer of pension benefits*. The effect of this is that, where the principal purpose of an overseas periodical publication is to offer advice on *securities, structured deposits, relevant investments, P2P agreements, home finance transactions* and certain pension transfers or conversions, the exclusion for an *overseas person* who provides advice to *persons in the United Kingdom* as a result of a legitimate approach will not apply to the advice concerning *home finance transactions* or pension transfers or conversions.

Exclusions and exempt persons

7.3.8

G

If a person is carrying on the business of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* in the *United Kingdom*, he will not require *authorisation* if:

- (1) he is able to rely on an exclusion; in addition to the exclusions already mentioned (in articles 54 and 72 of the *Regulated Activities Order*), other exclusions that may be relevant are in Chapter XVII of Part II of the *Regulated Activities Order*; or
- (2) he is an *exempt person* (see ■ PERG 2.11 (What to do now?)); since *persons* are exempt only in relation to specified *regulated activities*, his exemption must apply to the *regulated activity* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* as the case may be.

Which person is required to be authorised?

7.3.9

G

Many people may be involved in the production of a periodical publication, news service or broadcast. But if the *regulated activity* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* is being carried on so that *authorisation* is required, the *FCA's* view is that the *person* carrying on the activity (and who will require *authorisation*) is the *person* whose business it is to have the editorial control over the content. In the case of a periodical publication, this will often be the proprietor. But particular circumstances may vary so that the responsibility for content and editorial control rests with a freelance journalist rather than with the proprietor. In such cases it may well be that the journalist may properly be viewed as carrying on his own business, using the periodical publication as the vehicle for doing so – in which case it is likely to be the journalist alone who needs the *authorisation*.

7.3.10

G

Similar principles apply to news services and broadcasts.

7.4 Does the article 54 exclusion apply?

The formats

7.4.1

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The exclusion applies to advice given in one of the following formats:

- (1) advice in writing or other legible form which is contained in a newspaper, journal, magazine, or other periodical publication;
- (2) advice in writing or other legible form which is given by way of a service comprising regularly updated news or information;
- (3) advice given in any service consisting of the broadcast or transmission of a television or radio programme.

7.4.2

G

But the exclusion applies only if the principal purpose of the publication or service is not:

- (1) to advise on *securities* or *structured deposits* or *relevant investments* or *P2P agreements* or *home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
- (2) to lead or enable *persons*:
 - (a) to *buy, sell*, subscribe for or underwrite *securities, structured deposits* or *relevant investments*; or
 - (aa) to enter into a relevant article 36H agreement (within the meaning of article 53(4) of the *Regulated Activities Order*) as a *lender*, to assume the rights of a *lender* under such an agreement by *assignment* or operation of law, or to assign rights under such an agreement; or
 - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by them as borrower on or after 31 October 2004 or the terms of *legacy CCA mortgage contracts* entered into by them as borrower; or
 - (c) to enter as *reversion occupier* or reversion provider into *home reversion plans* or to vary the terms of *home reversion plans* entered into by them as *reversion occupier* or as reversion provider where the plan was originally established on or after 6 April 2007;
 - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007; or

- (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009; or
- (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building.
- (g) to do any of the following in the context of *advising on conversion or transfer of pension benefits*:
 - (i) convert *safeguarded benefits* into different benefits that are *flexible benefits* under the scheme; or
 - (ii) make a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to *flexible benefits* under another pension scheme; or
 - (iii) pay a lump sum that would be an *uncrystallised funds pension lump sum* in respect of any of the benefits.

Formats in writing or other legible form

7.4.3

G

- (1) There are two specified formats for advice appearing in writing or other legible form.
- (2) The first is that of a newspaper, journal, magazine or other periodical publication. For these purposes it does not matter what form the periodical publication takes as long as it can be read. This will include, for example, a newspaper appearing as a hard copy or electronically on a website. It will also include any periodical published on an intranet site.
- (3) The second is that of a regularly updated news or information service. As with periodical publications, it does not matter how the service is accessed by, or delivered to, the user as long as it can be read. This will include, for example, a service provided through teletext, a fax retrieval system or a website (including websites that are used through handheld devices). The fact that it must be a 'regularly updated' service means that the provision of up-to-date news or information must be a primary feature of the service (for example, where it is likely to be of commercial value to the recipient). But, in the FCA's view, a news or information 'service' is not restricted only to the giving of news or information since this would not generally constitute the *regulated activity* of *advising on investments* (see ■ PERG 8.28 (Advice or information)), *advising on regulated mortgage contracts* (see ■ PERG 4.6.13 G to ■ PERG 4.6.16 G (Advice or information)), *advising on regulated credit agreements for the acquisition of land* (see ■ PERG 4.10A.20 G), *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6), *advising on a home reversion plan*, *advising on a home purchase plan* or *advising on regulated sale and rent back agreements*. So the exclusion applies to services providing material in addition to news or information, such as comment or advice.

Television and Radio

7.4.4

G

The third specified format is for advice in any service consisting of the broadcast or transmission of television or radio programmes. This will encompass the transmission through cable of interactive television programmes. In the *FCA's* view, 'service' in this context goes beyond any particular series of programmes broadcast or transmitted through a given medium. It refers instead to the administrative system (usually aimed at a particular audience) through which a range of different programmes is provided, for example any particular TV or radio channel. In the *FCA's* view, it is unlikely that a TV or radio service will have one of the *principal* purposes that would prevent its being able to rely on the exclusion unless the complete service is designed to focus on financial or *investment* matters.

The principal purpose test

7.4.5

G

The exclusion applies only if the principal purpose of the publication or service is not:

- (1) to give advice on *securities, structured deposits, relevant investments, P2P agreements* or *home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
- (2) to lead or enable *persons*:
 - (a) to *buy, sell*, subscribe for or underwrite *securities, structured deposits* or *relevant investments*; or
 - (aa) to enter into a relevant article 36H agreement (within the meaning of article 53(4) of the *Regulated Activities Order*) as a *lender*, to assume the rights of a *lender* under such an agreement by *assignment* or operation of law, or to assign rights under such an agreement; or
 - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by them as borrower on or after 31 October 2004 or the terms of *legacy CCA mortgage contracts* entered into by them as borrower; or
 - (c) to enter as *reversion occupier* or reversion provider into *home reversion plans* or to vary the terms of *home reversion plans* entered into by them as *reversion occupier* or as reversion provider where the plan was originally established on or after 6 April 2007;
 - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007;
 - (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009;
 - (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building; or
 - (g) to do any of the things listed in ■ PERG 7.4.2G(2)(g).

References to leading or enabling *persons* to do the things mentioned in (2)(a) or (b) are abbreviated in ■ PERG 7.4.9 G and ■ PERG 7.4.11 G as leading or enabling *persons* 'to engage in a relevant transaction'.

7.4.6

G

Any assessment of the principal purpose of a periodical publication, news service or broadcast needs to be carried out against the background that:

- (1) they all share the characteristic of being available over a sustained period and, within that period, appearing from time to time with a different content;
- (2) the same periodical publication will have many different editions;
- (3) the regular updating of the news or information service will produce differences in the material provided, comparing the content of the service as it appears at any one time with its content as it appears at any other; and
- (4) the programmes in a TV or radio service are bound to have a different content from each other.

7.4.7

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To address this feature of variation in content, article 54 requires that the principal purpose of a publication or service is to be assessed by looking at the publication or service taken as a whole and including any advertisements or other promotional material contained in it. This requirement of an overall assessment of purpose or purposes goes beyond the content of any particular example of the publication or service (such as a particular edition or programme). It fixes instead on the characteristic content of the publication or service looked at over time. This judgment depends on the overall impression of content. One way of approaching this is to consider what an average consumer of a publication or service might expect to find when making a decision whether to buy a particular edition or to use the service.

7.4.8

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Looking at the first disqualifying purpose set out in the exclusion, all the matters relevant to whether the *regulated activities* of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, *advising on a home finance transaction* or *advising on conversion or transfer of pension benefits* are being carried on must be taken into account (see ■ PERG 8.24 (Advising on investments)). If the principal purpose of a publication or service is to give to *persons*, in their capacity as investors (or potential investors), as borrowers, as *reversion occupiers* or reversion providers or as *home purchasers* or as *SRB agreement sellers* or *SRB agreement providers* (as the case may be), advice as referred to in ■ PERG 7.4.5G (1), then the publication or service will not be able to benefit from this exclusion.

7.4.9

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For the second disqualifying purpose, the focus switches to assessing whether the principal purpose of a publication or service is to lead a *person* to engage in a relevant transaction or enable him to do so. This disqualifying purpose is an alternative to the first. So it extends to material not covered by the first. In this respect:

- (1) material in a publication or service that invites or seeks to procure *persons* to engage in a relevant transaction can be said to "lead" to those transactions even if it would not constitute the *regulated activities* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* ; this includes, for example, material that consists of generic *buy or sell* recommendations, corporate brochures or invitations to invest in particular products or with a particular broker or fund manager; and
- (2) material enables *persons* to engage in a relevant transaction if it facilitates the transactions, for example by giving a user the forms that enable him to carry out relevant transactions; so this limb of the second disqualifying purpose would apply to the material providing an online dealing facility on an interactive website or to facilities for on-screen dealing through digital television.

In the *FCA's* view, material will not lead or enable a *person* to engage in a relevant transaction where the material is intended merely to raise people's awareness of matters relating to *securities, structured deposits, relevant investments, P2P agreements, home finance transactions* or pension scheme transfers.

- 7.4.10** **G** The test for determining the principal purpose of any publication that appears on a website, or of any news or information service on a website, is no different from any other medium. An overall view will need to be taken of all the contents of the publication or service, including any features such as chatrooms, advertisements or other promotional material.
- 7.4.11** **G** In the context of the second disqualifying purpose, whether or not the presence of a hypertext link to another website indicates that the purposes of a publication or service include leading to relevant transactions (or enabling them to be entered into) will depend on all the circumstances. It will, in particular, be necessary to consider the form of the link and the content of the destination website. In the *FCA's* view, the presence on a host publication or service of a hypertext link which is only the name or logo of another website is unlikely itself to indicate that a purpose of the host website is to lead to relevant transactions (or enable them to be entered into). But if more sophisticated links, such as banners or changeable text, contain promotional material inviting or seeking to procure *persons* to enter into relevant transactions, those links will have to be weighed in the balance in determining the principal purpose of the publication or service hosting the link. The same applies if the host publication or service hosting the link itself contains material inviting *persons* to activate the link with a view to entering into relevant transactions.
- 7.4.12** **G** In reaching a view of the principal purpose of the publication or service as a whole, all the material that falls within either the first or second disqualifying purpose must be considered together.

Personal recommendations

7.4.12A

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(1) The exclusion does not apply to *advising on investments (except P2P agreements)* when the definition of that *regulated activity* is restricted to giving *personal recommendations*.

[**Note:** For these *personal recommendations*, see ■ PERG 7.3.1G(3).]

(2) In practice, advice given as described in ■ PERG 7.4.1G is unlikely to be a *personal recommendation* in the first place, for the reasons set out in ■ PERG 8.30B.2G(4) and ■ PERG 8.30B.22G to ■ PERG 8.30B.24G (Recommendation to the public).

Who can benefit from the exclusion?

7.4.13

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The *persons* who directly benefit from the exclusion will be the *persons* who would otherwise require *authorisation* (see ■ PERG 7.3.9 G), that is, the *person* whose business it is to have editorial control over the content of the publication or service. The exclusion will apply regardless of the legal form of the *person* giving the advice so, for example, it will extend to advice given by a *company* through its employees.



7.5 When is it appropriate to apply for a certificate?

- 7.5.1** **G** To decide whether the exclusion in article 54 applies, three assessments need to be made:
- (1) first, an assessment whether the vehicle for giving the advice is a newspaper, journal, magazine or other periodical publication, a service comprising regularly updated news or information or a service consisting of the broadcast or transmission of television or radio programmes;
 - (2) second, an assessment of the purpose or purposes of any particular publication or service; and
 - (3) third, an assessment of the relative significance of each purpose compared with any others.
- 7.5.2** **G** Because opinions may differ in circumstances close to the borderline, giving rise to doubt as to whether or not the exclusion applies, the *Regulated Activities Order* makes provision for a certification process. The purpose of this process is not to provide certification for every publication or service to which the exclusion in article 54 applies.
- 7.5.3** **G** In many cases it will be clear whether or not a publication or service benefits from the exclusion. A publication or service may provide reports on such a wide range of matters that it is not possible to say that it has any purpose other than to provide coverage of a wide range of matters. Alternatively, it may be clear that the principal purpose of a publication or service is something other than those specified in the article 54 exclusion. Examples of cases where, in the *FCA's* view, the exclusion is capable of applying include:
- (1) national or local newspapers providing the normal range of non-financial news and coverage of other matters (such as sports, arts and leisure) and which simply contain financial journalism (such as reports on particular *investments* or markets) as one element of their all-round coverage;
 - (2) weekly or monthly journals aimed at a particular subject (such as computing or sport) but which have some coverage of, or promotional material relating to, *investments* and financial matters;
 - (3) websites which provide financial news or information;

- (4) closed user group communication systems specialising in financial or *investment* matters; and
- (5) television or radio channels dedicated to consumer affairs which devote a small number of programmes to financial planning.

7.5.4

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It is only where there are grounds to think that there is a significant doubt as to the principal purpose of a publication or service that the question of whether or not to apply to the *FCA* for a certificate under article 54 of the *Regulated Activities Order* is expected to arise. For example, this may happen where a publication or service has several significant purposes and one of them is a disqualifying purpose referred to in the exclusion in article 54. It may on occasion be difficult to assess the relative importance of the purposes compared with each other, particularly given that over time there will be a variation in the content of the publication or service. In such cases, an application for a certificate would be appropriate.



7.6 Applications for a certificate

Pre-application contact

- 7.6.1 **G** A person considering applying for a certificate should, before sending in any application, contact the Perimeter Enquiries Team of the *FCA* (email: firm.queries@fca.org.uk , Tel 0800 111 6768) to discuss whether a certificate may be appropriate.

Form of application

- 7.6.2 **G**
- (1) An application should be made by the proprietor of the relevant publication or service using the appropriate form, accessible from our website (see Forms/ Perimeter Guidance manual forms and Certificate A, Certificate B and Certificate C). The form asks for general information about the applicant and gives *guidance* notes on completion and other details of how the *FCA* can help.
 - (2) An applicant will be asked to state his own view of the principal purpose of the publication or service. This should include an explanation why the applicant believes that he qualifies for the exclusion and why he believes that a certificate may be called for.
 - (3) The applicant will be asked to define the extent of the publication or service for which he is seeking a certificate.
 - (4) The applicant will be asked to supply material to demonstrate the content of the publication or service or, in the case of a new publication or service, its proposed content. For an existing publication or service, past samples should be supplied in the form most appropriate to the medium for which certification is sought. The samples should be chosen on the basis that they are representative of the publication or service as a whole and as it appears from time to time. The applicant will be asked to justify the selection of the particular samples as being representative. For a new publication or service, samples of proposed content should be supplied. These should be as comprehensive as possible.
 - (5) The applicant will be asked to supply material to demonstrate that the principal purpose is not liable to change over the foreseeable future. This may, for example, include business plans, a statement of editorial policy and marketing literature.
 - (6) The application must be accompanied by the application fee (see **■ PERG 7.6.5 G**).

Requests for further information

- 7.6.3 **G** After an application is sent in, the *FCA* may, on occasion, need to obtain additional information from the applicant or elsewhere to enable it to process the application.

Time for processing applications

- 7.6.4 **G** The *Act* does not specify a time limit for processing the application but the *FCA* intends to deal with an application as quickly as possible. The more complete and relevant the information provided by an applicant, the more quickly a decision can be expected. But on occasion it may be necessary to allow time in which the *FCA* can monitor the content of the service. This might happen where, for example, a service is in a form that makes record keeping difficult (such as a large website with a number of hypertext links).

Application Fee

- 7.6.5 **G** The fee for an application for a certificate under article 54 of the *Regulated Activities Order* is £2,000.

The FSA's approach to considering applications

- 7.6.6 **G** The *FCA* will consider any application for a certificate on its merits.
- 7.6.7 **G** Before it gives a certificate, the *FCA* must be satisfied that the principal purpose of the publication or service is neither of the purposes referred to in the exclusion (see ■ PERG 7.4.5 G). If there is insufficient evidence, a certificate cannot be given.
- 7.6.8 **G** The *FCA* will form an overall view as to the purpose (or purposes) underlying the publication or service. It will then determine whether the principal purpose is neither of those referred to in article 54 of the *Regulated Activities Order*. Because the possible range of subject matter covered by different publications or services is very wide it is not possible to apply standard tests. The *FCA* will form a judgment as to the overall impression created by the publication or service. For example, the proportion of advice, compared with other material in the publication or service, will be relevant in determining the principal purpose of the publication or service. But this will not necessarily be conclusive one way or the other. The purpose of a publication or service may still be to give advice even if only a small proportion of the space is devoted to advice as such. This might happen if, for example, a publication were marketed primarily on the basis that it contains advice on *investments*.
- 7.6.9 **G** In reaching a view, the *FCA* will take into account both editorial and promotional material in the publication or service. It will also have regard to the stated purpose of the publication or service and to any other material relevant to its purpose.
- 7.6.10 **G** Other factors relevant to an assessment of purpose or content of the publication or service may vary depending on the nature of the publication or service. For example, if a service is provided by a website, consideration of

the content of the publication or service will take account of hypertext links and other features such as e-mail addresses, bulletin boards and chat rooms.

Grant of application

7.6.11

G

If the *FCA* decides to grant the application it will issue a certificate. The certificate will normally be granted for an indefinite period. It will state what it is that the *FCA* considers constitutes the periodical or service in relation to which the *FCA* is satisfied that the exclusion in article 54 of the *Regulated Activities Order* applies. In many cases this will be self-evident. But it may sometimes be necessary to include further details in the certificate indicating what the certificate covers. For example, in the case of a large website, a distinct publication or service may form part of the website. In such a case a certificate may be given for that part only.

Refusal of application

7.6.12

G

An application may be refused on the grounds that the *FCA* is not satisfied that the principal purpose of the publication or service is neither of those mentioned in article 54(1)(a) or (b) of the *Regulated Activities Order* (see ■ PERG 7.4.5 G). An application may also be refused on the grounds that the *FCA* considers that the vehicle through which advice is to be given is not a newspaper, journal, magazine or other periodical publication, a regularly updated news or information service or a service consisting of the broadcast or transmission of television or radio programmes. Where an application is refused, the *FCA* will issue a notice which will give a statement of the reasons for the refusal in that case. If the application is refused, the applicant, if he is an *unauthorised person*, will need to consider whether it is appropriate to continue to publish the periodical or provide the service without *authorisation* or exemption.

7.7 Post-certification issues

Ongoing monitoring

- 7.7.1 **G** If a certificate is granted then, until it is revoked, it is conclusive evidence that the exclusion under article 54 of the *Regulated Activities Order* applies. A *person* to whom a certificate is given should notify the *FCA* of any significant changes to the purpose or nature of the content of the relevant publication or service. The *FCA* will need to keep the content of the publication or service in question under review.
- 7.7.2 **G** An annual fee of £1,000 will be charged to meet the costs of ongoing monitoring (see ■ SUP 20 Annex 3 R).

Revocation of certificate

- 7.7.3 **G** The *FCA* may revoke a certificate at the request of its holder or on the *FCA*'s own initiative if the *FCA* considers that it is no longer justified. If the *FCA* revokes a certificate on its own initiative, it would normally expect to give advance notice to the holder of the certificate together with a statement of the reasons for the proposed revocation, and give the holder of the certificate an opportunity to make representations. Where a certificate is revoked, the holder of the certificate, if he is an *unauthorised person*, will need to consider whether it is appropriate to continue to publish the periodical or provide the service without *authorisation* or exemption.

Publication of details of certificate holders

- 7.7.4 **G** The fact of a *person* holding a certificate granted under article 54(3) is information which may be of relevance to other *persons* (including investors or potential investors). For this reason, the *FCA* considers it appropriate that details of certificates granted under article 54(3) should be included in a list on the public record which the *FCA* is required to maintain under section 347 of the *Act* (The record of authorised persons, etc).

Further information

- 7.7.5 **G** For further information contact the Perimeter Enquiries Team of the *FCA* (email: authorisationenquiries@fca.org.uk , Tel 020 7066 0082).

Chapter 8

Financial promotion and related activities

8.1 Application and purpose

Application

- 8.1.1 **G** This chapter applies to *persons* who need to know whether their communications are subject to or comply with the *Act*. It also helps them decide whether their activities in making or helping others to make *financial promotions* are *regulated activities*.
- 8.1.1A **G** This chapter also applies to *persons* who need to know whether they are *marketing an AIF*.

Purpose of guidance

- 8.1.2 **G** The purpose of this *guidance* is three-fold:
- (1) to outline the restriction on financial promotion under section 21 of the *Act* (Restrictions on financial promotion) and the main exemptions from this restriction; and
 - (2) to outline the main circumstances in which *persons* who are primarily involved in making or helping others to make *financial promotions* may be conducting *regulated activities* requiring *authorisation* or exemption themselves; this part of the *guidance* may also be of more general relevance to *persons* who may be concerned whether or not they are carrying on the *regulated activities* of *advising on investments* or *making arrangements with a view to transactions in investments*; and
 - (3) to provide *guidance* in relation to *marketing an AIF*.
- 8.1.3 **G** In particular, this *guidance* covers:
- (1) invitations and inducements (see ■ PERG 8.4);
 - (2) meaning of 'in the course of business' (see ■ PERG 8.5);
 - (3) meaning of '*communicate*' (see ■ PERG 8.6);
 - (4) meaning of '*engage in investment activity*' (see ■ PERG 8.7);
 - (4A) meaning of '*engage in claims management activity*' (see ■ PERG 8.7A);
 - (5) meaning of 'having an effect in the *United Kingdom*' (see ■ PERG 8.8);
 - (6) circumstances where the restriction in section 21 does not apply (see ■ PERG 8.9);

- (7) types of *financial promotion*, including:
 - (a) meaning of '*real time financial promotion*' (see ■ PERG 8.10.2 G); and
 - (b) meaning of '*unsolicited real time financial promotion*' (see ■ PERG 8.10.8 G);
- (8) types of exemption under the *Financial Promotion Order*, including:
 - (a) exemption for certain one-off promotions (see ■ PERG 8.14.3 G);
 - (b) exemption for *financial promotions* not directed at the *United Kingdom* (see ■ PERG 8.12.2 G);
 - (c) exemptions for *financial promotions* by journalists and in broadcasts (see ■ PERG 8.12.23 G);
- (9) *financial promotions* concerning *deposits* and *contracts of insurance* other than *life policies* (see ■ PERG 8.13);
- (10) *financial promotions* concerning promotions by members of the professions (see ■ PERG 8.15);
- (11) [deleted]
- (12) *financial promotions* concerning the Lloyd's market (see ■ PERG 8.18);
- (13) additional restrictions on the promotion of:
 - (a) *life policies* (see ■ PERG 8.19);
 - (b) *collective investment schemes* (see ■ PERG 8.20);
- (14) *company* statements, announcements and briefings (see ■ PERG 8.21);
- (15) *financial promotions* made on the Internet (see ■ PERG 8.22);
- (16) *regulated activities*:
 - (a) *advising on investments* (see ■ PERG 8.24);
 - (b) *making arrangements with a view to transactions in investments* (see ■ PERG 8.32);
- (17) the business test for *regulated activities* (see ■ PERG 8.34); and
- (18) the *marketing* of an *AIF* (see ■ PERG 8.37).

8.1.4

G This *guidance* is issued under section 139A of the *Act*. It represents the *FCA's* views and does not bind the courts. For example, it would not bind the courts in an action for damages brought by a *private person* for breach of a *rule* (see section 138D of the *Act* (Actions for damages)), or in relation to the enforceability of a contract where there has been a breach of sections 19 (The general prohibition) or 21 (Restrictions on financial promotion) of the *Act* (see sections 26 to 30 of the *Act* (Enforceability of agreements)). Although the *guidance* does not bind the courts, it may be of persuasive effect for a court considering whether it would be just and equitable to allow a contract to be enforced (see sections 28(3) and 30(4) of the *Act*). Anyone reading this *guidance* should refer to the *Act* and to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/

1529) (the *Financial Promotion Order*) and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (as amended) (the *Regulated Activities Order*). These should be used to find out the precise scope and effect of any particular provision referred to in the *guidance* and any reader should consider seeking legal advice if doubt remains. If a *person* acts in line with the *guidance* in the circumstances mentioned by it, the *FCA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

8.2 Introduction

- 8.2.1** **G** (1) The effect of section 21 of the Act (Restrictions on financial promotion) is that in the course of business, an *unauthorised person* must not *communicate* an invitation or inducement to *engage in investment activity* or to *engage in claims management activity* unless either the content of the communication is *approved* for the purposes of section 21 by an *authorised person* or it is exempt.
- (2) By virtue of section 21(2A) of the Act an *authorised person* is unable to *approve* the content of a communication for the purposes of section 21 of the Act unless:
- (a) the *firm* is a *permitted approver* in relation to the *financial promotion*; or
- (b) an *approver permission exemption* applies.
- (3) References in this chapter to *financial promotions* being *approved* by an *authorised person* should be read as referring to *approval* by an *authorised person* who is either a *permitted approver* in relation to that *financial promotion* or where the *approval* falls within the scope of an *approver permission exemption*.
- (4) Under section 25 of the Act (Contravention of section 21), a *person* commits a criminal offence if they carry on activities in breach of the restriction in section 21 of the Act. A *person* who commits this criminal offence is subject to a maximum of two years imprisonment and an unlimited fine. However, it is a defence for a *person* to show that they took all reasonable precautions and used all due diligence to avoid committing the offence.
- 8.2.2** **G** Another consequence of a breach of section 21 of the Act is that certain agreements could be unenforceable (see section 30 of the Act (Enforceability of agreements resulting from unlawful communications)). This applies to agreements entered into by a *person* as a customer as a consequence of a communication made in breach of section 21.
- 8.2.3** **G** An *authorised person* will not breach section 21 when *communicating* a *financial promotion*. Nevertheless, this *guidance* may be relevant where an *authorised person* needs to know whether the *financial promotion rules* apply to a particular communication.
- 8.2.4** **G** A *person* who is concerned to know whether his communications will require *approval* or, if he is an *authorised person*, whether the appropriate *financial*

promotion rules will apply to his communications will need to consider the following:

- (1) am I making a communication or causing a communication to be made? (see ■ PERG 8.6);
- (2) if so, is it an invitation or inducement? (see ■ PERG 8.4);
- (3) if so, does the invitation or inducement relate to a *controlled investment*? (see ■ PERG 8.7);
- (4) if so, is the invitation or inducement to *engage in investment activity*? (see ■ PERG 8.7);
- (4A) alternatively, is the invitation or inducement to *engage in claims management activity*? (see ■ PERG 8.7A);
- (5) if so, is it made in the course of business? (see ■ PERG 8.5);
- (6) if so, and the *financial promotion* originates outside the *United Kingdom*, is it capable of having an effect in the *United Kingdom*? (see ■ PERG 8.8);
- (7) if so, or if the answer to (5) is yes and the *financial promotion* was made in the *United Kingdom*, is the promotion exempt? (see ■ PERG 8.12 to ■ PERG 8.15 and ■ PERG 8.21);
- (8) if not, am I an *authorised person*?

8.2.5

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- (1) If the answer to ■ PERG 8.2.4G (8) is yes, then the appropriate *financial promotion rules* will potentially apply (subject to the relevant application provisions).
- (2) If the answer to ■ PERG 8.2.4G(8) is no, then the promotion must be *approved* by an *authorised person* if it is a *non-real time financial promotion*. *Authorised persons* are not allowed to *approve*:
 - (a) *financial promotions* other than within the scope of:
 - (i) *approver permission* given by the *FCA* under section 55NA of the *Act*; or
 - (ii) an *approver permission exemption* (see ■ PERG 8.9.1AG);
 - (b) *real time financial promotions* (see ■ COBS 4.10.4R).
- (3) ■ PERG 8.36.1G contains a flowchart explaining these steps.

8.2.6

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[deleted]

8.2.7

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The restriction in section 21 applies to all forms of communication such as advertising, broadcasts, websites, e-mails and all other forms of written or oral communication whether sent to one *person* or many. However, the restrictions only apply to a communication made in the course of business and not, for example, to personal communications between individuals.

- 8.2.8** **G** There are extensive exemptions in the *Financial Promotion Order*. This is explained in greater detail in ■ PERG 8.11 to ■ PERG 8.15 and ■ PERG 8.21.
- 8.2.9** **G** Because of the *United Kingdom's* exit from the *EU*, the Treasury amended the *Financial Promotion Order*. This included the amendment or removal of certain exemptions in the *Financial Promotion Order* that had previously been in place to take account of the *United Kingdom's* membership of the *EU*. Where those amendments are relevant to the *guidance* in this Chapter the *FCA* has amended the *guidance* accordingly. The Treasury also made transitional provision so that nothing in those amendments to the *Financial Promotion Order* will cause a *communication* to breach the restriction in section 21, if the *communication* is required under a contact entered into before *IP completion day*, and it would not have constituted a breach if it had been made before *IP completion day*.
- [Note: see Part 4 of the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632)]**

8.3 Financial promotion

- 8.3.1** **G** The basic restriction on the *communication of financial promotions* is in section 21(1) of the *Act*. Sections 21(2) and (5) disapply the restriction in certain circumstances. Their combined effect is that a *person* must not, in the course of business, *communicate* an invitation or inducement to *engage in investment activity* unless:
- (1) he is an *authorised person*; or
 - (2) the content of the communication is *approved* for the purposes of section 21 by an *authorised person*; or
 - (3) the communication is exempt under an order made by the Treasury under section 21(5) – the *Financial Promotion Order* (as amended).
- 8.3.1A** **G** The effect of section 21(2A) of the *Act* is that an *authorised person* is unable to *approve* the content of a communication for the purposes of section 21 unless:
- (1) the *firm* is a *permitted approver* in relation to the *financial promotion*; or
 - (2) an *approver permission exemption* applies.
- 8.3.2** **G** Section 21 of the *Act* does not itself (other than in its heading and side-note) refer to a '*financial promotion*' but rather to the *communication* of 'an invitation or inducement (a) to *engage in investment activity* or (b) to *engage in claims management activity*'. References in this *guidance* to a *financial promotion* mean an invitation or inducement to *engage in investment activity* or to *engage in claims management activity*.
- 8.3.3** **G** Section 21 of the *Act* contains a number of key expressions or phrases which will determine whether or not it will apply. These are:
- (1) 'invitation or inducement' (see ■ PERG 8.4);
 - (2) 'in the course of business' (see ■ PERG 8.5);
 - (3) '*communicate*' (see ■ PERG 8.6);
 - (4) '*engage in investment activity*' (see ■ PERG 8.7);

(4A) 'engage in claims management activity' (see ■ PERG 8.7A); and

(5) 'having an effect in the *United Kingdom*' (see ■ PERG 8.8).

8.3.4

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The *FCA's* views as to the meaning of these are explained in ■ PERG 8.4 to ■ PERG 8.8.

8.3.5

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In addition, this *guidance* deals with other factors such as when the exemptions in the *Financial Promotion Order* can be applied, including the exemptions relating to territorial scope and one-off *financial promotions*.

8.4 Invitation or inducement

Promotional element

- 8.4.1** **G** The *Act* does not contain any definition of the expressions ‘invitation’ or ‘inducement’, leaving them to their natural meaning. The ordinary dictionary entries for ‘invitation’ and ‘inducement’ offer several possible meanings to the expressions. An ‘invitation’ is capable of meanings ranging from merely asking graciously or making a request to encouraging or soliciting. The expression ‘inducement’ is given meanings ranging from merely bringing about to prevailing upon or persuading. In the *FCA*'s view it is appropriate, in interpreting the expressions, to take due account of the context in which they are being used and their purpose.
- 8.4.2** **G** The Treasury, responding to consultation on the draft *Financial Promotion Order*, stated its intention that only communications containing a degree of incitement would amount to ‘inducements’ and that communications of purely factual information would not. This is provided the facts are presented in such a way that they do not also amount to an invitation or inducement. This was made clear both in the Treasury’s consultation document on financial promotion and during the passage of the *Act* through Parliament. Under questioning, the Minister confirmed that the government’s policy was “to capture promotional communications only. The Minister also stated that ‘inducement’, in its Bill usage, already incorporates an element of design or purpose on the part of the person making the communication and that “design or purpose” is implicit in this context (Hansard HL, 18 May 2000 cols 387 and 388). In the same debate, the Minister stated that the restriction would not apply to such things as “public announcements, exchange of draft share purchase agreements in corporate finance transactions or cases in which the recipient of a communication simply misunderstands its contents and engages in investment activity as a result.”
- 8.4.3** **G** The *FCA* recognises that the matter cannot be without doubt. However, it is the *FCA* view that the context in which the expressions ‘invitation’ or ‘inducement’ are used clearly suggests that the purpose of section 21 is to regulate communications which have a promotional element. This is because they are used as restrictions on the making of financial promotions which are intended to have a similar effect to restrictions on advertising and unsolicited personal communications in earlier legislation. Such communications may be distinguished from those which seek merely to inform or educate about the mechanics or risks of investment. In this respect, the *FCA* supports the views expressed by Ministers as referred to in ■ PERG 8.4.2 G. To the extent that doubt may remain as to the true meaning of ‘invitation’ or ‘inducement’ when used in section 21, it is the opinion of

the *FCA* that the courts are likely to take account of the ministerial statements under the judgement in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

8.4.4

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The *FCA* considers that it is appropriate to apply an objective test to decide whether a communication is an invitation or an inducement. In the *FCA*'s view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a *person* to *engage in investment activity* or to *engage in claims management activity*, and be promotional in nature. So it must seek, on its face, to persuade or incite the recipient to *engage in investment activity* or to *engage in claims management activity*. The objective test may be summarised as follows. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:

- (1) consider that the communicator intended the communication to persuade or incite the recipient to *engage in investment activity* or to *engage in claims management activity*, or that that was its purpose; and
- (2) regard the communication as seeking to persuade or incite the recipient to *engage in investment activity* or to *engage in claims management activity*.

It follows that a communication which does not have any element of persuasion or incitement will not be an invitation or inducement under section 21.

Invitations

8.4.5

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An invitation is something which directly invites a *person* to take a step which will result in his *engaging in investment activity* or *engaging in claims management activity*. It follows that the invitation must cause the *engaging in investment activity* or *engaging in claims management activity*. Examples of an invitation include:

- (1) *direct offer financial promotions*;
- (2) a prospectus with application forms; and
- (3) Internet promotions by brokers where the response by the recipient will initiate the activity (such as 'register with us now and begin dealing online').

A communication may contain a statement that it is not an invitation. Such statements may be regarded as evidence that the communication is not an invitation unless its contents indicate otherwise.

8.4.6

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Merely asking a *person* if they wish to enter into an agreement with no element of persuasion or incitement will not, in the *FCA*'s view, be an invitation under section 21. For example, the *FCA* does not consider an invitation to have been made where:

- (1) a trustee or nominee receives an offer document of some kind and asks the beneficial owner whether he wishes it to be accepted or declined;
- (2) a *person* such as a professional adviser enquires whether or not his client would be willing to sign an agreement; or
- (3) a *person* is asked to sign an agreement on terms which he has already accepted or to give effect to something which he has already agreed to do.

Inducements

8.4.7

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An inducement may often be followed by an invitation or vice versa (in which case both communications will be subject to the restriction in section 21 of the Act). An inducement may be described as a link in a chain where the chain is intended to lead ultimately to an agreement to *engage in investment activity* or to *engage in claims management activity*. But this does not mean that all the links in the chain will be an inducement or that every inducement will be one to *engage in investment activity* or to *engage in claims management activity*. Only those that are a significant step in persuading or inciting or seeking to persuade or incite a recipient to *engage in investment activity* or to *engage in claims management activity* will be inducements under section 21. The FCA takes the view that the mere fact that a communication may be made at a preliminary stage does not, itself, prevent that communication from being a significant step. However, in many cases a preliminary communication may simply be an inducement to contact the *communicator* to find out what he has to offer. For example, an advertisement which merely holds out a *person* as having expertise in or providing services about investment management or venture capital will not be an inducement to *engage in investment activity*. It will merely be an inducement to make contact for further material and will not be a significant step in the chain. However, that further material may well be a significant step and an invitation or inducement to *engage in investment activity*. In contrast, an advertisement which claims that what the recipient should do in order to make his fortune is to invest in securities and that the *communicator* can provide him with the services to achieve that aim will be a significant step and an inducement to *engage in investment activity*.

8.4.8

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■ PERG 8.4.9 G to ■ PERG 8.4.34 G apply the principles in ■ PERG 8.4.4 G to ■ PERG 8.4.7 G to communications made in certain circumstances. They do not seek to qualify those principles in any way. A common issue in these circumstances arises when contact details are given (for example, of a provider of investments or investment services). In the FCA's view, the inclusion of contact details should not in itself decide whether the item in which they appear is an inducement or, if so, is an inducement to *engage in investment activity* or to *engage in claims management activity*. However, they are a factor which should be taken into account. The examples also refer, where appropriate, to specific exemptions which may be relevant if a communication is an invitation or inducement to *engage in investment activity* or to *engage in claims management activity*.

Directory listings

8.4.9

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Ordinary telephone directory entries which merely list names and contact details (for example where they are grouped together under a heading such

as ‘stockbrokers’) will not be inducements. They will be sources of information. Were they to be presented in a promotional manner or accompanied by promotional material they would be capable of being inducements. Even so, they may merely be inducements to make contact with the listed person. Specialist directories such as ones providing details of venture capital providers, unit trust managers, contractual scheme managers or investment trusts will usually carry greater detail about the services or products offered by the listed firms and are often produced by representative bodies. Such directories may also be essentially sources of information. Whether or not this is the case where individual entries are concerned will depend on their contents. If they are not promotional, the entries will not be inducements to *engage in investment activity* or to *engage in claims management activity*. However, it is possible that other parts of such a directory might, for example, seek to persuade recipients that certain *controlled investments* offer the best opportunity for financial gain. They may go on to incite recipients to contact one of the member firms listed in the directory in order to make an investment. In such cases, that part of the directory will be an inducement to *engage in investment activity*. But this does not mean that the individual entries or any other part of the directory will be part of the inducement. ■ PERG 8.6 provides *guidance* on the meaning of ‘communicate’ and ‘causing a communication’. This is of relevance to this example and those which follow.

Tombstone advertisements (announcements of a firm’s past achievements)

8.4.10

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Such advertisements are almost invariably intended to create awareness, hopefully generating future business. So they may or may not be inducements. This depends on the extent to which their contents seek to persuade or incite *persons* to contact the advertiser for details of its services or to do business with it. Merely stating past achievements with no contact details will not be enough to make such an advertisement an inducement. Providing contact details may give the advertisement enough of a promotional feel for it to be an inducement. But, if this is the case, it will be an inducement to contact the advertiser to find out information or to discuss what he can offer. Only if the advertisement contains other promotional matter will it be capable of being an inducement to *engage in investment activity* or to *engage in claims management activity*. In practice, such advertisements are often aimed at influencing only investment professionals. Where this is the case, the exemption in article 19 of the *Financial Promotion Order* (Investment professionals) may be relevant (see ■ PERG 8.12.21 G). Tombstone advertisements will not usually carry the indicators required by article 19 to establish conclusive proof. However, article 19 may apply even if none of the indicators are present if the *financial promotion* is in fact directed at investment professionals.

Links to a website

8.4.11

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Links on a website may take different forms. Some will be inducements. Some of these will be inducements under section 21 and others not. Links which are activated merely by clicking on a name or logo will not be inducements. The links may be accompanied by or included within a narrative or, otherwise, referred to elsewhere on the site. Whether or not such narratives or references are inducements will depend upon the extent to which they may seek to persuade or incite *persons* to use the links. Simple statements such as ‘these are links to stockbrokers’ or ‘click here to find out about stockmarkets – we provide links to all the big exchanges’ will either

not amount to inducements or be inducements to access another site to get information. If they are inducements, they will be inducements to *engage in investment activity* or to *engage in claims management activity* only if they specifically seek to persuade or incite *persons* to use the link for that purpose. Where this is the case, but the inducement does not identify any particular *person* as a provider of a *controlled investment* or as someone who carries on a *controlled activity* or a *controlled claims management activity*, the exemption in article 17 of the *Financial Promotion Order* (Generic promotions) may be relevant (see ■ PERG 8.12.14 G).

Banner advertisements on a website

8.4.12

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These are the Internet equivalent to an advertisement in a newspaper and are almost bound to be inducements. So whether they are inducements to *engage in investment activity* or to *engage in claims management activity* will depend upon their contents as with any other form of advertising and the comments in ■ PERG 8.4.11 G will be relevant.

Publication or broadcast of prices of investments (historic or live)

8.4.13

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These may or may not involve invitations or inducements. Where a *person* such as a newspaper publisher, broadcaster or data supplier merely presents prices of *investments* whether historic or live the information can be purely factual and not be an inducement. Historic prices on their own will never be invitations or inducements. Merely adding simple contact details to such prices will not make them invitations or inducements to *engage in investment activity*. However, any additional wording seeking to persuade or incite *persons* to contact firms so that they may buy or sell such *investments* may do so. In other circumstances, the publication of prices may involve an invitation or an inducement to engage in *investment activity*. For example, *persons* may use an electronic trading system to display prices and other terms such as lot size and volume at which they are prepared to deal, on screens viewed by potential counterparties. The price and other terms may be firm or indicative. The *persons* using the trading systems will have accepted the general terms and conditions for trading. Where prices and terms quoted are firm, the screen display may be an invitation to *engage in investment activity* by entering into a transaction at that price and on those terms. This will be where the offer may be accepted by the counterparty by a simple electronic response. Where the price or other terms are indicative, the screen display may be an inducement to *engage in investment activity* after negotiating acceptable terms. But in either case, the display of prices and other terms will only be invitations or inducements to *engage in investment activity* if it also contains material which seeks to persuade or incite the recipient to do so.

Company statements and announcements and analyst briefings

8.4.14

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Encouraging (or discouraging) statements may be made by a *company* director. These will typically be made in reports or accounts or at a presentation or road show or during a briefing of analysts. Alternatively, such statements may be made on the *company's* behalf by its public relations adviser. Statements of fact about a *company's* performance or activities will not, themselves, be inducements to *engage in investment activity* even if they may lead *persons* to decide to buy or sell the *company's* shares.

However, statements which speculate about the *company's* future performance or its *share* price may have an underlying purpose or intent to encourage investors to act. If this is so, whether they will be inducements to *engage in investment activity* will depend entirely on their contents and the extent to which they seek to promote investment in the *company*. ■ PERG 8.21 contains detailed *guidance* on the various exemptions which may apply in this area.

Journalism

8.4.15

G

Journalism can take many forms. But typically a journalist may write an editorial piece on a *listed company* or about the *investments* or investment services that a particular firm provides or the *controlled claims management activity* that it carries on. This may often be in response to a press release. The editorial may or may not contain details of or, on a website, a link to the site of the *company* or firm concerned. Such editorial may specifically recommend that readers should consider *buying* or *selling investments* (whether or not particular *investments*) or obtaining investment services (whether or not from a particular firm) or obtaining services which constitute a *controlled claims management activity* (whether or not from a particular firm). If so, those recommendations are likely to be inducements to *engage in investment activity* (bearing in mind that a recommendation not to *buy* or *sell investments* cannot be an inducement to engage in *investment activity*) or to *engage in claims management activity*. In other cases, the editorial may be an objective assessment or account of the *investment* or its *issuer* or of the firm and may not encourage *persons* to make an *investment* or obtain *investment* services or other services which constitute a *controlled claims management activity*. If so, it will not be an inducement to *engage in investment activity* or to *engage in claims management activity*. Article 20 of the *Financial Promotion Order* (Communications by journalists) contains a specific exemption for journalism and journalists may be able to make good use of the generic promotions exemption in article 17 of the *Financial Promotion Order* (see ■ PERG 8.12.23 G and ■ PERG 8.12.14 G). Journalists should bear in mind that they may communicate a *financial promotion* by repeating a recommendation that originates from another source. That source could be, for example, an *authorised person*, an academic or another publication. Such a *financial promotion* would be viewed as *communicated* by the journalist where he has editorial control over its form and content. In the *FCA's* view, a *person* is not causing the *communication* of a *financial promotion* merely by providing material, including a press release or a quotation, to a journalist who uses it in an article. This is provided that the *person* has no control over the way in which the article is prepared and published. The press release or quotation itself, if it is a *financial promotion*, should be exempt under article 47 of the *Financial Promotion Order* (Persons in the business of disseminating information) – see ■ PERG 8.21.10 G.

Performance tables

8.4.16

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League tables showing the past performance of investment products of a particular kind or investment firms of a particular class (such as investment managers) and determined by the application of pre-set criteria will not, in themselves, be inducements. The fact that such tables represent pure information could, for example, be made clear by their being accompanied by a statement to the effect that the fact of a product or firm being well placed in the tables based on past performance is no guide to their likely future performance. The effectiveness of such a statement will, of course, depend upon it being the case that they do, in fact, represent mere

information. But if, for example, the tables are accompanied by or presented or provided in a way that they are an actual or implied recommendation that a particular product's performance suggests it is a potential buy or sell they may become inducements.

8.4.17

G

Tables or other forms of list may identify products with their relevant features such as interest rates, redemption periods and charges. Again, provided that the tables amount to purely factual information enabling comparison of products they will not be inducements. This includes such things as electronic systems that allow users to programme in their requirements and find details of the products that meet them. Producers of the table or list may, to some extent, expect that the information will lead *persons* to make investments. Or they might have negotiated a payment from the firms featured that reflects leads generated. In either case, the absence of a promotional element in the table will be determinative. As with performance tables, these can become inducements to *engage in investment activity*. This will happen when there is an actual or implied recommendation that either the products which come out best in respect of certain features or a specific combination of features or those that have been chosen for inclusion are likely to be good or best buys. This might, for example, include identifying the top ten *deposit* accounts for *persons* looking for *deposit* accounts offering certain features. The mere inclusion in tables of the kind referred to generally in this paragraph or those in ■ PERG 8.4.16 G of contact details should not turn what is otherwise factual or neutral information into an inducement. Both types of table may benefit, if necessary, from the exemption for journalists in article 20 (see ■ PERG 8.12.23 G). This will be where they are prepared by a *person* acting as a journalist and are included in a publication, service or broadcast as described in article 20(5)(b). Where the tables are merely a reproduction of information supplied by a third party data source which does not provide them as a journalist article 20 will not be available.

Decision Trees

8.4.18

G

A decision tree (or flow chart) will generally be used in one of two ways. Either it will be an educational tool (for instance, where an employer wishes to help his employees understand their pension options) or a promotional tool. As an educational tool which does no more than enable a *person* to identify generic investment options it will not be an inducement. But if its use is intended to procure business for an investment firm then it is likely to be an inducement. For example, electronic decision trees on websites may typically invite *persons* to enter basic information about their circumstances and objectives leading to a recommendation or choice of products or services, or both, possibly with links to other firms' sites. These decision trees will be inducements to *engage in investment activity* although, in some cases, the journalists' exemption in article 20 of the *Financial Promotion Order* may be relevant (see ■ PERG 8.12.23 G).

Investment agreements, share purchase agreements and customer agreements

8.4.19

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These types of agreements will only rarely be inducements or invitations. For instance, where the terms of a deal have been agreed in principle and the agreement is merely the means of giving it effect, the inducement phase has clearly passed. And an agreement or draft agreement itself may usually be seen as a document setting out the terms and conditions of a deal and not

itself an inducement (or an invitation) to deal. However, an agreement or draft agreement may often be accompanied by an invitation or inducement such as a covering letter or an oral communication that seeks to persuade or incite a *person* to enter into the agreement. Whilst such accompaniments are capable of being inducements (or invitations), merely offering concessions or amendments to a draft agreement during negotiations will not turn those accompaniments into inducements. It is, however, possible for an agreement itself to be or to include an invitation or inducement. For example, an advertisement that contains the terms and conditions and the means to enter into it as a binding contract, a *direct offer financial promotion* or a prospectus with an application form included.

Image advertising

8.4.20

G

Activities which are purely profile raising and which do not identify and promote particular investments or investment services or services which constitute a *controlled claims management activity* may not amount to either an invitation or inducement of any kind. Examples of this include where *listed companies* sponsor sporting events or simply put their name or logo on the side of a bus or on an umbrella. This is usually done with a view, among other things, to putting their names in the minds of potential investors or consumers. In other cases, an image advertisement for a *company* which provides investment services (for example, on a pencil or a diary) may include, along with its name or logo, a reference to its being an investment adviser or fund manager or a telephone or fax number or both. Profile raising activities of this kind may involve an inducement (to contact the advertiser) but will be too far removed from any possible *investment activity* or, where relevant, *controlled claims management activity*, to be considered to be an inducement to *engage in investment activity* or to *engage in claims management activity*.

Advertisements which invite contact with the advertiser

8.4.21

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These will be advertisements that contain encouragement to contact the advertiser. They are likely to be inducements to do business with him or to get more information from him. If so, they will be inducements to *engage in investment activity* or to *engage in claims management activity* if they seek to persuade or incite *persons* to buy or sell *investments* or to get investment services or services which constitute a *controlled claims management activity*. See ■ PERG 8.4.7 G for more *guidance* on preliminary communications and whether they are a significant step in the chain of events which are intended to lead to the recipient *engaging in investment activity* or *engaging in claims management activity*. Where advertisements invite *persons* to send for a prospectus, article 71 (Material relating to prospectus for public offer of unlisted securities) may provide an exemption. Any *financial promotion* which contains more information than is allowed by article 71 but which is not the prospectus itself is likely to require *approval* by an *authorised person* unless another exemption applies.

Introductions

8.4.22

G

(1) Introductions may take many forms but typically involve an offer to make an introduction or action taken in response to an unsolicited request. An introduction may be an inducement if the introducer is actively seeking to persuade or incite the *person* he is introducing to do business with the *person* to whom the introduction is made. So it

may fall under section 21 if its purpose is to lead to investment activity or *controlled claims management activity*. For example, if a *person* answers the question 'do you or can you provide investment advice' with a simple 'no, but I can introduce you to someone who does', that may be an inducement. But, if so, it is likely to be an inducement to contact someone to find out information about his services rather than to *engage in investment activity* or to *engage in claims management activity*.

- (2) Where a *person* calls in to an office or branch of a *company* and asks to see 'the investment adviser', a *person* who responds merely by directing or showing the way is not making an inducement.
- (3) Neither would a *person* be making an inducement by responding to an enquiry with 'we do not provide investment services – you need to consult an *authorised person*' or words to that effect. That is provided he does not go on to seek to persuade or incite the enquirer to contact a particular *authorised person* for investment services.
- (4) But a *person* would be making an inducement to *engage in investment activity* if, for example, he seeks to persuade or incite *persons* to allow him to introduce them to a particular *authorised person* so that they may take advantage of the cheap dealing rates which that *person* offers.
- (5) Where introductions do amount to inducements under section 21 they may fall under the exemption for generic promotions (article 17 of the *Financial Promotion Order*) (see ■ PERG 8.12.14 G). This will be the case provided the *financial promotion* does not identify any particular *investment* or *person* to whom introductions are to be made or identify the introducer as a *person* who carries on a *regulated activity* (typically of *making arrangements with a view to transactions in investments* under article 25(2) of the *Regulated Activities Order* - (see ■ PERG 8.33 (Introducing)) or *making arrangements with a view to regulated mortgage contracts* under article 25A(2) of the *Regulated Activities Order* (see ■ PERG 4.5 (Arranging regulated mortgage contracts)). It is most likely to apply where the *financial promotion* relates to *deposits* or *contracts of insurance* which are not *contractually based investments*.
- (6) The journalists' exemption in article 20 of the *Financial Promotion Order* (Communications by journalists) may be relevant where the introduction is made through or in a publication, broadcast or regularly updated news or information service (see ■ PERG 8.12.23 G).
- (7) Article 15 (Introductions) may apply provided certain conditions are met (see ■ PERG 8.12.11 G). In addition, article 28B (Real time communications: introductions) may apply where an introduction is a *real time financial promotion* about *home finance transactions* and *home finance activities* (see ■ PERG 8.17.12 G).

Distributors

8.4.23

G

A *person* may be distributing *financial promotions* which have been issued or approved by an *authorised person*. This may be by displaying copies or delivering them or handing them out whether or not on request. ■ PERG 8.6 explains when such a *person* will be *communicating* the *financial*

promotions. Where this is so, the exemption for mere conduits in article 18 of the *Financial Promotion Order* may apply (see ■ PERG 8.12.18 G). But article 18 will not apply if the distributor creates his own *financial promotion* by seeking to persuade or incite the recipient to act upon the *financial promotions* he is distributing.

Investment trading methods and training courses

8.4.24

G

Trading methods and techniques, such as traded options training courses and software-based or manual trading tools will, in many cases, be too remote from any eventual investment dealing activities to be inducements to *engage in investment activity*. Promotions of such things will be inducements (or invitations) to receive training and general trading tips and techniques. However, such things may be sold on the basis that they are almost certain to produce profits from the trading which the recipient will undertake using the training or technique. If this is the case, the promotions are capable of being inducements to engage in those trading activities. Such *financial promotions* are capable of being generic promotions under article 17 of the *Financial Promotion Order* (see ■ PERG 8.12.14 G).

Invitations to attend meetings or to receive telephone calls or visits

8.4.25

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These are clearly invitations or inducements. Whether they will involve invitations or inducements to *engage in investment activity* or to *engage in claims management activity* rather than to attend the meeting or receive the call or visit, will depend upon their purpose and content. ■ PERG 8.4.7 G discusses communications which are a significant step in the chain of events leading to an agreement to *engage in investment activity* or to *engage in claims management activity*. The purpose of the meeting, call or visit to which the invitation or inducement relates may be to offer the audience or recipient investment services or services which constitute a *controlled claims management activity*. In this case, the invitation or inducement will be a significant step in the chain if it seeks to persuade or incite the invitee to *engage in investment activity* or to *engage in claims management activity* at the meeting, call or visit. Any *financial promotions* made during the meeting, call or visit would still need to be *communicated or approved* by an *authorised person* or be exempt.

Explanation of terms

8.4.26

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An explanation of the terms of an agreement or of the consequences of taking a particular course of action can be merely factual information unless it includes or is accompanied by encouragement to enter into the agreement or take the course of action. The mere fact that the explanation may present the investment in a good light or otherwise influence the recipient will not make it an inducement. Where such communications are *financial promotions* they may fall under one of the exemptions for one-off promotions in articles 28 and 28A of the *Financial Promotion Order* (see ■ PERG 8.14.3 G).

Enquiries about a person’s status or intentions

- 8.4.27 **G** A *person* ('A') may enquire:
- (1) whether another *person* is certified as a high net worth individual or a sophisticated investor so that A may determine whether an exemption applies; or
 - (2) whether a *person* has received material sent to him; or
 - (3) how a *person* might propose to react to a take-over offer. or
 - (4) whether a *person* has been involved in an accident.

Enquiries of this or a similar kind will not amount to inducements to *engage in investment activity* or to *engage in claims management activity* unless they involve persuasion or incitement to do so. The enquiry may be accompanied by a brief statement of the reason why it is being made. This may, for example, include a reference to the type of *investment* to which any subsequent *financial promotions* would relate. Such initial enquiries may be followed up with an inducement but this fact alone will not turn the initial enquiry into a *financial promotion*. For example, an enquiry about whether a *person* is certified for the purposes of article 48 (High net worth individuals), article 50 (Sophisticated investors) or article 50A (self-certified sophisticated investors) may, where the answer is positive, be followed by a *financial promotion*. That *financial promotion* can then rely on article 48, 50 or 50A as the case may be.

Solicited and accompanying material

- 8.4.28 **G** Solicited or accompanying material which does not contain any invitation or inducement to *engage in investment activity* will not itself be a *financial promotion*. This is provided that the material is not part of any *financial promotion* which may accompany it. This is explained in greater detail in ■ PERG 8.4.29 G to ■ PERG 8.4.30 G.

- 8.4.29 **G** *Persons* may sometimes be asked to send material which has not been prepared for use as a *financial promotion* to a *person* who is interested in making an investment. For example, a prospective participant in a Lloyd’s *syndicate* may ask for a copy of the business plan or forecast prepared by the *managing agent* to comply with Lloyd’s requirements. As another example, a prospective purchaser of, or investor in, a *company* may wish to see a valuation report, a due diligence report or legal advice. The fact that the *person* requesting the material may intend to rely on it in making his investment decision does not, itself, make the material an inducement under section 21.

- 8.4.30 **G** The *person* who responds to the request for the material in the circumstances in ■ PERG 8.4.29 G may make a *financial promotion* in the form of a covering letter or oral communication ('C'). This will not mean that the material accompanying C must itself be treated as an inducement. This will depend on the circumstances. The material itself would only become an inducement if it is turned into part of the *financial promotion* in C. For example, C may refer to the contents or part of the contents of the accompanying material and claim that they will convince the recipient that

he should *engage in investment activity*. In such a case, the contents, or the relevant part of the contents as the case may be, would become part of the *financial promotion* in C. In other cases, C may simply refer to the fact that certain material has been enclosed or is available without using it as a selling point to persuade or incite the recipient to *engage in investment activity*. In that case, the material will not become part of the *financial promotion*. A similar situation arises if a *person* other than the *person* who originated an oral or written communication which is not itself a *financial promotion* uses it to persuade or incite a potential investor.

Telephone services

8.4.31 G A *person* ('P') may be engaged, typically by investment product companies, to provide telephone services. Where such services require P to seek to persuade or incite prospective customers to receive investment literature or a personal call or visit from a representative of his principal they will frequently involve inducements to *engage in investment activity*. This is so whether the inducement results from P making unsolicited calls or by his raising the issue during a call made by the prospective customer. Generally speaking, it is likely that P would be carrying on a *regulated activity* under article 25(2) of the *Regulated Activities Order* and require *authorisation* or exemption (for example, as an *appointed representative*) if he is required to procure leads for his principal. In other cases, P may merely respond to a request from a prospective customer. This may be a request for investment literature or to arrange a call or visit. P will not be making an inducement simply by agreeing to send the literature, referring the caller to a representative of his principal or agreeing to arrange for the visit or call. Where *persons* providing telephone services are *appointed representatives* the exemption in article 16 of the *Financial Promotion Order* (Exempt persons) may apply (see ■ PERG 8.12.12 G).

8.4.31A G Where the telephone services that P provides, or other services provided in conjunction with those telephone services, have the result that P is carrying on the *regulated activity of seeking out, referrals and identification of claims or potential claims*, instead of (or in addition to) *communicating a financial promotion* that relates to *controlled claims management activity*, P will require *permission* to carry on the *regulated activity of seeking out, referrals and identification of claims or potential claims*.

Personal illustrations

8.4.32 G A personal illustration (for instance, of the costs of and benefits under a particular investment product) may or may not be an invitation or inducement. This will depend on the extent to which it seeks to persuade or incite the recipient to invest as opposed to merely providing him with information. A personal illustration may, however, be accompanied by an invitation or inducement to buy the investment in which case the exemptions for one-off *financial promotions* in articles 28 or 28A may apply (see ■ PERG 8.14.3 G). *Authorised persons* should note that, where personal quotations or illustrations do amount to a *financial promotion* the *financial promotion rules* will not usually apply to them.

Instructions or guidance on how to invest

- 8.4.33 **G** Things such as help-lines for *persons* who wish to make an *investment* will not usually involve invitations or inducements to *engage in investment activity*. This is where their purpose is merely to explain or offer *guidance* on how to invest or to accept an offer. In such cases, the investor will already have decided to invest and there will be no element of persuasion on the part of the *person* giving the explanation or guidance.

Communications by employers and contracted service providers to employees

- 8.4.34 **G** Employers and their contracted service providers may *communicate* with employees on matters which involve *controlled investments*. For example, *work-related insurance*, *staff mortgages*, *personal pension schemes* (including *stakeholder schemes*) and other employee benefit schemes other than *occupational pension schemes*. Interests under the trusts of an *occupational pension scheme* are not a *controlled investment* (see paragraph 27 (2) of Schedule 1 to the *Financial Promotion Order*).

In the case of *personal pension schemes* (including *stakeholder schemes*), such communications will only be invitations or inducements to *engage in investment activity* if they seek to persuade or incite employees to do things such as:

- (1) participate in or leave the pension or other benefit scheme;
- (2) exercise certain rights under such a scheme, including making additional contributions or exercising options.

Communications which seek to persuade or incite employees to subscribe for *work-related insurance* or enter into *staff mortgages* may also be invitations or inducements to *engage in investment activity*.

Communications which are intended to educate or give employees information with no element of persuasion or incitement will not be invitations or inducements under section 21. Employers may wish to give their employees investment material prepared and *approved* by an *authorised person*. This material may be given under cover of a communication from the employer. If so, the covering communication will not itself be an inducement if all it does is to refer employees to the material and explain what they should do if they wish to act on it, without seeking to persuade or incite them to act. Where the covering communication is itself a *financial promotion* it will need to be *approved* by an *authorised person* provided it is a *non-real time financial promotion* unless an exemption applies. If it is a *real time financial promotion* it cannot be *approved* (see, for example, ■ COBS 4.10.4 R). In such cases, an exemption would need to apply. Where employee share schemes are concerned, the exemption in article 60 of the *Financial Promotion Order* (Participation in employee share schemes) is likely to apply to any *financial promotions* made by employers or members of their *group*. Where an employer's *financial promotions* relate to such things as *company health* or general insurance benefit packages, the exemptions in article 24 (Relevant insurance activity: non real time communications) or 26 (Relevant insurance activity: real time communications) of the *Financial Promotion Order* may apply. Employers who promote pension products, *work-related insurance* or *staff mortgages* to their employees will be able to use the exemptions in article 72, article

72B and article 72D and contracted service providers who promote pension products, *work-related insurance* or *staff mortgages* to employees will be able to use the exemptions in article 72A, article 72C and article 72E, provided certain conditions are met. These conditions are explained in ■ PERG 8.14.40A G to ■ PERG 8.14.40AE G. (Pension products offered by employers (article 72)). Any *financial promotion* made by an employer for the purpose of meeting his obligations under the Welfare Reform and Pensions Act 1999 to offer his employees a *stakeholder pension scheme* should be able to use the exemption in article 29 (Communications required or authorised by enactments).

8.5 In the course of business

- 8.5.1** **G** Under section 21(4) of the *Act*, the Treasury has the power to specify circumstances in which a *person* is viewed as 'acting in the course of business' or 'not acting in the course of business'. The power under section 21(4) relates only to *financial promotions* and is distinct from the power in section 419 which relates to *regulated activities*. To date, the Treasury has not used the power in section 21(4). As a result, the phrase has its ordinary or natural meaning.
- 8.5.2** **G** The *FCA* considers that 'in the course of business' requires a commercial interest on the part of the communicator. This does not necessarily have to be a direct interest. And the communicator does not need to be carrying on *regulated activities* (the test in section 19 of the *Act*) as or as part of his business. Neither does the communication need to be made in the course of carrying on activities as a business in their own right (the test in article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001) (SI 2001/1177). For example, if a holding company proposes to sell one of its subsidiaries, that sale will be 'in the course of business' irrespective of the fact that the company may well not be in the business of selling subsidiaries.
- 8.5.3** **G** The position is slightly more blurred with individuals. The 'in the course of business' test is intended to exclude genuine non-business communications. Examples of these would be friends talking in a pub, letters between family members or e-mails sent by individuals using an Internet chat-room or bulletin board for personal reasons. An issue arises where capital is raised for small private *companies*. Where such a *company* is already in operation, it will be acting 'in the course of business' when seeking to generate additional share or loan capital. At the pre-formation stage, however, it will often be the case that individuals who are proposing to run the *company* will approach a small number of friends, relatives and acquaintances to see if they are willing to provide start-up capital. In the *FCA's* view, such individuals will not be acting 'in the course of business' during the pre-formation stage of a small private *company*. This is provided that they are not:
- (1) forming *companies* with such regularity that they would be regarded as carrying on the business of forming *companies*; or
 - (2) already running the business which the *company* will carry on (for example, as a partnership).
- 8.5.4** **G** There is, of course, no reason why an individual cannot act 'in the course of business'. For example, sole traders who are independent financial advisers

will give investment advice 'in the course of business' and so satisfy the test. Individuals who are merely seeking to make personal investments will not be acting 'in the course of business' by approaching a company about making an investment in its shares. However, it is possible that an individual who regularly seeks to invest in companies who are seeking to raise venture capital with a view to becoming a director and influencing their affairs may be regarded as acting in the course of business. In approaching *companies*, such a *person* should be able to make use of the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* (see ■ PERG 8.14.3 G).

8.5.5

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Persons who carry on a business which is not a *regulated activity* will need to be particularly careful in making communications which may amount to *financial promotions* (because they seek to persuade or incite *persons* to *engage in investment activity* (see ■ PERG 8.4)). For example, where a *company* makes *financial promotions* to its employees, they may well be made in the course of business. Examples of these include *financial promotions* concerning employee share schemes, group wide insurance arrangements and *stakeholder pension schemes*. These would need to be *approved* by an *authorised person* unless an appropriate exemption is available. ■ PERG 8.4.34 G provides further *guidance* on this.



8.6 Communicate

8.6.1 **G** The word '*communicate*' is extended under section 21(13) of the Act and includes causing a communication to be made. This means that a *person* who causes the *communication* of a *financial promotion* by another *person* is also subject to the restriction in section 21. Article 6(d) of the *Financial Promotion Order* also states that the word '*communicate*' has the same meaning when used in exemptions in the Order. Article 6(a) also states that the word '*communication*' has the same meaning as '*financial promotion*'. It appears to the *FCA* that a *person* is *communicating* where he gives material to the recipient or where, in certain circumstances (see ■ PERG 8.6.5 G), he is responsible for transmitting the material on behalf of another *person*. As both causers and communicators *communicate* under section 21 the distinction between them is not usually of great significance. What is important is whether a *person* who is not himself *communicating* is or is not causing a communication to be made by another. In the *FCA*'s view, primary responsibility for a communication to which section 21 applies and which is capable of being read will rest with its originator. This is the *person* responsible for its overall contents. Where it is an oral communication primary responsibility will rest with the speaker. A speaker will, of course, be an individual. But where the individual speaks on behalf of his employer, it will be the employer who is responsible. The same will apply if the individual is an officer of a *company* or partner in a partnership and speaks on behalf of the *company* or partnership. Individuals who make *financial promotions* otherwise than in their capacity as employees, officers or partners will need to consider their own position (they may not be acting in the course of business (see ■ PERG 8.5)). Where a *person* other than the originator (for example a newspaper publisher) transmits a communication on the originator's behalf he is *communicating* it and the originator is causing its *communication*.

Persons who communicate or cause a communication

8.6.2 **G** Apart from the originators of a *financial promotion*, the *FCA* considers the following *persons* to be *communicating* it or causing it to be *communicated*:

- (1) publishers and broadcasters who carry advertisements (including websites carrying banner advertisements); and
- (2) intermediaries who redistribute another *person's* communication probably with their own communications.

Persons who do not communicate or cause a communication

8.6.3 **G** In the *FCA*'s view, the following *persons* will not be causing or *communicating*:

- (1) advertising agencies and others when they are designing advertising material for originators;
- (2) *persons* who print or produce material for others to use as advertisements;
- (3) professional advisers when they are preparing material for clients or advising them on the need to *communicate* or the merits or consequences of their *communicating a financial promotion*; and
- (4) *persons* who are responsible for securing the placing of an advertisement provided they are not responsible for its contents.

Need for an active step to communicate or cause a communication

8.6.4 G The FCA considers that, to *communicate*, a *person* must take some active step to make the communication. This will be a question of fact in each case. But a *person* who knowingly leaves copies of a document where it is reasonable to presume that *persons* will pick up copies and may seek to act on them will be *communicating* them.

8.6.5 G The *Financial Promotion Order* contains an exemption for mere conduits in article 18. It does not follow that all *persons* who provide services for facilitating the distribution of *financial promotions* are *communicating*. Where *persons* of this kind would normally be unaware of the fact that they may be distributing *financial promotions* or are indifferent as to whether they are doing so, or both, they will not be regarded as *communicating* them. This may, for example, include:

- (1) postal services providers;
- (2) telecommunication services providers;
- (3) broadcasting services providers;
- (4) courier services providers;
- (5) *persons* employed to hand out or disseminate communications;
- (6) a newsagent who sells newspapers and journals containing *financial promotions*.

In other cases, *persons* of this kind may need to rely on the mere conduit exemption (see ■ PERG 8.12.18 G).

Website operators

8.6.6 G Where a website operator provides links to other sites he is not usually to be regarded as causing the *communication* of the contents of those other sites to *persons* who may use the links. See further *guidance* on Internet issues in ■ PERG 8.22.

Application of exemptions to persons causing a communication

8.6.7 **G** A general point arises about causing and *communicating* on whether a particular exemption that applies to a communication made by a specified *person* also applies to a *person* who is causing that communication to be made. For example, article 55 of the *Financial Promotion Order* (Communications by members of professions) applies only to a communication by an *exempt professional firm*. This exemption may apply where a *person* ('P') requests an *exempt professional firm* ('E') to *communicate* an offer to a client of E. In this case, where P causes E to *communicate*, it is the FCA's view that the exemption that applies to E will also apply to P. This is because, as '*communicate*' includes '*causing to communicate*', the exemption applies where P causes the *communication* of the *financial promotion* by E.

8.6.7A **G** The position of an *unauthorised person* ('U') who, in the course of business, causes an *authorised person* to communicate a *financial promotion* is somewhat different. This is because the *authorised person* ('A') is not subject to section 21 of the *Act* and so will not necessarily be communicating the *financial promotion* in circumstances in which an exemption would apply. To avoid any doubt about the application of section 21 to U, a specific exemption is provided in article 17A of the *Financial Promotion Order* (Communications caused to be made or directed by unauthorised persons). This exemption applies where U causes A to make or direct a *real time financial promotion*. It also applies to a *non-real time financial promotion* but only where the content is prepared by A. This means that U will remain subject to section 21 where, for example, he provides A with copies of a *financial promotion* for the purpose of A distributing them to other *persons* or where he is placing an advertisement in a publication issued by A.

Application of exemptions to persons who communicate on behalf of others

8.6.8 **G** Another general point arises about the scope of exemptions that apply only to *financial promotions* by a particular *person*. This is whether the exemption applies to the *communication* of a *financial promotion* by an *unauthorised person* on behalf of the *person* to whom the exemption applies. In the FCA's view, this will not be the case unless the exemption specifically states that it applies to a communication made on behalf of the *person* identified in the exemption. For example, article 62 (Sale of body corporate) applies to 'any communication by or on behalf of a body corporate'.

Meaning of 'made to', 'directed at' and 'recipient'

8.6.9 **G** Section 21(1) of the *Act* refers only to the *communication* of an invitation or inducement. It says nothing about communications being 'made to' or 'directed at' *persons* or about who the 'recipient' of a communication will be. These facts are determined by the following sequence:

- (1) section 21(13) of the *Act* indicates that communications are 'made';
- (2) article 6 of the *Financial Promotion Order* (Interpretation: communications) indicates that communications are made by being 'addressed to' a *person*;
- (3) article 6 then indicates that communications may be addressed:

- (a) to a particular *person* or *persons* whether verbally or in a legible form (for example, in a telephone call or letter) – these are referred to as communications which are 'made to' *persons*; or
 - (b) to *persons* generally (for example, in a television broadcast or on a website) – these are referred to as communications which are 'directed at' *persons*;
- (4) article 6 also indicates that a recipient of a communication is the *person* to whom the communication is made, or, in the case of a non-real time communication directed at *persons* generally, anyone who reads or hears the communication.

8.6.10

G In the FCA's opinion, the matters in ■ PERG 8.6.9 G have the following effects.

- (1) Any one particular communication will either be real time or non-real time but not both. This is because:
 - (a) a real time communication is one made in the course of an interactive dialogue (see ■ PERG 8.10.2 G for *guidance* on the meaning of real time);
 - (b) those exemptions which concern real time communications apply only to communications which are made to *persons* and not those which are directed at *persons*;
 - (c) a communication is made to a *person* where it is addressed to him specifically;
 - (d) the *persons* to whom a real time communication is addressed are those *persons* who take part in the interactive dialogue; and
 - (e) where a communication is addressed to a particular *person* or *persons* it is not made to anyone else who may read or hear it.

This means that a real time communication cannot also be a non-real time communication made to *persons* other than those to whom it is addressed. But it is possible for the same communication to be issued in different forms. For example, the text of a *real time financial promotion* may be made available to *persons* generally in writing intending to persuade or incite them to *engage in investment activity*. In that case, the written version will be a separate *non-real time financial promotion* which will need to be *approved* or *exempt*. A similar situation may arise where a *real time financial promotion* made during a meeting is recorded on video and then made available to the public. Also, a *person* may, in the course of an interactive dialogue with a particular *person*, address an invitation or inducement to others who may be present. Where this does not result in an interactive dialogue taking place with those other *persons*, the invitation or inducement will be a separate non-real time communication.

- (2) A communication in the form of a letter or e-mail addressed to a particular *person* is not made to anyone else who, legitimately or otherwise, may read it. For example, it will not be made to any *persons* to whom it is copied unless any invitation or inducement that may be in it is addressed also to those *persons*.

- (3) A communication in the form of a personal conversation or telephone call will not be *communicated* to anyone else who may eavesdrop or otherwise listen to the conversation.
- (4) The recipient of a communication to whom it is addressed, will not always be the *person* who physically receives it. As a communication under section 21 is an invitation or inducement to *engage in investment activity*, it will be addressed to the *person or persons* (P) who is or are being invited or induced. An invitation or inducement may be *communicated* to someone such as a friend or relative of P who is asked to pass it on. If so, the communication will be regarded as addressed to P and not to the friend or relative. The same will usually apply where an invitation or inducement is *communicated* to P's adviser or other agent. However, this will not always be the case. The communication made to the agent may be aimed at getting him to act in a particular way. For example, to exercise discretion on his client's behalf. In this case, the communication may be an invitation or inducement to the agent himself to *engage in investment activity*. In the *FCA's* view, the friend, relative or agent should not himself be regarded as *communicating* the invitation or inducement simply because he faithfully relays the message to P. This is provided that the friend, relative or adviser, in relaying the message, does not make his own invitation or inducement. Friends and relatives would not, in any case, be *communicating* in the course of business. Should agents be making their own *financial promotions* in relaying messages, it is likely that the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* will apply.
- (5) It is important to consider whether any particular *financial promotion* is 'made to' or 'directed at' *persons* as some exemptions in the *Financial Promotion Order* apply only to *financial promotions* which are made to *persons*.



8.7 Engage in investment activity

8.7.1 **G** A communication must be an invitation or inducement to *engage in investment activity* (or to *engage in claims management activity* (see ■ PERG 8.7A)) for the restriction in section 21 to apply. Section 21(8) defines this phrase as:

- (1) entering or offering to enter into an agreement the making or performance of which by either party is a *controlled activity*; or
- (2) exercising any rights conferred by a *controlled investment* to acquire, dispose of, underwrite or convert a *controlled investment*.

8.7.2 **G** *Controlled activity* and *controlled investment* are defined in Schedule 1 to the *Financial Promotion Order* and are listed in ■ PERG 8.36.3 G and ■ PERG 8.36.4 G. Broadly speaking, *controlled activities* and *controlled investments* are similar to *regulated activities* and *specified investments* under the *Regulated Activities Order*. However, with *controlled activities*, the exclusions set out in the *Regulated Activities Order* do not, in most cases, apply. It is important to note, however, that there are certain differences between *controlled activities* and *regulated activities* and between *controlled investments* and *specified investments*. This is most notable where the *financial promotion* is about:

- (1) certain credit agreements (see ■ PERG 8.17 (Financial promotions concerning agreements for qualifying credit)); and
- (2) [deleted]
- (3) *contracts of insurance* other than *life policies* (see ■ PERG 8.17A (Financial promotions concerning insurance distribution activities)).

So, it is quite possible for a *person* to be carrying on a business in the *United Kingdom* for which he does not require *authorisation* because the business activity either is not connected with financial services or falls within one of the exclusions in the *Regulated Activities Order* but find that the restriction in section 21 applies to his communications. It should also be noted that *electronic money* is not a *controlled investment*. This means that the restriction in section 21 does not apply to the communication of an invitation or inducement that concerns *electronic money*. This is unless the communication is a *financial promotion* for some other reason. For guidance on *electronic money* see ■ PERG 3A.

8.7.3 **G** The overall effect is that a *financial promotion* must relate in some way to a *controlled investment* and may be summarised as the *communication*, in the course of business, of an invitation or inducement to:

- (1) acquire, dispose of or underwrite certain *investments* or exercise rights conferred by such an *investment* for such purpose or for the purpose of converting it; or
- (2) receive or undertake investment services such as *dealing in investments as principal or as agent, managing investments, advising on investments or safeguarding and administering investments*.

8.7.4 **G** So a *financial promotion* will not include an invitation or inducement to:

- (1) refrain from doing any of the things in ■ PERG 8.7.3 G; or
- (2) exercise rights conferred by an *investment* other than to acquire, dispose of, underwrite or convert an *investment*.

This means that most invitations or inducements to exercise voting rights will not be *financial promotions*.

8.7.5 **G** In the *FCA's* opinion, section 21 will apply to a communication (made in the course of business) if it contains an invitation or inducement to *engage in investment activity* which is addressed to a particular *person* or to *persons* generally. Where this is the case, it will not matter that the communication may be physically delivered to someone other than the *person* who is intended to engage in *investment* activity. ■ PERG 8.6.10 G gives more *guidance* on this.



8.7A Engage in claims management activity

Controlled claims management activity

8.7A.1 **G** A communication must be an invitation or inducement to *engage in claims management activity* (or to *engage in investment activity* (see ■ PERG 8.7)) for the restriction in section 21 to apply. Section 21(10A) of the Act defines this phrase as “entering into or offering to enter into an agreement the making or performance of which by either party constitutes a controlled claims management activity”. And section 21(10B) of the Act provides that an activity is a “controlled claims management activity” if:

- it is an activity of a specified kind;
- it is, or relates to, *claims management services*; and
- it is carried on in *Great Britain*.

8.7A.2 **G** The activities which have been specified are those set out in Part 1A of the *Financial Promotion Order* (which are listed in the *Glossary* definition of “*controlled claims management activity*”). These are the same as the activities which have been specified in the *Regulated Activities Order* as *regulated claims management activities*; the exclusions set out in articles 89N to 89W of the *Regulated Activities Order* in relation to *regulated claims management activities* are set out as exemptions in articles 73A to 73J of the *Financial Promotions Order* in relation to *controlled claims management activity*.

8.7A.3 **G** The activity must be or relate to a *claims management service*. The drafting of the *Financial Promotions Order* has the effect that the *controlled claims management activities* all meet this condition.

8.7A.4 **G** The activity must be carried on in *Great Britain*: see ■ PERG 2.4A.

The distinction between controlled claims management activity and regulated claims management activity

8.7A.5 **G** The *regulated activity of seeking out, referrals and identification of claims or potential claims*, as specified in article 89G of the *Regulated Activities Order*, constitutes three activities one of which is seeking out *persons* who may have a *claim* unless that activity constitutes a *controlled claims management activity*.

8.7A.6 **G** For a communication to constitute a *financial promotion*, it must constitute an invitation or inducement to *engage in claims management activity* (or to *engage in investment activity*): see ■ PERG 8.4. Where a *person* advertises the services of a *firm* which carries on a *regulated claims management activity* with a view to seeking out *customers*, the *person* is likely to be communicating an invitation or inducement to *engage in claims management activity*: the *person* will therefore have to be an *authorised person* or the communication will have to be approved by an *authorised person*, if the *person* is not to breach the prohibition in section 21 of the Act.

8.7A.7 **G** It may be possible for a *person* (for example, for a *lead generator*) to seek out claimants or potential claimants without communicating an invitation or inducement to *engage in claims management activity*. Whether or not there is an invitation or inducement would depend on the facts and circumstances of the communication. Where there is no invitation or inducement, the seeking out would constitute the *regulated activity* of *seeking out, referrals and identification of claims or potential claims*, and the *person* would need to be an *authorised person* if they are not to breach the *general prohibition*, or to hold the necessary *permission* if they are not to breach the requirement for *permission* in section 20 of the Act.



8.8 Having an effect in the United Kingdom

- 8.8.1** G Section 21(3) of the *Act* states that, in the case of a communication originating outside the *United Kingdom*, the restriction in section 21(1) applies only if it is capable of having an effect in the *United Kingdom*. In this respect, it is irrelevant whether the communication has an effect provided it is capable of doing so.

- 8.8.2** G This appears to give a potentially broad jurisdictional scope to section 21. It seems clear that a communication which originates overseas will be capable of having an effect in the *United Kingdom* if it is an invitation or inducement to *engage in investment activity* which is *communicated* to a *person* in the *United Kingdom*. It would seem that communications made in other circumstances may also be capable of having an effect in the *United Kingdom*. However, the exemption for communications to overseas recipients in article 12 of the *Financial Promotion Order* (Communications to overseas recipients) (see ■ PERG 8.12.2 G) prevents section 21 from applying to communications which are not directed at *persons* in the *United Kingdom*.

- 8.8.3** G [deleted]

8.9 Circumstances where the restriction in section 21 does not apply

8.9.1

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Section 21(2) of the *Act* sets out two circumstances in which a *financial promotion* will not be caught by the restriction in section 21(1). These are where the *communicator* is an *authorised person* or where the content of the *financial promotion* has been approved for the purposes of section 21 by an *authorised person*. Where *approval* is concerned it must be specifically for the purposes of enabling the *financial promotion* to be *communicated* by *unauthorised persons* free of the restriction under section 21. For example, if a solicitor who is an *authorised person* approves a *financial promotion* for legality generally, that would not suffice unless the solicitor also specifically *approves* the *financial promotion* for the purposes of section 21. And it will not be enough that an *authorised person* has ensured that the *financial promotion* complies with the appropriate *financial promotion rules* purely so that he can *communicate* it himself. In the *FCA's* view an *unauthorised person* should be able to rely on a statement made by an *authorised person* on the face of a *financial promotion* that its approval has been given for the purpose of section 21. Such *approval* may be stated to be made for limited purposes. For example, as with the *approval* of a *financial promotion* for an *unregulated collective investment scheme* (see ■ PERG 8.20). In other cases, the *unauthorised person* may satisfy himself that it is evident from the facts that *approval* has been given for the purposes of section 21.

8.9.1A

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- (1) Section 21(2A) of the *Act* specifies that the content of a *financial promotion* can only be *approved* for the purposes of section 21 by an *authorised person*:
 - (a) who is a *permitted approver* in relation to the *financial promotion*; or
 - (b) within the scope of an *approver permission exemption*.
- (2) Exemptions in the *Financial Promotion Requirement Exemption Regulations* allow an *authorised person* (A) to *approve* the content of a *financial promotion* where the content has been prepared by:
 - (a) A (for the purposes of communication by an *unauthorised person*) (see ■ PERG 8.9.3G);
 - (b) an *unauthorised person* (U), where both A and U are members of the same *group*;
 - (c) an *appointed representative* of A, in relation to any *regulated activity* comprised in the carrying on of the business for which A has accepted responsibility.

(3) In relation to ■ PERG 8.9.1AG(2)(c), the relevant exemption allows a *firm* to approve a *financial promotion* prepared by its *appointed representative* where that *financial promotion* is made for the purposes of the *appointed representative's* exempt activities.

8.9.2

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Where an *authorised person* makes a *financial promotion*, he is not subject to the restriction in section 21. So, the *communication* of the *financial promotion* by the *authorised person* will not be a criminal offence under the provisions of section 25 of the *Act* (Contravention of section 21) and any resulting contract will not be unenforceable under section 30 of the *Act* (Enforceability of agreement resulting from unlawful communications). However, the appropriate *financial promotion rules* may apply wholly or partially to any such *financial promotion*.

8.9.3

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An *unauthorised person* may wish to pass on a *financial promotion* made to them by an *authorised person*. In this case, the fact that the *financial promotion* was made to them by an *authorised person* will not be enough for the restriction in section 21 not to apply to them. The *authorised person* must also both have *approved* its content and have done so for the purpose of section 21 of the *Act*. If an *authorised person* wishes to ensure that an *unauthorised person* can *communicate* a *financial promotion* made by the *authorised person* to third parties, it may *approve* its own *financial promotion* for the purposes of section 21 of the *Act* (see ■ COBS 4.10.3G (2)). An *approver permission exemption* allows an *authorised person* to *approve* its own *financial promotion* without requiring *approver permission*.

8.9.4

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With *approval* generally, issues may arise as to what would be subject to the restrictions in section 21 where an invitation or inducement to *engage in investment activity* or to *engage in claims management activity* is made through a publication, broadcast or website or is accompanied by other material. In any such instances, it is necessary to consider the circumstances in which the *financial promotion* is made. For example, where a *financial promotion* takes the form of an advertisement or advice in a newspaper, broadcast or website, the rest of the newspaper, broadcast or website would not ordinarily be part of the *financial promotion*. There may, of course, be a number of *financial promotions* in the same publication, broadcast or website. They will be regarded as separate *financial promotions* unless it is clear that they are part of the same invitation or inducement. ■ PERG 8.4.28 G offers *guidance* about when accompanying material may be part of a *financial promotion*.

8.9.5

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The restriction in section 21 is also disapplied by means of an order made under section 21(5) (the *Financial Promotion Order*). This contains a number of specific exemptions which are referred to in ■ PERG 8.12 to ■ PERG 8.15, ■ PERG 8.17 and ■ PERG 8.21.

8.10 Types of financial promotion

8.10.1 **G** Although the restriction in section 21 addresses all forms of *financial promotion*, it is necessary to distinguish between particular types of *financial promotion* as these are treated differently under the *Financial Promotion Order*. This regime recognises two types of *financial promotion*. These are *real time* and *non-real time financial promotions*. *Real time financial promotions* are then divided into *solicited* or *unsolicited real time financial promotions*.

Real time v non-real time financial promotions

8.10.2 **G** The terms *real time financial promotion* and *non-real time financial promotion* are defined in article 7 of the *Financial Promotion Order* (Interpretation: real time communications). Article 7(1) defines a *real time financial promotion* as a *financial promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue. A *non-real time financial promotion* is one that is not a *real time financial promotion*. Article 7(5) states that *financial promotions* made by letter or e-mail or in a publication (defined in article 2 (Interpretation: general) as a newspaper, journal, magazine or other periodical publication, a website, a television or radio programme or a teletext service) are *non-real time financial promotions*. Articles 7(4) and (5) provide certain indicators that a *financial promotion* is a *non-real time financial promotion*. These are that:

- (1) the *financial promotion* is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity);
- (2) the *financial promotion* is made or directed by way of a system which in the normal course is or creates a record of the *financial promotion* which is available to the recipient to refer to at a later time; and
- (3) the *financial promotion* is made by way of a system which in the normal course does not enable or require the recipient to respond to it immediately.

■ PERG 8.6.9 G explains the meaning of 'made to' and 'directed at'.

8.10.3 **G** In the *FCA's* view, the matters identified in ■ PERG 8.10.2 G mean that:

- (1) for a communication to be real time it must be made in course of an interactive dialogue; but that
- (2) if the interactive dialogue takes place by means of the exchange of letters or e-mails or in a publication, the communication will be

deemed to be non-real time. In this case, publications include newspapers, journals, magazines or other periodical publications, websites or similar systems for the electronic display of information, television or radio programmes and teletext services.

8.10.4 **G** The words 'personal visit, telephone conversation or other interactive dialogue' clearly imply that the first two are types of the third. In the *FCA's* view, it is difficult to envisage circumstances in which a personal visit or telephone conversation would not be interactive. The very fact of a conversation taking place would mean two or more *persons* were interacting with each other. A telephone call is not the same thing as a conversation. It may be made to, or even by, an intelligent machine which asks questions and responds to answers. That is, in the *FCA's* view, no more an interactive dialogue than a questionnaire or an electronic decision tree. The *FCA* cannot see how a scripted call can avoid being an interactive dialogue. The caller presumably has prompts as to what to say depending on the response given or question asked by the recipient of the call. However, the recipient is clearly able to and likely to interact and the degree of interaction cannot be determined in advance.

8.10.5 **G** In the *FCA's* view, the fact that scope for interaction is essential if a *financial promotion* is to be real time leads to the following conclusions.

- (1) Most communications made in written or pictorial form will not offer scope for interaction. The most likely exception to this is where *persons* are expected to respond immediately. This situation may arise, for example, where the equivalent of a telephone conversation is conducted by e-mail. This is the basis of the exemption in article 20A(1)(b)(ii) (see ■ PERG 8.12.37 G). However, the only communications in written or pictorial form which can be real time communications are those which are not contained in a letter, e-mail or publication. This results from article 7(3) as explained in ■ PERG 8.10.2 G and ■ PERG 8.10.3G (2).
- (2) The factors in article 7(5), whilst they are helpful as indicators, do not necessarily have to be satisfied for a communication to be non-real time provided it does not represent an interactive dialogue. For example, in the *FCA's* view, a broadcast made by megaphone from a moving vehicle or temporary chalk markings on a board are non-real time communications even though there may be no lasting record.
- (3) Some oral communications will not involve an interactive dialogue. This is because:
 - (a) they are recorded or broadcast, so preventing interaction; or
 - (b) they represent a one-way flow such as a speech, address or presentation.

8.10.6 **G** An issue arises where a *person* (P), during the course of a presentation or meeting, invites or is asked to answer questions from the audience. P's response may or may not be a real time communication. For example, the question may not be personal to the questioner and P may respond by addressing the audience in a way that precludes or does not call for any interaction. This will be a non-real time communication. On the other hand, the question may call for P to pursue a conversation with the questioner, in

which case the communication will be an interactive dialogue and a real time communication. In this case, the communication will not involve a non-real time communication made to or directed at the rest of the audience as it is addressed and made to the questioner. It may be that P, in the course of an interactive dialogue with a questioner, makes an invitation or inducement that is addressed to the audience as a whole. This will be a separate communication that will be non-real time. Any handout or slide or other visual aids used during the presentation will be non-real time communications.

8.10.7 G In the *FCA's* view, a communication which may exist in enduring form will be a non-real time communication. Examples of this include videos, audio cassettes, bulletin boards, websites and recorded telephone messages. Messages placed on Internet chat-rooms will also be non-real time. Radio or television programmes or teletext services may contain communications that involve an interactive dialogue. For example, a communication made by the broadcaster and addressed to an interviewee studio guest, a member of the audience or a person who speaks to the broadcaster by telephone. These will always be non-real time communications. This is again the effect of article 7(3) as explained in ■ PERG 8.10.2 G and ■ PERG 8.10.3G (2). Broadcasters may be able to use the exemption for journalists in article 20 of the *Financial Promotion Order* (see ■ PERG 8.12.23 G). Interviewee studio guests, if they make *financial promotions* during a broadcast, may be able to use the exemption in article 20A of the *Financial Promotion Order* (Promotion broadcast by company director etc) (see ■ PERG 8.12.32 G).

Solicited v unsolicited real time financial promotions.....

8.10.8 G Article 8(1) of the *Financial Promotion Order* (Interpretation: solicited and unsolicited real time communications) states that a *real time financial promotion* is solicited where it is made in the course of a personal visit, telephone conversation or other interactive dialogue which was initiated by or takes place in response to an express request from the recipient. An express request for these purposes may have been made before section 21 entered into force. An unsolicited *real time financial promotion* is any *real time financial promotion* which is not solicited.

8.10.9 G Article 8(3) of the *Financial Promotion Order* clarifies that a *person* will not have expressly requested a call, visit or dialogue merely:

- (1) because he does not indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue; or
- (2) because he agrees to standard terms that state that such visits, calls or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for the visit, call or dialogue to take place.

8.10.10 G Article 8(3) of the *Financial Promotion Order* also has the effect in broad terms that *financial promotions* made during a visit, call or dialogue will be solicited only if they relate to *controlled activities* or *controlled investments* or *controlled claims management activities* of the kind to which the recipient envisaged that they would relate. In determining whether this is the case,

account must be taken of all the circumstances when the call, visit or dialogue was requested or initiated. For example, a *person* may ask for a visit from a representative of an investment product company with a view to receiving advice on an appropriate pension product. In this case, the representative would be likely to be making an *unsolicited real time financial promotion* if, during conversation, he attempts to persuade or incite the recipient to make an investment which would not be for the purposes of pension provision.

8.10.11

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■ PERG 8.6.9 G explains that article 6 of the *Financial Promotion Order* has the broad effect that a communication is made to another *person* where it is addressed to a particular *person* or *persons*. It also states that a 'recipient' of a communication is the *person* or *persons* to whom it is made (that is to whom it is addressed). This takes on importance where certain exemptions which apply to *real time financial promotions* made to a *person* are concerned. It appears to the FCA that, in certain situations, a *person* may make a *financial promotion* to someone who has expressly asked that it be made or who has initiated it but where, at the same time, it is also made (that is addressed) to *persons* who may have not requested or initiated it. For example, a married couple may visit their financial adviser. One partner may request or initiate the dialogue which the adviser then addresses to both. Article 8(4) of the *Financial Promotion Order* recognises this and has the effect that an *unsolicited real time financial promotion* will have been made to the *persons* other than the *person* who expressly asked for or initiated the call, visit or dialogue in which it was made unless they are:

- (1) close relatives of that *person* (that is, a *person's* spouse, children and step-children, parents and step-parents and brothers and sisters and step-brothers and step-sisters, including a spouse of any of those *persons*); or
- (2) expected to engage in any investment activity or to *engage in claims management activity* jointly with that *person*.

8.10.12

G

In the FCA's view, *persons* who may be *engaging in investment activity* or *engaging in claims management activity* jointly include:

- (1) a married couple;
- (2) two or more *persons*, who will invest jointly in a product (for example, a cohabiting couple who are not married or members of a family);
- (3) the directors of a *company* or partners in a firm;
- (4) members of a *group of companies*;
- (5) the participants in a joint commercial enterprise;
- (6) the members of an investment club; and
- (7) the managers or prospective managers of a *company* who are involved in a management buy-out or buy-in.

8.10.13 **G** There will be occasions when *financial promotions* are received by *persons* other than those in ■ PERG 8.10.11G (1) or ■ PERG 8.10.11G (2) who will not have solicited them. For example, a more distant relative or friend ('F') who acts as a support to the *person* who is to *engage in investment activity* or to *engage in claims management activity* ('P') or P's professional adviser ('A'). As explained in ■ PERG 8.6.10 G, in such cases the *financial promotion* will not be made to F or A unless it is also addressed to them. And it will only be addressed to F or A if the invitation or inducement relates to F or A *engaging in investment activity* or *engaging in claims management activity*. So a solicited *financial promotion* made to P will not also be an unsolicited *financial promotion* made to F or A.

8.10.14 **G** In the FCA's view, the mere fact of a *person* accepting an invitation to attend a meeting does not automatically mean that he has initiated any dialogue which may take place during the meeting and which may amount to a *financial promotion*. This will depend on the facts of each case and such matters as the manner in which the invitations are made, the arrangements for acceptance and how the meeting is conducted. For example, the fact that *investments* or investment services will be offered during the meeting may be made clear in the invitation.



8.11 Types of exemption under the Financial Promotion Order

8.11.1 **G** The various exemptions in the *Financial Promotion Order* are split into three categories:

- (1) exemptions applicable to all *controlled activities* (Part IV of the Order);
- (2) exemptions applicable only to *controlled activities* concerning *deposits* and *contracts of insurance* other than *life policies* (Part V of the Order); and
- (3) exemptions applicable to any other types of *controlled activity* (Part VI of the Order).

8.11.2 **G** Each individual exemption indicates the type of *financial promotion* (for example, non-real time) to which it relates. ■ PERG 8.36.6 G contains a table showing this breakdown. Each exemption also indicates whether it applies to any communication or only to those made to or directed at *persons*.

8.11.3 **G** Article 11 of the *Financial Promotion Order* (Combination of different exemptions) allows for certain exemptions to be combined when no single exemption may apply. The overall effect of article 11 is that any relevant exemptions may be combined except where the conditions applicable to an exemption prevent this (see ■ PERG 8.11.4 G).

8.11.4 **G** In a few instances, the requirements of a particular exemption may affect the practicality of its being combined with another. These are article 12 (Communications to overseas recipients) and article 52 (Common interest group of a company). Article 12, for example, requires that *financial promotions* must be made to or directed only at *overseas persons* and certain *persons* in the *United Kingdom*. This presents no difficulty with article 12 being combined with other exemptions in Parts IV or VI of the *Financial Promotion Order* where *financial promotions* are being made to *persons*. But, where a *financial promotion* is directed at the *persons* mentioned in article 12, it is difficult to see how the requirement that it must be directed only at those *persons* can be satisfied if it is also directed at other *persons* under another exemption. However, in the FCA's view, this does not prevent the same *financial promotion* being *communicated* under another exemption in another form or at any other time. For example, an electronic version of a *financial promotion* may be directed at *overseas persons* from a *person's* website in the *United Kingdom* using article 12. That *person* may then use another exemption to send paper copies of the same *financial promotion*.

8.11.5 **G** A number of exemptions require that a *financial promotion* must be accompanied by certain indications. Article 9 of the *Financial Promotion Order* states that indications must be presented in a way that can be easily understood and in such manner as is 'best calculated' to bring the matter to the recipient's attention. In the *FCA's* opinion, the expression 'best calculated' should be construed in a sensible manner. It does not, for instance, demand that the indication be presented in bold red capitals at the start of a document or advertisement. If the indication is given enough prominence, taking account of the medium through which it is *communicated*, to ensure that the recipient will be aware of it and able to consider it before deciding whether to *engage in investment activity* or to *engage in claims management activity*, the *FCA* would regard article 9 as being satisfied.

8.11.6 **G** Some exemptions are based on the *communicator* believing on reasonable grounds that the recipient meets certain conditions. For example, articles 19(1)(a), 44, 47 and 49. What are reasonable grounds for these purposes will be a matter for the courts to decide. In the *FCA's* view, it would be reasonable for a *communicator* to rely on a statement made by a potential recipient that he satisfies relevant conditions. This is provided that there is no reason to doubt the accuracy of the statement. In case of doubt, further checks may be necessary. These could include:

- (1) checking on the record kept by the *FCA* under section 347 of the *Act* (The record of authorised persons etc) that a *person* is *authorised*; or
- (2) checking with a *person's* employer that he is employed in a particular capacity; or
- (3) in the case of a *person* claiming to be a high net worth individual or a sophisticated or self-certified sophisticated investor, asking to see a copy of the current certificate.



8.12 Exemptions applying to all controlled activities

8.12.1 **G** Part IV of the *Financial Promotion Order* contains several exemptions which apply to all *controlled activities*. These are summarised in ■ PERG 8.12.2 G to ■ PERG 8.12.38 G.

Financial promotions to overseas recipients (article 12)

8.12.2 **G** This exemption concerns *financial promotions* which are made to or directed only at *overseas persons* (except in the circumstances referred to in ■ PERG 8.12.8 G). But this exemption does not apply to communications in respect of *controlled claims management activity*.

8.12.3 **G** The exemption applies to situations where a *financial promotion* is either:

- (1) made to a *person* who receives it outside the *United Kingdom*; or
- (2) directed at *persons* who are outside the *United Kingdom*.

8.12.4 **G** The exemption applies whether or not the *financial promotion* is made from the *United Kingdom*. However, there is the exception that, if it is an *unsolicited real time financial promotion*, it must be made from a place outside the *United Kingdom* and be for the purposes of a business carried on entirely outside the *United Kingdom*.

8.12.5 **G** Articles 12(3) and (4) of the *Financial Promotion Order* (subject to article 12(5) – see ■ PERG 8.12.8 G) have the effect that, where a *financial promotion* is directed from a place outside the *United Kingdom*, it will be conclusive proof that it is not directed at *persons* in the *United Kingdom* even if it is received by a *person* in the *United Kingdom*, if:

- (1) the *financial promotion* is not referred to in or directly accessible from another communication (for example, an advertisement in a *UK* newspaper or a *UK* website) which is itself made to or directed at *persons* in the *United Kingdom* by the *overseas person* who is directing it; and
- (2) there are proper systems and procedures in place to prevent recipients in the *United Kingdom* other than *persons* to whom the communication might otherwise lawfully have been made from engaging in the investment activity to which the *financial promotion*

relates with the *overseas person* or his *close relative* or *group company*.

8.12.6 **G** There is no definition in the *Financial Promotion Order* of what ‘proper systems and procedures’ are, and the matter will ultimately be for the courts to determine. This is unsurprising as systems and procedures may take many different forms depending upon the precise circumstances in which *financial promotions* are made. But it is clear that *persons* seeking conclusive proof that the exemption applies must consciously make arrangements to prevent their dealing with certain recipients in the *United Kingdom*. In the *FCA*’s view, proper systems and procedures will involve arrangements for scrutinising enquirers or applications with a view to identifying *persons* who are located in the *United Kingdom* and are not *persons* to whom the communication could lawfully have been made. *Persons* to whom the *financial promotion* could lawfully have been made does not mean only those covered by article 12. For example, depending on the *controlled investment* which the *financial promotion* is about, they could include a high net worth individual or a sophisticated investor. Such arrangements may be conducted manually using a questionnaire or electronically through password-protected access to information or the programming of software to recognise and reject *United Kingdom* addresses or both. The need for proper systems and procedures does not automatically mean that there will no longer be conclusive proof should, on isolated occasions, the systems or procedures fail to prevent dealings with a recipient in the *United Kingdom*. Provided the systems and procedures were and remain proper there will be conclusive proof that the exemption applies. A *financial promotion* from overseas might lead to a recipient in the *United Kingdom* engaging in *investment activity* with another *group company* (G) of the *person* (P) who makes the *financial promotion*. In this situation, it is not necessary that P operates the proper systems and procedures to get conclusive proof that the exemption applies. It will be enough that G operates the proper systems and procedures.

8.12.7 **G** Where a *financial promotion* is directed from within the *United Kingdom*, articles 12(3) and (4) also state (subject to article 12(5) – see ■ PERG 8.12.8 G) that there can be conclusive proof that the *financial promotion* is directed only at *persons* outside the *United Kingdom*. This will be the case if, in addition to the conditions referred to in ■ PERG 8.12.5G (1) and ■ PERG 8.12.5G (2), the *financial promotion* is accompanied by an indication that:

- (1) it is directed only at *persons* outside the *United Kingdom*; and
- (2) it must not be acted upon by *persons* in the *United Kingdom*.

8.12.8 **G** In any case, some but not all of the conditions referred to in ■ PERG 8.12.5G (1) to ■ PERG 8.12.5G (2) and ■ PERG 8.12.7G (1) to ■ PERG 8.12.7G (2) (or the additional condition that the communication is included in a website, newspaper or periodical publication which is principally accessed in or intended for a non-UK market or in a radio or television broadcast or teletext service transmitted principally for reception overseas) may be met. In these cases, those conditions being satisfied will be taken into account in assessing whether the *financial promotion* is directed only at *persons* outside the *United Kingdom*. Even if none of the conditions are satisfied, it is still possible that a *financial promotion* which has been received by a *person* in

the *United Kingdom* may properly be regarded as not having been directed at him. In the *FCA's* view, it will be an indication that a *financial promotion* in a website is directed at the *United Kingdom* if the website is registered with a *UK* search engine. Article 12(5) of the *Financial Promotion Order* also states that a *financial promotion* may be regarded as directed only at *persons* outside the *United Kingdom* where it is also directed at *persons* in the *United Kingdom*. This is provided those *persons* are limited to:

- (1) investment professionals (article 19); or
- (2) high net worth companies etc (article 49); or
- (3) previously overseas customers of overseas *communicators* (article 31); or
- (4) any combination of (1), (2) and (3).

Where a *financial promotion* is also directed at such *persons* in the *United Kingdom* the conclusive conditions referred to in ■ PERG 8.12.5G (1) to ■ PERG 8.12.5G (2) and ■ PERG 8.12.7G (1) to ■ PERG 8.12.7G (2) should be read as if references to *persons* to whom the *financial promotion* may be made or directed included investment professionals or high net worth companies etc. ■ PERG 8.11.4 G explains how article 12 may be combined with other exemptions.

Financial promotions from customers and potential customers (article 13)

8.12.9 G *Financial promotions* made by a prospective customer to a *person* who supplies a *controlled investment* or services comprising *controlled activities* or *controlled claims management activities* with a view to his acquiring the *investment*, or receiving the services or receiving information about those *investments* or services, are exempted. This exemption will only be of relevance to corporate customers or others who are acting in the course of business. Other types of customers will not be subject to section 21 to begin with.

Follow up financial promotions (article 14)

8.12.10 G *Financial promotions* other than *unsolicited real time financial promotions* are exempt where they follow up an earlier *financial promotion* which, in compliance with another exemption (such as that for promotions made to high net worth individuals or sophisticated investors – see ■ PERG 8.14.21 G and ■ PERG 8.14.27 G), contains certain indications or information. This is provided the *financial promotion*:

- (1) is made by the *person* who made or directed the earlier *financial promotion*;
- (2) is made to a recipient of the earlier *financial promotion*;
- (3) relates to the same matter as the earlier *financial promotion*; and
- (4) is made within 12 months of the earlier *financial promotion*.

This exemption does not help in situations where the original *financial promotion* was made or directed under an exemption which did not require

it to include any indications or information. However, it is likely that, in many cases where no indications or information are required, the exemption to which the earlier *financial promotion* applies would also apply to any follow up *financial promotion*. The requirement that the follow up *financial promotion* be made by the *person* who made or directed the earlier one would seem to prevent use of the exemption by someone acting on behalf of that *person*. However, the earlier *financial promotion* may have been made or directed by an individual in his capacity as an officer or employee of a *company* or a partner or employee of a partnership. If so, the exemption will be satisfied if the follow-up *financial promotion* is made by another employee, director or partner of the same *company* or *partnership*.

Introductions (article 15)

8.12.11 G

This exemption applies to any *financial promotion* that is made with a view to or for the purposes of introducing the recipient to certain kinds of *person*. These are *authorised persons* who carry on the *controlled activity* to which the *financial promotion* relates, or *exempt persons* where the *financial promotion* relates to a *controlled activity* that is also a *regulated activity* in relation to which he is an *exempt person*. This is subject to the requirement that:

- (1) the *person* making the *financial promotion* ('P') is not a *close relative* or *group company* of the *authorised* or *exempt person*;
- (2) P does not receive any financial reward for making the introduction other than from the recipient of the *financial promotion*; and
- (3) the recipient of the *financial promotion* has not, in his capacity as investor, sought advice from P or, if he has, P has declined to provide it and has recommended that he seek advice from an *authorised person*.

For the purposes of (2), it is the *FCA's* view that P may be viewed as not receiving any financial reward other than from the recipient where P treats any commission or other financial benefit received from third parties to whom introductions are made as belonging to and held to the order of the recipient. P cannot simply tell the recipient that P will receive commission. The position must be that the commission belongs to the recipient and must be paid to him unless he agrees to its being kept by P. Where this occurs, the payment may be seen to be received by P from the recipient. In the *FCA's* opinion, the condition would be satisfied by P paying over to the recipient any third party payment he receives. Otherwise, it would be satisfied by P informing the recipient of the sum and that he has the right to require that the sum to be paid to him. This would allow the sum to be used to offset fees due from the recipient for other services provided to him by P. This could take the form of an agreement between P and the recipient that sums received by P will be used to offset any other fees due to P from the recipient. This is provided that P informs the recipient of sums which P has received and of the fees which they have been used to offset. However, it does not allow P to keep third party payments by seeking the recipient's agreement through standard terms and conditions. Similarly, a mere notification to the recipient that a particular sum has been received coupled with a request to keep it does not satisfy the condition.

8.12.11A **G** This exemption does not apply to any *financial promotion* that is made with a view to, or for the purpose of, an introduction to a person who carries on the *controlled activities* of:

- (1) credit broking;
- (2) operating an electronic system in relation to lending; or
- (3) agreeing to carry on the above activities.

Exempt persons (article 16)

8.12.11B **G** This exemption also does not apply to any *financial promotion* that is made with a view to, or for the purpose of, an introduction to a *person* who carries on a *controlled claims management activity*.

8.12.12 **G** This exemption covers three distinct situations. Article 16(1) applies to all *exempt persons* where they make *financial promotions* for the purpose of their exempt activities. These *persons* would include *appointed representatives* (except *appointed representatives* to whom the exemption in article 16(1A) applies; see ■ PERG 8.12.12A G), *recognised investment exchanges*, *recognised clearing houses*, *recognised auction platforms* and those who are able to take advantage of the *Exemption Order*. So, it allows *exempt persons* both to promote that they have expertise in certain *controlled activities* or *controlled claims management activities* and to make *financial promotions* in the course of carrying them on. Article 16(1) does not apply to *unsolicited real time financial promotions*. *Persons* to whom the *general prohibition* does not apply because of Part XX (Provision of financial services by members of the professions) or Part XIX (Lloyd’s members and former underwriting members) of the *Act* are not, for the purposes of article 16, *exempt persons* for their Part XX or Part XIX activities.

8.12.12A **G** Article 16(1A) applies to *non-real time financial promotions* and *solicited real time financial promotions* made:

- (1) by an *appointed representative* who is carrying on an activity to which sections 20(1) and (1A) and 23(1A) of the *Act* do not apply as a result of section 39(1D) of the *Act*; and
- (2) for the purposes of the appointed representative’s business of carrying on a *controlled activity* which is also a *regulated activity* to which sections 20(1) and (1A) and 23(1A) of the *Act* do not apply by virtue of section 39(1D) of the *Act*.

■ SUP 12.2.2AG (3) provides *guidance* on section 39(1D) of the *Act*.

8.12.13 **G** Article 16 (2) applies to *unsolicited real time financial promotions* made by an *appointed representative* in carrying on the business:

- (1) for which his principal has accepted responsibility for the purposes of section 39 of the *Act* (Exemption of appointed representatives); and
- (2) in relation to which the *appointed representative* is exempt under section 39.

In addition, the *financial promotion* may only be made in the circumstances in which it could be made by the *appointed representative's principal* under the appropriate *financial promotion rules*. This ensures a level playing field as between employed and tied sales forces. This exemption may be of particular use to telephone sales agencies who will often need to be *appointed representatives* of investment product companies.

Generic promotions (article 17)

- 8.12.14 G Under this exemption, the *financial promotion* itself must not relate to a *controlled investment* provided by a *person* who is identified in it, nor must it identify any *person* as someone who carries on any *controlled activity* or *controlled claims management activity*. So, it will apply where there is a *financial promotion* of a class of products. For example 'ISAs are great' or 'buy into an investment trust and help the economy'. Such *financial promotions* may be made by a *person* such as a trade association which is not itself carrying on a *controlled activity* or a *controlled claims management activity*. But this is provided there is no mention of any particular *ISA* or investment trust or of any *person* who may give advice on or arrange, *sell* or manage such investments.
- 8.12.15 G The exemption can also be used in certain circumstances where an intermediary is advertising its services as an intermediary. This is because advising on and arranging *deposits* and *contracts of insurance* other than *life policies* are not *controlled activities*. This means that an unauthorised intermediary offering to find the best rates on *deposits* may identify himself in the *financial promotion* as he will not be carrying on a *controlled activity*. This is provided that the *financial promotion* does not identify any particular deposit-taker. The same considerations would apply to an *authorised* intermediary who offers to advise on the best available motor insurance.
- 8.12.16 G Other *persons* may be able to take advantage of the exemption. For example, a *person* making a generic *financial promotion* may identify himself, whether he may carry on a *controlled activity* or *controlled claims management activity*, or not. This is provided that the *financial promotion* does not (directly or indirectly) identify him as someone who carries on a *controlled activity* or a *controlled claims management activity*.
- 8.12.17 G Journalists may be able to take advantage of this exemption when writing about *investments* generally. But the exemption would not apply if the *financial promotion* recommends the purchase or sale of particular *investments* such as XYZ Plc *shares*. This is because it will be identifying XYZ Plc as a *person* who provides the *controlled investment* (being its *shares*) and as a *person* who carries on the *controlled activity* of dealing in *securities* and *contractually based investments* (by issuing its own *shares*). Nor would the exemption apply if the *financial promotion* identifies an exchange on which *investments* are traded. That would indirectly identify the exchange as a *person* who carries on the *controlled activities* of dealing in *securities* or *contractually based investments* or *arranging deals* in investments. Journalists may also be able to use the exemption for journalists in article 20 (See ■ PERG 8.12.23 G).

Mere conduits (article 18 and 18A)

8.12.18 **G** The purpose of these exemptions is to ensure that, subject to certain conditions, the restriction in section 21 of the *Act* does not apply to those who merely transport the *financial promotions* of other *persons*. Obvious examples here are postal and Internet service providers, courier companies and telecommunications companies. ■ PERG 8.6.5 G explains that such *persons* may not be regarded as *communicating a financial promotion* simply because they have distributed it. Article 18 (Mere conduits) does not apply to the *person* who causes the mere conduit to make the communication. Neither does it apply where the *financial promotion* is an *electronic commerce communication*. A *person* acting as a mere conduit for *financial promotions* of this kind will, however, be able to use article 18A (Outgoing electronic commerce communications: mere conduits, caching and hosting). Article 18A is not subject to the conditions that apply to other forms of mere conduit (as referred to in ■ PERG 8.12.19 G and ■ PERG 8.12.20 G). However, it does require compliance with the relevant conditions in regulation 17(1), 18 or 19 of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) that relate to the liability of intermediary service providers.

8.12.19 **G** The conditions in article 18(2) include a requirement that the *person* making the *financial promotion* does not select, modify or otherwise exercise control over its content before it is transmitted or received. Article 18(3) provides that a *person* is not selecting, modifying or exercising control merely as a result of having power to remove material which is illegal, defamatory or in breach of copyright or at the request of a regulatory body or where the law requires him to do so. However, in the *FCA's* view, the control normally exercised by newspaper publishers or broadcasters over traditional forms of advertising they carry is likely to be enough for the exemption not to be available to such *persons*.

8.12.20 **G** The conditions in article 18 also require that the *person* acting as the mere conduit must *communicate* in the course of an activity carried on by him the principal purpose of which is transmitting or receiving material provided to him by others. In the *FCA's* view, what matters is that the *person* is carrying on an activity which has the required principal purpose. Such an activity might represent but a part of a *person's* overall business activities (however small), so long as it represents a discrete activity. A discrete activity is an activity whose principal purpose is to receive and transmit other *persons'* communications and which is not simply an activity that is carried on incidentally or as an adjunct to another activity. For example, a *person* who operates a website will not be entitled to the exemption (should he be *communicating financial promotions* see ■ PERG 8.6) simply because he chooses to provide a chatroom or bulletin board for the use of his customers.

Investment professionals (article 19)

8.12.21 **G** *Financial promotions* made only to or directed only at certain types of *person* who are sophisticated enough to understand the risks involved are exempt. These are:

- (1) *authorised persons*;
- (2) *exempt persons* (where the *financial promotion* relates to a *controlled activity* which is a *regulated activity* for which the *person* is exempt);

- (3) governments and local authorities; and
- (4) *persons* whose ordinary business involves carrying on a *controlled activity* of the kind to which the *financial promotion* relates and which may include:
 - (a) investment trust companies;
 - (b) *companies* which provide venture capital;
 - (c) large *companies* which have a corporate treasury function;
 - (d) other *persons* who carry on an activity such as dealing in, arranging or advising on *investments* but who do not require *authorisation* because of an exclusion in the *Regulated Activities Order*; and
 - (e) *professional firms* who are exempt under Part XX of the *Act*.

This also includes *persons* acting in their capacity as directors, officers or employees of such *persons*.

8.12.22 G Article 19(4) sets out conditions which, if all are satisfied, offer conclusive proof that a *financial promotion* is directed only at investment professionals. These conditions relate to indications accompanying the *financial promotion* and the existence of proper systems and procedures. The *guidance* about proper systems and procedures in ■ PERG 8.12.6 G applies equally to article 19. Article 19(6) specifically states that a *financial promotion* may be treated as made only to or directed only at investment professionals even if it is also made to or directed at other *persons* to whom it may lawfully be communicated. This would include *overseas persons* and high net worth companies, etc. Where this is the case, the conditions in article 19(4) should, in the *FCA's* view, be satisfied if:

- (1) the indications make it clear that the *financial promotion* is directed only at investment professionals and other *persons* to whom it may lawfully be promoted; and
- (2) the systems and procedures are designed to prevent *persons* other than such types of *persons engaging in investment activity*.

8.12.22A G This exemption does not apply to communications in respect of *controlled claims management activity*.

Journalists (article 20)

8.12.23 G The broad scope of the restriction in section 21 of the *Act* will inevitably mean that it will, from time to time, apply to journalists and others who make their living from commenting on news including financial affairs (such as broadcasters). This is liable to happen when such *persons* offer share tips or recommend the use of a particular firm for investment purposes. Such tips or recommendations are likely to amount to inducements to *engage in investment activity* or to *engage in claims management activity*.

8.12.24 G The Treasury, in making the *Financial Promotion Order*, noted that financial journalism has an important part to play in increasing consumer awareness of financial services and products. It further observed the need to strike the

right balance between protecting consumers and ensuring that the level of regulation is as light as possible, while respecting the principle of the freedom of the press.

8.12.25 **G** With this objective in mind, the exemption in article 20 applies to any *non-real time financial promotion* the contents of which are devised by a *person* acting as a journalist where the *financial promotion* is in:

- (1) a newspaper, journal, magazine or other periodical publication;
- (2) a regularly updated news or information service (such as a website or teletext service); or
- (3) a television or radio broadcast or transmission.

In addition, the publication, service or broadcast must be one which satisfies the principal purpose test set out in article 54 of the *Regulated Activities Order*. This means that the principal purpose must not be to advise on or lead or enable *persons* to *buy or sell securities or relevant investments*. See ■ PERG 7 for further *guidance* on this. Article 20 does not define what is meant by a *person* 'acting in the capacity of a journalist'. In the *FCA's* opinion, this expression has a potentially wide meaning. It will apply to anyone who writes for or contributes to a publication, service or broadcast. This includes experts or analysts who may be asked to contribute articles for a publication or website service or to offer their opinion in a broadcast.

8.12.26 **G** Provided the conditions in ■ PERG 8.12.25 G are met, the exemption in article 20 applies to any *non-real time financial promotion*. However, there is an additional condition where the subject matter of the *financial promotion* is *shares or options, futures or contracts for differences* relating to *shares* and the *financial promotion* identifies directly a *person* who issues or provides such an *investment*, or the subject matter of the *financial promotion* is a *controlled claims management activity* and the *financial promotion* directly identifies a *person* who undertakes that activity. In such cases, the exemption is subject to a disclosure requirement which is itself subject to certain exceptions (see ■ PERG 8.12.27 G). This requirement is that the *financial promotion* must be accompanied by an indication of the nature of any financial interest held by the *person* responsible for the promotion (that is, the journalist or editor) or member of his family (his spouse or children under 18). A financial interest would be subject to disclosure where the *person* or a member of his family would be likely to get a financial benefit or avoid a financial loss if *persons* acted in line with the *financial promotion*. Article 20 does not specify the way in which a financial interest should be indicated. In the *FCA's* view, a financial interest should be disclosed in a way that will enable recipients to understand readily its nature. For example, 'the writer has a substantial holding of traded call options in these shares'.

8.12.27 **G** The exceptions to the disclosure requirement are where the *financial promotion* is in either:

- (1) a publication, service or broadcast which has proper systems and procedures which prevent the publication of communications without disclosure of financial interests; or
- (2) a publication, service or broadcast which falls within the remit of:

- (a) the Code of Practice issued by the Press Complaints Commission; or
- (b) the OFCOM Broadcasting Code; or
- (c) the Producers' Guidelines issued by the British Broadcasting Corporation.

8.12.28 **G** The effect of **■ PERG 8.12.27G (2)** is that *financial promotions* made by journalists in publications, services or broadcasts to which one of the codes or the guidelines apply are not subject to the disclosure requirement. This is so even if a *financial promotion* is made in breach of the codes or guidelines. Such *financial promotions* would remain to be dealt with by the body responsible for the code or guidelines and the publisher concerned. The code or guidelines may, of course, themselves require disclosure but the fact that they have been specified does not necessarily mean that they will or will always require disclosure. That is something which depends on the requirements of the particular code or guidelines.

8.12.29 **G** The effect of **■ PERG 8.12.27G (1)** is that a journalist will not breach section 21 by not disclosing a financial interest, providing that the publication, service or broadcast concerned operates proper systems and procedures. As with the exemption in article 12 of the *Financial Promotion Order* (see **■ PERG 8.12.6 G**), what proper systems and procedures are will be a matter ultimately for the courts to determine and may vary according to the medium used. It will depend upon all the circumstances surrounding the publication, service or broadcast. In the *FCA's* opinion, proper systems and procedures may achieve the objective of preventing the publication of communications without the required disclosure in one of two ways. They may require that disclosure be made. Or they may seek to prevent journalists from acting in a way which would enable them to profit if *persons* follow their published recommendations. For example, by banning their dealing in the *shares* or related investments for a reasonable period following the promotion. This would ensure that the journalist will not have a financial interest to disclose. For example, and in the *FCA's* opinion, a publication, service or broadcast may be likely to satisfy the test referred to in **■ PERG 8.12.27G (1)** if it has set up procedures:

- (1) for *persons* responsible for devising the content of *financial promotions*, or for deciding that they should be included in the publication, service or broadcast, to register their financial interests in a central log;
- (2) for the central log to be properly maintained and regularly reviewed;
- (3) where disclosure is required, for all *financial promotions* to be subject to review before publication or broadcast by an appropriately qualified and senior *person*; and
- (4) for the *persons* referred to in (1) to be made aware in writing of the procedures and of their obligations to disclose their financial interests or to refrain from any course of action which may be likely to give them a financial interest requiring disclosure and, preferably, to have confirmed their acceptance of those obligations in writing.

8.12.30 **G** *Persons* such as experts or analysts may be approached to contribute at very short notice and may be overseas. In such cases, the systems and procedures referred to in **■ PERG 8.12.29 G** may not be practical. It is the *FCA's* opinion that, where occasional contributors are concerned, proper systems and procedures may include arrangements for ensuring that the need for disclosure (or the avoidance of financial interests) is drawn to the contributor's attention before the communication is made. The contributor's confirmation that he understands and accepts the position on disclosure would also need to be obtained. The arrangements for bringing the position on disclosure to the contributor's attention and for obtaining his understanding and acceptance should be made in whatever way is most appropriate in the circumstances. In other cases, it may be enough that the *persons* responsible for the broadcast satisfy themselves that contributors represent reputable regulated businesses. And that it would be reasonable to believe that they would not seek to promote an investment or investment service in which they had a financial interest without disclosing that fact. This is, of course, merely an example and not the only circumstances in which overseas broadcasts may be regarded as having proper systems and procedures.

8.12.31 **G** It appears to the *FCA*, however, that there will be situations when it may not be practical for the *persons* who are responsible for a publication, service or broadcast to apply proper systems and procedures to every *person* who may, whilst acting in the capacity of a journalist, *communicate a financial promotion*. For example where *persons* are asked to stand in at the last moment. In such cases, it is the *FCA's* opinion that the benefit of the exclusion will not be lost as respects those *persons* who are subject to the proper systems and procedures. However, any *financial promotions communicated* by *persons* who are not subject to them would still be subject to the restriction in section 21 and would need to be approved by an *authorised person* or otherwise exempt.

Promotion broadcast by company director etc (article 20A).....

8.12.32 **G** Article 20A provides a further exemption for certain *financial promotions communicated* by means of a service or broadcast which satisfies the principal purpose test in article 54 of the Regulated Activity Order (see **■ PERG 8.12.25 G** and **■ PERG 7**). Readers of this section should also refer to the *guidance on company statements* in **■ PERG 8.21**.

8.12.33 **G** The main purpose of the exemption appears to be to guard against the possibility that, during the course of a broadcast interview or a live website presentation, a *financial promotion* is made inadvertently by a director or employee of a *company* or other business undertaking when he is not acting in the capacity of a journalist (see **■ PERG 8.12.25 G**). The exemption applies if the *financial promotion* relates only to:

- (1) *shares* of the undertaking or of another undertaking in the same *group* or *options, futures or contracts for differences* related to those *shares*; or
- (2) any *controlled investment* issued or provided by an *authorised person* in the same *group* as the undertaking.

- 8.12.34** **G** The exemption applies where the *financial promotion*:
- (1) comprises words which are spoken by the director or employee and not broadcast, transmitted or displayed in writing; or
 - (2) is displayed in writing only because it is part of an interactive dialogue to which the director or employee is a party and in the course of which he is expected to respond immediately to questions put by a recipient of the communication.
- This is provided that the *financial promotion* is not part of an organised marketing campaign. ■ PERG 8.14.4G (3) provides *guidance* on the meaning of an organised marketing campaign. In the context of article 20A, it is the *FCA's* view that an individual or isolated *financial promotion* will not represent or be part of an organised marketing campaign. However, a *company* representative may use a broadcast interview or webcast to encourage or incite viewers or listeners to acquire *investments* or investment services which are the subject of an advertising campaign being conducted at the same time. In such cases, any *financial promotion* contained in that interview or webcast will be part of an organised marketing campaign. Where this is the case, the *company* representative may be able to rely on other exemptions depending upon the subject matter of the *financial promotion* – see ■ PERG 8.21.
- 8.12.35** **G** The exemption also requires that the director or employee is identified as such in the *financial promotion* before it is *communicated*.
- 8.12.36** **G** The first part of the exemption (referred to in ■ PERG 8.12.34G (1)) specifically precludes any form of written communication. However, the *FCA* understands that the Treasury did not intend to prohibit the use of written words in the form of subtitling. These may be an aid to those with hearing difficulties or to interpret a foreign language, or the use of captions which supplement a spoken communication by highlighting aspects of it without introducing anything new. The *FCA* cannot fetter its discretion and must consider potential breaches of section 21 of the *Act* on their merits. However, where the only reason why a *person* may have breached section 21 of the *Act* is because he has used subtitling or captioning in this way the *FCA* would not expect to take further action. In the *FCA's* view, the position is different if a transcript of the spoken communication is later made available. This would be a separate communication and would need to be *approved* or otherwise exempt.
- 8.12.37** **G** The second part of the exemption (referred to in ■ PERG 8.12.34G (2)) envisages that the director or employee will be holding the equivalent of a conversation conducted in writing. Typically this will involve the exchange of e-mails. It is possible that this part of the exemption could be used by companies making so-called webcasts over the Internet. However, this would only be the case if the service through which the webcast is provided is a regularly updated news or information service (and which meets the principal purpose test – see ■ PERG 8.12.25 G). There is no reason why the exemption should not apply to a *company* website which provides regularly updated news or information about the activities, products or services of the *company* where the website represents a service provided to those who use it. However, not all *company* websites will be services of this kind.

8.12.38 **G** [deleted]

8.13 Exemptions applying to financial promotions concerning deposits and certain contracts of insurance

- 8.13.1** **G** The exemptions in Part V of the *Financial Promotion Order* concern *financial promotions* relating to *deposits* and *contracts of insurance*. The exemptions may be combined with exemptions in Part IV and Part VI (see ■ PERG 8.11.3 G (Types of exemption under the Financial Promotion Order)). The exemptions in Part V do not apply to *life policies* or *structured deposits*.
- 8.13.2** **G** Part V provides two kinds of exemption of a general nature and one specific exemption. The exemptions of a general nature are:
- (1) any form of *real time financial promotion* (articles 23 (Deposits: real time communications) and 26 (Relevant insurance activity; real time communications)); and
 - (2) *non-real time financial promotions* containing certain specified information including the name, country of incorporation (if relevant) and principal place of business of the deposit-taker or *insurer* and whether it is regulated, details of any redress schemes and, for deposit-takers only, certain financial information (articles 22 (Deposits: non-real time communications) and 24 (Relevant insurance activity: non-real time communications)).
- 8.13.3** **G** Article 25 (Relevant insurance activity: non-real time communications: reinsurance and large risks) exempts *financial promotions* concerning *contracts of insurance* which are either contracts of reinsurance or contracts covering certain large risks.
- 8.13.4** **G** Intermediaries involved with *arranging* and advising on *deposits* may be *unauthorised persons* as such activities do not amount to *regulated activities* (other than where they involve giving basic advice on a *stakeholder product* (article 52A of the *Regulated Activities Order* (Giving basic advice on a stakeholder product))) and so do not require *authorisation* under section 19 of the *Act*. However, the combination of the exemptions in Part V together with certain of the exemptions in Part IV (such as generic promotions – see ■ PERG 8.12.14 G – and follow up communications – see ■ PERG 8.12.10 G) should mean that it will often be possible for such *persons* to avoid any need to seek *approval* for their *financial promotions* from an *authorised person*. *Guidance* on the application of these exemptions to *financial promotions* about *insurance distribution activities* is in ■ PERG 8.17A (Financial promotions concerning insurance distribution activities).



8.14 Other financial promotions

8.14.1 G The exemptions in Part VI apply to different types of *financial promotion*, and the exemption available may be based on a number of facts. These may be the identity of the maker of the *financial promotion*, the identity of the recipient of the *financial promotion*, the subject matter of the *financial promotion* or the nature of the *financial promotion* itself. Some of these exemptions apply to *non-real time financial promotions*, others to *solicited real time financial promotions* and others to *unsolicited real time financial promotions*. Many of the exemptions apply to more than one category of *financial promotion*. ■ PERG 8.36.6 G contains a table showing which types of *financial promotion* are covered by each individual exemption.

8.14.2 G ■ PERG 8.14.3 G to ■ PERG 8.14.42 G describe some of the more significant exemptions contained in Part VI. See the *Financial Promotions Order* for full details of all the exemptions in Part VI.

8.14.2A G The exemptions in Part 6 of the *Financial Promotions Order* apply to communications which relate to "*controlled claims management activity*" except where stated otherwise in that Part (article 27).

One-off financial promotions (articles 28 and 28A)

8.14.3 G Article 28 exempts *financial promotions*, other than *unsolicited real time financial promotions*, which are one-off in nature. Whether or not any particular *financial promotion* is one-off in nature will depend upon the individual circumstances in which it is made. Article 28(3) sets out conditions which, if all are met, are conclusive. Otherwise they are indicative. Even if none are met the exemption may still apply. This makes it clear that the overriding issue is whether the *financial promotion* is, in fact, a one-off. The conditions are that:

- (1) the *financial promotion* is made only to one recipient or to a group of recipients in the expectation that they would *engage in investment activity* or *engage in claims management activity* jointly;
- (2) the product or service involved has been determined having regard to the circumstances of the recipient or recipients; and
- (3) the *financial promotion* is not part of an organised marketing campaign.

8.14.4

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The *FCA* considers the effect of each of the conditions in ■ PERG 8.14.3G (1) to ■ PERG 8.14.3G (3) to be as follows.

- (1) The first condition requires the *financial promotion* to be made, so ruling out any *financial promotions* which are directed at *persons*. The effect of article 6(b) and (e) of the *Financial Promotion Order* is that a communication is made to a *person* when it is addressed to him and that *person* to whom the *financial promotion* is addressed is its recipient. This means that when one *person* addresses a *financial promotion* to another *person*, it will not be regarded as having been made to anyone else. So, in the case of a *real time financial promotion*, it is not made to any other *person* who may be present. And in the case of a *non-real time financial promotion*, it is not made to any other *person* who may read or hear it. If the *financial promotion* is addressed to more than one *person* they must be proposing to *engage in investment activity* or *engage in claims management activity* jointly (see ■ PERG 8.14.6 G).
- (2) The second condition requires the *financial promotion* to apply to the personal circumstances of the recipient so not benefiting a *financial promotion* which take no account of the personal circumstances of the recipient or recipients.
- (3) The third condition requires that the *financial promotion* must not be part of an organised marketing campaign. There is no definition of an organised marketing campaign but, in the *FCA*'s view, it is appropriate to consider each of the words and their effect in this context:
 - (a) 'organised' suggests that the campaign is planned in advance and not something done on the spur of the moment;
 - (b) 'marketing' suggests an element of public promotion so as not to apply to anything of a personal or very limited nature even if it is promotional; and
 - (c) 'campaign' suggests that the *financial promotion* must be part of an overall plan having a common objective.

8.14.5

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In the *FCA*'s opinion, the indicators referred to in ■ PERG 8.14.4 G suggest that there are two essential elements of a one-off *financial promotion*. These are that it is tailored to the circumstances of the recipient and that it is individual in nature (in that it is not simply a personalised letter sent out as part of a general mailshot). Apart from this there is no need for the communication to be an isolated instance. For example, the fact that there may be a considerable number of communications made during negotiations for a transaction will not prevent each communication from being one-off. The *FCA* is of the view that none of the three conditions carries significantly more weight than the others. Each *financial promotion* must be assessed against the conditions on its merits. The *FCA* regards the following to be *financial promotions* which will meet the conclusive conditions provided, in each case, that the *financial promotion* is tailored to the personal circumstances of and addressed to the recipient.

- (1) Individual personal written communications or one-to-one conversations.

- (2) A response printed in a publication or website or given during a broadcast in response to an enquiry from a reader, viewer or listener.
- (3) A response given to a *person* who asks a question at a presentation or meeting.
- (4) A response to a question raised by another *person* using an internet chatroom or bulletin board.

8.14.6 **G** In the FCA's view, a group of recipients who may be *engaging in investment activity* or *engaging in claims management activity* jointly could include:

- (1) a married couple;
- (2) two or more *persons* who will invest jointly in a product (for example, a cohabiting couple who are not married or members of a family);
- (3) the directors of a *company* or partners in a firm;
- (4) members of a *group of companies*;
- (5) the participants in a joint commercial enterprise;
- (6) the members of an investment club; and
- (7) the managers or prospective managers of a *company* who are involved in a management buy-out or buy-in.

8.14.7 **G** A *financial promotion* may fail to satisfy all of the indicators referred to in **PERG 8.14.4 G** because it is addressed to more than one recipient and they are not *persons* who will *engage in investment activity* or *engage in claims management activity* jointly. In the FCA's view, such a *financial promotion* is capable of being one-off where the *persons* are to enter into the same transaction and the promotion is tailored to their individual circumstances. This may typically happen during negotiations for the sale of a *company* or the raising of corporate finance where a small number of parties are involved.

8.14.8 **G** The fact that a *financial promotion* may be made following an organised marketing campaign does not mean that it must automatically be regarded as part of the campaign or that it cannot be one-off. For example, after a *person* has responded to a general promotion, an investment manager may make *financial promotions* to him and tailor them to his individual objectives. Such subsequent *financial promotions* can be one-off. Similarly, a *person* who provides corporate finance services may use an organised marketing campaign to find a potential investor or investee company. Any subsequent *financial promotions* made during negotiations for the deal may be one-off even though they may represent a series of communications to the same recipient. On the other hand, the situation is slightly different where an organised marketing campaign involves the sale of an investment product such as a *life policy*. There will be fewer instances where subsequent *financial promotions* to individual recipients will be capable of being one-off. For example, any *financial promotion* which has the basic elements of selling the product is likely to be part of an organised marketing campaign and will not be a one-off.

- 8.14.9** **G** In the *FCA's* view, a *person* such as an investment manager or adviser is not conducting an organised marketing campaign purely because he regularly provides a particular client with *financial promotions* as part of his service. Neither is such a *person* conducting an organised marketing campaign purely because he may have several clients whose personal circumstances and objectives may suggest that a particular investment opportunity may attract them. If he considers the individual circumstances and objectives of each client before determining that the opportunity would be suitable for that client the *financial promotions* should be capable of being one-off.
- 8.14.10** **G** In the *FCA's* view, a *person* will not be making one-off *financial promotions* simply by sending out a series of letters to a number of customers or potential customers where a few details are changed (such as the name and address) but the bulk of the letter is standard. Such letters would be likely to be part of an organised marketing campaign.
- 8.14.11** **G** Article 28A exempts one-off *unsolicited real time financial promotions* provided that the *person* making the *financial promotion* believes on reasonable grounds:
- (1) that the recipient understands the risks associated with engaging in the investment activity to which the *financial promotion* relates; and
 - (2) (at the time the communication is made) that the recipient would expect to be contacted by him about the investment activity to which the *financial promotion* relates.
- 8.14.12** **G** In the *FCA's* view, the article 28A exemption should provide scope for *persons* such as professional advisers to make *unsolicited real time financial promotions* in various situations. For example, when approaching *persons* with whom their clients are proposing to do business or those *persons'* professional advisers. The exemption will not apply where the *financial promotions* are part of an organised marketing campaign (see ■ PERG 8.14.4G (3)). So, in cases where a professional adviser is to contact a number of *persons* on a matter which involves each of them it will be necessary for him to consider whether the approaches would be part of an organised marketing campaign. For example, where they are significant shareholders in a *company* for which an offer has been made. In the *FCA's* opinion, provided the professional adviser considers the circumstances of each recipient and tailors the *financial promotions* to them it should be possible for the *financial promotions* to be regarded as one-off. Ultimately, however, the matter depends on the precise circumstances in which the *financial promotions* are made.
- 8.14.13** **G** Whether or not it would be reasonable to believe that any *person* understands the risks associated with the investment activity covered in a *financial promotion* or would expect to be contacted about it must be judged on the particular circumstances. In the *FCA's* opinion, the exemption requires that the recipient has the required understanding of risk at the time the promotion is made to him. However, it would be reasonable to believe that a *person* understands the risk involved if:
- (1) he is understood to be a professional in relation to the investment activity to which the *financial promotion* relates; or

- (2) he is advised about the risks by a *person* who is professionally qualified to give such advice; or
- (3) he has a position in a *company* which it is reasonable to suppose would require him to have such an understanding (such as a *person* who is in charge of a *company's* treasury function).

In the *FCA's* opinion, a *person* such as the managing director or finance director of a *company* that is seeking venture capital may reasonably be regarded as expecting to be contacted by or on behalf of a potential investor.

8.14.13A G The article 28A exemption does not apply to communications in respect of *controlled claims management activity*.

Overseas communicators (articles 30-33)

8.14.14 G There are a number of exemptions in the *Financial Promotion Order* relating to *financial promotions* sent into the *United Kingdom* by an overseas communicator who does not carry on certain *controlled activities* in the *United Kingdom*. These exemptions apply in addition to any other exemptions which may apply to any particular *financial promotion* by an overseas communicator. The article 30-33 exemptions do not apply to any communications in respect of *controlled claims management activity*.

8.14.15 G Article 30 exempts any solicited *real time financial promotion* made by an overseas communicator in the course of or for the purposes of certain *controlled activities* which he carries on outside the *United Kingdom*. This enables an overseas communicator, for example, to respond to an unprompted telephone enquiry made by a *person* in the *United Kingdom* or an enquiry which follows a *financial promotion* made by the overseas communicator and which was *approved* by an *authorised person*.

8.14.16 G In order to make an *unsolicited real time financial promotion*, an overseas communicator must rely on either article 32 or article 33. Article 32 provides an exemption for *unsolicited real time financial promotions* made by an overseas communicator to *persons* who were previously overseas and were a customer of his then. This is subject to certain conditions, including that, in broad terms, the customer would reasonably expect to be contacted about the subject matter of the *financial promotion*. Article 33 is similar to a sophisticated investor exemption and applies where the overseas communicator has reasonable grounds to believe that the recipient is knowledgeable enough to understand the risks associated with the *controlled activity* to which the *financial promotion* relates. It is also necessary for the recipient to have been informed that he will not gain the protections under the *Act* in respect of the activity or of the making of *unsolicited real time financial promotions*, and whether he will lose the benefit of dispute resolution and compensation schemes. The recipient must also have signified clearly that he accepts the position after having been given a proper opportunity to consider the information. There is no definition of a proper opportunity for this purpose. In the *FCA's* opinion it is likely to require the recipient to have a reasonable time to reflect on the matter and, if appropriate, seek other advice. What is a reasonable time, will

depend upon the circumstances of the recipient, but, in the *FCA's* opinion, it is unlikely that a time of less than 24 hours will be enough.

8.14.17 G Article 31 exempts *non-real time financial promotions* made to previously overseas customers and subject to certain conditions. Again, to satisfy this exemption, the *communicator* must be based overseas and must be *communicating* with a *person* who was previously a customer of his while that *person* was overseas.

Governments, central banks etc (article 34)

8.14.17A G A *local authority* (in the *United Kingdom* or elsewhere) is exempt from the *financial promotion* restriction (that is, the restriction in section 21 of the *Act*) for a communication which is a *non-real time financial promotion* or a *solicited real time financial promotion*. However, this exemption does not apply to a communication which relates to a *regulated credit agreement*, where entering into the agreement or exercising, or having the right to exercise, the *lender's* rights and duties under the agreement constitutes the carrying on of an activity of the kind specified in article 60B of the *Regulated Activities Order* (and where the exclusion in article 72G of that Order does not apply).

Nationals of EEA States other than the United Kingdom (article 36)

8.14.18 G [deleted]

Joint enterprises (article 39)

8.14.19 G Article 39 of the *Financial Promotion Order* exempts a *financial promotion* that:

- (1) is *communicated* by one participator or potential participator in a joint enterprise to another; and
- (2) is in connection with or for the purposes of that enterprise.

A joint enterprise means, in general terms, arrangements entered into by two or more *persons* for commercial purposes related to a business that they carry on. The business must not involve a *controlled activity* or a *controlled claims management activity*

. The term 'participant' includes other members of a *group* of which a participant is a member.

8.14.20 G In the *FCA's* opinion;

- (1) it will not matter that a *person* enters into arrangements for investment or other purposes provided that he also enters them into for commercial purposes; and
- (2) each participant must be carrying on the business in question in their own right.

This means that the sponsors or promoters of a *company* who arrange for private investors to become shareholders will not be setting up a joint enterprise simply because the *company* may intend to carry on a relevant business which is not a *controlled activity* or a *controlled claims management activity*

. Examples of a joint enterprise include a special purpose *company* owned by the participants and set up to operate a commercial project or to hold property of some kind. The participants in joint enterprises of this kind would typically be businesses which are to undertake work on the project or property development and investment companies.

High net worth individuals (article 48)

8.14.21 **G** This exemption disapplies the restriction in section 21 of the Act from *non-real time financial promotions* or *solicited real time financial promotions* which are made to a *person* who the communicator believes on reasonable grounds to be a high net worth individual and which relate to certain *investments*. These *investments* must be either:

- (1) *shares* in or *debentures* or *alternative debentures* of an unlisted *company*; or
- (2) *warrants*, *certificates representing certain securities*, *options*, *futures* or *contracts for differences* relating to *shares* in or *debentures* of an unlisted *company*; or
- (3) *units* in *collective investment schemes* investing wholly or predominantly in *shares* in or *debentures* of an unlisted *company*.

There is an additional requirement that the recipient must have no contingent liability so that the maximum they may lose is the amount they invest. The term 'unlisted company' is defined in article 3 of the *Financial Promotion Order*. This exemption is expected to be of help to unlisted *companies* seeking venture capital.

8.14.22 **G** A high net worth individual is an individual who has completed and signed a statement in the form prescribed in Part I (High net worth individual investor statement) of Schedule 5 to the *Financial Promotion Order* and whose completion of that statement indicates that they satisfy the conditions set out in the statement to be classified as a high net worth individual. This requires the individual to certify that they have earned at least £100,000 (not including any one-off pension withdrawals) or have held net assets to the value of £250,000 or more in the financial year before the date of the certificate and to specify certain supporting information. Where the *financial promotion* is an outgoing electronic commerce communication, the earnings or net assets may be of an equivalent amount in another currency. For the exemption to apply, the certificate must have been completed and signed within twelve months of the date on which the communication is made. The validity of the statement is not affected by a defect in its wording or form provided the defect does not alter its meaning or involve failure to place certain paragraphs in bold.

8.14.22A **G** Until 30 January 2025, a high net worth individual includes an individual who has completed and signed a statement in the form prescribed in Part I (High net worth individual investor statement) of Schedule 5 to the *Financial*

Promotion Order, as that Part was in force during the period from 31 January 2024 to 26 March 2024 (the 2024 form). A statement in the 2024 form has no effect for any purpose after 30 January 2025. This means that, after 30 January 2025, any individual who has completed and signed a statement in the 2024 form may not be considered a high net worth individual.

[**Note:** Article 5 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment and Transitional Provision) Order 2024]

8.14.23

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In addition, the *financial promotion* must be accompanied by:

- (1) a warning in the terms prescribed in article 48(5) and which satisfies certain conditions regarding its form as set out in article 48(6) – this warning must either be given in legible form at the time the communication is made or given orally at that time and a copy in legible form sent to the recipient within two business days;
- (1A) certain information specified in article 48(5A) and which satisfies certain conditions regarding its form as set out in article 48(6) – this information must either be given in legible form at the time the communication is made or, where this is not reasonably practicable, sent in legible form to the recipient within two business days; and
- (2) certain indications as set out in article 48(7).

8.14.24

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A *person* seeking to make a *financial promotion* to another *person* may wish to make enquiries of that *person* to establish whether they are certified. Unless another exemption applies or the *financial promotion* is *approved* by an *authorised person*, such enquiries will not be possible if the enquiry communication is an inducement or invitation to *engage in investment activity*. In the FCA's view, a communication which is merely an enquiry seeking to establish that a *person* holds a current certificate will not itself be an inducement or invitation. Once it has been established that the *person* qualifies as a high net worth individual *financial promotions* about the *controlled investments* in ■ PERG 8.14.21 G may then be sent to them under article 48. ■ PERG 8.4.27 G offers further *guidance* on this.

High net worth companies, unincorporated associations and trusts (article 49)

8.14.25

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This exemption works on a different basis to that for high net worth individuals. There is no requirement for a certificate or statement to be signed. Instead, the *person* making the promotion must believe on reasonable grounds that the recipients are high net worth companies, unincorporated associations or trusts or be reasonably regarded as directing the *financial promotion* only at such *persons*. A high net worth company, unincorporated association or trust is a *person* who satisfies the conditions in article 49(2)(a) to (d) which, for the most part, involve the amount of assets held. In addition, the exemption allows a *financial promotion* that is made to, or directed at, *persons* coming under article 49(2)(a) to (d) also to be made to, or directed at, any other *persons* to whom it may lawfully be made (article 49(2)(e)). This would include *persons* such as overseas recipients (article 12 (Communications to overseas recipients)) and investment professionals (article 19 (Investment professionals)).

8.14.26-A **G** The article 49 exemption does not apply to communications in respect of *controlled claims management activity*.

8.14.26 **G** Article 49(4) gives the list of conditions which, if all are met, is proof that the *financial promotion* is directed at relevant *persons*. It is not necessary for all or any of the conditions to be met for a *financial promotion* to be regarded as directed at relevant *persons*. Ultimately the matter will be one of fact to be determined by taking account of the circumstances in which the *financial promotion* is made. In the *FCA's* opinion, it is not necessary for a *financial promotion*, to comply with the condition in article 49(4)(a) that there be an indication of the types of *person* to whom it is directed, to refer in detail to the terms of article 49(2). It will be enough that it is clear that the *financial promotion* is directed at *persons* to whom article 49 applies. *Persons* using article 49 will need, however, to consider the extent to which recipients of the *financial promotion* are likely to understand the indication. An appropriate approach may often be to refer to the *financial promotion* being 'directed at high net worth companies, unincorporated associations etc for the purposes of article 49' or similar.

Sophisticated investors (articles 50 and 50A)

8.14.26A **G** There are two exemptions that relate to sophisticated investors. The first (article 50 (Sophisticated investors)) applies to *persons* who are certified by an *authorised person* and to a broad range of *investments*. The second (article 50A (Self-certified sophisticated investors)) is similar to the exemption for high net worth individuals and applies where the investor has self-certified themselves and to a narrower range of *investments*. ■ PERG 8.14.27 G to ■ PERG 8.14.28D G describe these exemptions in greater detail.

8.14.27 **G** To be a sophisticated investor for the purposes of article 50, the recipient of a *financial promotion* must have a current certificate from an *authorised person* stating that they have enough knowledge to be able to understand the risks associated with the description of investment to which the *financial promotion* relates. The *FCA* considers that a 'description of investment' relates to a category of *investments* with similar characteristics. Examples are given below.

- (1) The *shares* in a private *company* are not the same 'description of investment' as shares in a plc as there will usually be certain significant distinctions. For instance, there will often be restrictions on the transfer of *shares* in a private *company*.
- (2) *Shares* traded on a market or exchange will be a different 'description of investment' to unlisted *shares*.
- (3) *Shares* which have similar characteristics will be of the same 'description of investment' irrespective of whether they are *shares* of *companies* in the same market or geographical sector.

The recipient must also have signed a statement in the terms in article 50(1)(b). The validity of the statement is not affected by a defect in its wording provided the defect does not alter its meaning. The exemption applies to all kinds of *financial promotion* made to a certified sophisticated investor. However, it does not, unlike articles 48 and 50A, provide for the communicator to have reasonable belief that the recipient is a certified

sophisticated investor. The *financial promotion* must not invite or induce the recipient to *engage in investment activity* with the *person* who has signed the certificate. But it may invite or induce the recipient to *engage in investment activity* with an associate or *group* member of that *person*.

8.14.28 **G** The exemption also requires that certain warnings are given to the potential investor. In this respect, article 50(3)(d) provides that the *financial promotion* must state that there is a significant risk of losing all monies invested or of incurring additional liability. In the *FCA's* view, these are alternative statements and whichever is the relevant statement should be included. If there is no risk of incurring additional liability the statement may simply say that there is a risk of losing the sum invested. This is a mandatory requirement, although the exemption under article 50 may be used to promote *investments* for which either statement would be inappropriate or potentially confusing (for instance if it is used to offer gilts). The *FCA* cannot fetter its discretion to decide individual cases on their merits. However, where a *person* seeks to rely on the article 50 exemption for a *financial promotion* which would otherwise satisfy the terms of article 50 but which omits the statement required under article 50(3)(d), on the grounds that it would be misleading to include it, the *FCA* would, generally, take no further action.

8.14.28A **G** The second exemption in article 50A disapplies the restriction in section 21 of the *Act* from any *financial promotions* which are made to a *person* who the communicator believes on reasonable grounds to be a self-certified sophisticated investor and which relate to one or more of the *investments* in ■ PERG 8.14.21G (1) to ■ (3) (High net worth individuals (article 48)).

8.14.28B **G** A self-certified sophisticated investor is an individual who has completed and signed a statement in the form prescribed in Part II (Self-certified sophisticated investor statement) of Schedule 5 to the Financial Promotion Order and whose completion of that statement indicates that they satisfy the conditions set out in the statement to be classified as a self-certified sophisticated investor. This requires the individual to certify that one or more of the following statements apply to them and to specify certain supporting information:

- (1) they are a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date on which the certificate was signed; or
- (2) [deleted]
- (3) they have worked in the two years prior to that date, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises; or
- (4) they have been in the two years prior to that date, a director of a *company* with an annual turnover of at least £1 million; or
- (5) they have made two or more investments in an unlisted *company* in the two years prior to that date.

8.14.28BA G Until 30 January 2025, a self-certified sophisticated investor includes an individual who has completed and signed a statement in the form prescribed in Part II (Self-certified sophisticated investor statement) of Schedule 5 to the *Financial Promotion Order*, as that Part was in force during the period from 31 January 2024 to 26 March 2024 (the 2024 form). A statement in the 2024 form has no effect for any purpose after 30 January 2025. This means that, after 30 January 2025, any individual who has completed and signed a statement in the 2024 form may not be considered a self-certified sophisticated investor.

[**Note:** Article 5 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment and Transitional Provision) Order 2024]

8.14.28C G For the exemption to apply, the certificate must have been completed and signed within twelve months of the date on which the communication is made. The validity of the statement is not affected by a defect in its wording or form provided the defect does not alter its meaning or involve failure to place certain paragraphs in bold.

8.14.28D G In addition, the *financial promotion* must be accompanied by:

- (1) a warning in the terms prescribed in article 50A(5) and which satisfies certain conditions regarding its form as set out in article 50A(6) – this warning must either be given in legible form at the time the communication is made or given orally at that time and a copy in legible form sent to the recipient within two business days;
- (1A) certain information specified in article 50A(5A) and which satisfies certain conditions regarding its form as set out in article 50A(6) – this information must either be given in legible form at the time the communication is made or, where this is not reasonably practicable, sent in legible form to the recipient within two business days; and
- (2) certain indications as set out in article 50A(7).

Associations of high net worth or sophisticated investors (article 51)

8.14.29 G (1) This exemption allows a *non-real time* or *solicited real time financial promotion* to be made to an association with a particular membership. Membership of this association must be reasonably believed to be wholly or predominantly made up of high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors. The *financial promotion* must not relate to an *investment* under the terms of which a *person* can incur additional liability of more than their original investment. In each case, whether the membership of an association is predominantly made up of high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors will be a question of fact. The exemption may be expected to be likely to apply, for example, to *financial promotions* to business angel networks.

(2) The exemption extends to *financial promotions* made to *persons* who are members of an association with a particular membership and not simply to *financial promotions* made to the operator or secretariat of

the association. It would appear that this includes members who are not themselves high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors.

- (3) This exemption does not apply to *financial promotions* relating to *qualifying cryptoassets*.

Common interest group of a company (article 52)

8.14.30 G Article 52 concerns *non-real time* and *solicited real time financial promotions* about offers of *shares* or *debentures* or *alternative debentures* of a *company*. The offers must be made only to or be reasonably regarded as only directed at certain *persons*. These *persons* must belong to an identified group of *persons* who, when the *financial promotion* is made, might reasonably be regarded as having an existing and common interest with each other and the *company*.

8.14.31 G The exemption is subject to certain conditions. In broad terms, these are that the *financial promotion* must be accompanied by an indication:

- (1) that the directors or promoters of the *company* have taken all reasonable care to ensure that the *financial promotion* is true and not misleading;
- (2) that the directors or promoters have not limited their liability;
- (3) that any *person* who is in doubt about the investment should consult an *authorised person*; and
- (4) that:
 - (a) the directors or promoters of the *company* have taken all reasonable care to ensure that potential investors have access to relevant information about the *company*; or
 - (b) any *person* considering investing in the *company* should regard his subscription as helping the *company* to meet its non-financial objectives and only secondarily, if at all, as an investment.

8.14.32 G In line with other exemptions, article 52 contains indicators which, if all are met, mean that the *financial promotion* is directed at relevant *persons*.

8.14.33 G Example of situations where article 52 is likely to apply include offers made by:

- (1) a club or association which is considering incorporation to its members;
- (2) a private school to the parents of its pupils; and
- (3) a *company* to its existing members or creditors (where the exemption in article 43 might also be expected to apply).

- 8.14.34** **G** However, *persons* are not to be regarded as having a common interest with each other and a *company* simply because:
- (1) they would have such an interest if they became its members or creditors; or
 - (2) they all carry on a particular trade or profession; or
 - (3) they have an existing business relationship with the *company* whether by being its clients, customers, contractors, suppliers or otherwise.

Insolvency practitioners (article 55B)

- 8.14.34A** **G** The *financial promotion* restriction (that is, the restriction in section 21 of the Act) does not apply to a communication which is a *non-real time financial promotion* or a *solicited real time financial promotion* by an insolvency practitioner who acts in that capacity (see the definition of “acting as an insolvency practitioner” in article 3 of the *Regulated Activities Order*). The exemption only applies where the communication is made in the course of carrying on an activity which is excluded from being a *regulated activity* by virtue of article 72H of the *Regulated Activities Order* (see ■ PERG 2.9.25G and ■ PERG 2.9.26G).

Sale of body corporate (article 62)

- 8.14.35** **G** The exemption in article 62 of the *Financial Promotion Order* applies to any *financial promotion communicated* by or on behalf of a *body corporate*, a *partnership*, an individual or a group of connected individuals. The *financial promotion* must relate to a transaction which is one to acquire or dispose of *shares* in a *body corporate* and either:
- (1) it is the case that:
 - (a) the *shares*, in addition, where appropriate, to any *shares* already held by the buyer, amount to 50% or more of the voting *shares* in the *body corporate*; and
 - (b) the party or parties who act as seller is a *body corporate*, a *partnership*, a single individual or a group of connected individuals and the party or parties who act as buyer is also one or other of these (but not necessarily the same type as the seller); or
 - (2) where the conditions in (1) are not met, but the object of the transaction may reasonably be regarded as being the acquisition of day to day control of the affairs of the *body corporate*.

- 8.14.36** **G** A group of connected individuals is defined in article 62(4) of the *Financial Promotion Order* as being a group of *persons* each of whom is (for sellers) or is to be (for buyers):
- (1) a director or manager of the *body corporate*;
 - (2) a *close relative* of such a *person*; or
 - (3) a *person* acting as trustee for a *person* as referred to in (1) or (2)

8.14.37 **G** In the *FCA's* view, a main aim of the exemption (see ■ PERG 8.14.35G (1)) is to remove from the scope of section 21 a *financial promotion* concerning the sale of a corporate business by a *person* who, either alone or with others, controls the business to another *person* who, either alone or with others, proposes to control the business.

8.14.38 **G** In any case where the conditions referred to in ■ PERG 8.14.35G (1) are not met, it will be necessary to consider the circumstances in which the transaction is to take place in order to determine whether its objective is the acquisition of day-to-day control (see ■ PERG 8.14.35G (2)). In situations where the 50% holding of voting *shares* test is not met it is still possible that the objective of a transaction could be the acquisition of day-to-day control. For instance, because the remaining shareholders represent a large number of small shareholders who it is reasonable to suppose will not regularly act in concert.

8.14.39 **G** Where the nature of the parties test (see ■ PERG 8.14.35G (1)(b)) is not met and the purpose for which the *person* who is the buyer holds or proposes to hold the voting *shares* is considered, it may still be the case that the objective of the transaction is the acquisition of day-to-day control. This may typically be because there are two or more parties involved as buyer and they do not collectively represent a group of connected individuals as defined. For example, this may happen where the *shares* are to be held by one of the following *persons* who intends to acquire control either alone or with others:

- (1) a *person* (of either sex) with whom a *person* who is to be a manager or director cohabits; or
- (2) a venture capital company which proposes to invest in the *company* and which is to provide a representative to act as a manager or director of the *company*; or
- (3) a private *company* used as a vehicle to hold *shares* by a *person* who is to be a manager or director of the *company* (or his *close relative*).

8.14.40 **G** In the *FCA's* opinion, provided that the purpose of the transaction is for the buyer to acquire the necessary control, it is irrelevant who is the seller. The exemption specifically applies to *financial promotions* which are *communicated* on behalf of the parties or potential parties to the transaction.

Pension products offered to employees by employers (article 72) and third parties (article 72A)

8.14.40A **G** Article 72 exempts any *financial promotion* made by an employer to an employee in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the *financial promotion* must inform the employee that the employer will make a contribution to the pension that the employee will receive from the pension scheme to which the *financial promotion* relates in the event of the employee becoming a member;

- (2) the employer must not receive or have received any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication;
- (3) the employer must notify the employee in writing, prior to the employee becoming a member, of the amount of the contribution that the employer will make to the scheme in respect of that employee or the basis on which the contribution will be calculated; and
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek independent advice from an *authorised person* or an *appointed representative*.

8.14.40AA **G**

Article 72A exempts any *financial promotion* made to an employee by or on behalf of a person ("A") in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person ("B") on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) the employer must make a contribution to the scheme in the event of the employee becoming a member of the scheme and the communication must contain a statement informing the employee of this;
- (5) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (6) the employer or A must notify the employee in writing prior to the employee becoming a member of the *scheme* of:
 - (a) the amount of the contribution that the employer will make to the *scheme* in respect of that employee, or the basis on which the contribution will be calculated; and
 - (b) any remuneration A or B has received, or will receive, as a consequence of the employee becoming a member of the *scheme*, or the basis on which any such remuneration will be calculated.

Insurance product offers communicated to employees by employers (article 72B) and third parties (article 72C)

8.14.40AB G

Article 72B exempts any *financial promotion* made by an employer to an employee in relation to *work-related insurance*. This is subject to certain requirements as follows:

- (1) where the provider of the insurance is not the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication; and
- (2) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*.

8.14.40AC G

Article 72C exempts any *financial promotion* made to an employee by or on behalf of a person ("A") in relation to *work-related insurance*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person ("B") on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (5) the employer or A must notify the employee in writing prior to the employee entering into a contract for the *work-related insurance* of any remuneration A or B has received, or will receive, as a consequence of the employee entering into the contract, or the basis on which any such remuneration will be calculated.

Staff mortgage offers communicated to employees by employers (article 72D) and third parties (article 72E)

8.14.40AD G

Article 72D exempts any *financial promotion* made by an employer to an employee in relation to a *staff mortgage*. This is subject to certain requirements as follows:

- (1) where the provider of the *staff mortgage* is an undertaking in the same group as the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication; and

- (2) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*.

8.14.40AE G

Article 72E exempts any *financial promotion* made to an employee by or on behalf of a person (“A”) in relation to a *staff mortgage*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person (“B”) on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) where the provider of the *staff mortgage* is an undertaking in the same group as the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) in the case of a non-real time communication, the communication must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (5) the employer or A must notify the employee in writing prior to the employee entering into the *staff mortgage* of any remuneration A or B has received, or will receive, as a consequence of the employee entering into the *staff mortgage*, or the basis on which any such remuneration will be calculated.

Credit agreements offered to employees by employers (article 72F)

8.14.40AEA G

Article 72F exempts any *financial promotion* which is made to an employee by or on behalf of a *person* in relation to an exempt staff loan. An exempt staff loan is defined as a *credit agreement* which is:

- (1) offered by a *lender* to a *borrower* as an incident of employment with the *lender*, or with an undertaking in the same group as the *lender*; and
- (2) an exempt agreement under a provision of article 60G (exempt agreements: exemptions relating to the total charge for credit) of the *Regulated Activities Order* other than article 60G(2) (relating to loans by *credit unions*). *Guidance* on article 60G can be found in ■ PERG 2.7.19I G.

8.14.40AF G

The exemptions described in ■ PERG 8.14.40A G to ■ PERG 8.14.40AEA G should enable employers (and their contracted service providers) to promote employee benefits packages that include any *pension schemes*, *work-related insurance schemes*, *staff mortgages* and certain staff loans to employees without undue concern that they may be breaching the restriction in section

21 of the Act. ■ PERG 8.14.34 G (Communications by employers and contracted service providers to employees) has further *guidance* about the application of section 21 to employers and contracted service providers generally.

Advice centres (article 73)

8.14.40B G Article 73 exempts any *financial promotion* made by a *person* in the course of carrying out his duties as an adviser for, or employee of, an advice centre. This is provided the *financial promotion* relates to:

- (1) a *home finance transaction*; or
- (2) rights under, or rights to or interests in rights under, a *life policy*; or
- (3) a child trust fund within the meaning of section 1(2) of the Child Trust Funds Act 2004; or
- (4) *controlled claims management activity*.

8.14.40C G An advice centre is defined in article 73 as a body which:

- (1) gives advice which is free and in respect of which it does not receive any fee, commission or other reward;
- (2) provides debt advice as its principal financial services activity; and
- (3) in the case of a body which is not part of a local authority, holds adequate professional indemnity insurance or a guarantee providing comparable cover.

This exemption should be of particular use to bodies such as Citizens Advice Bureaux.

Promotions of qualifying cryptoassets by registered persons (article 73ZA)

8.14.40D G (1) Article 73ZA exempts any *financial promotion* which relates only to one or more *qualifying cryptoassets* and which is *communicated*:

- (a) by a *registered person*; or
- (b) on behalf of a *registered person* provided that:
 - (i) the *financial promotion* is a *non-real time financial promotion*; and
 - (ii) the *registered person* prepared the content of the *financial promotion*.

(2) The exemption does not apply to the extent that a *financial promotion* relates to a *controlled investment* other than a *qualifying cryptoasset*.

(3) The exemption does not apply where the *registered person* makes or directs a *financial promotion*, or causes it to be made or directed, in breach of:

- (a) a requirement imposed on that *registered person* by the *FCA*; or

- (b) a direction given by the *FCA* under section 137S of the Act (Financial promotion rules: directions given by *FCA*).
- (4) The Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023 applies certain powers in the Act in relation to *registered persons* in connection with their *communication of financial promotions* in reliance on this exemption.
- (5) In particular, the *FCA* may make *rules* applying to *registered persons* about the *communication* by them of *financial promotions* relating to *qualifying cryptoassets* which are the same as, or substantially equivalent to, *rules* which would apply to an *authorised person* communicating a *financial promotion* relating to *qualifying cryptoassets*. The *FCA* has exercised this power primarily in applying relevant provisions in ■ COBS 4 and ■ COBS 10 to *registered persons*. The effect of this application is that a *registered person* must ensure that it complies with the relevant *rules* when:
 - (a) *communicating a financial promotion* relating to one or more *qualifying cryptoassets*; or
 - (b) preparing the content of a *non-real time financial promotion* relating to one or more *qualifying cryptoassets* for *communication* on its behalf,
 in either case in reliance on the exemption.
- (6) *Registered persons* are not able to *approve financial promotions* for the purposes of section 21 of the Act.

Other issues

8.14.41

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Several exemptions, including article 43 of the *Financial Promotion Order* (Members and creditors of certain bodies corporate), apply only in relation to relevant *investments* being *shares* or *debentures* or *alternative debentures* in the *body corporate* or a member of its group, or *warrants* or *certificates representing certain securities* relating to such *shares* or *debentures* or *alternative debentures*. In the *FCA*'s view, an exchangeable *debt security* which is partly a *debenture* or *alternative debenture* and partly an *option* is a relevant *investment* for these purposes.

8.14.42

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The exemptions for bearer instruments (articles 41 and 42 of the *Financial Promotion Order*) relate to *financial promotions* made to or directed at *persons* entitled to bearer instruments. For clarity, the *FCA* takes the view that *persons* who hold bearer instruments through a clearing system such as Euroclear or Clearstream are *persons* entitled to those instruments for the purposes of articles 41 and 42.

8.15 Financial promotions by members of the professions (articles 55 and 55A)

Real time financial promotions by professional firms

- 8.15.1 **G** Article 55 of the *Financial Promotion Order* contains a specific exemption for *professional firms* allowing them to make *solicited or unsolicited real time financial promotions*. This is provided the *financial promotion* is made:
- (1) by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption*; and
 - (2) to someone who has already (that is, before the *financial promotion* is made) engaged the *person* making the *financial promotion* to provide professional services (that is services which are not *regulated activities* and whose provision is supervised and regulated by a *Designated Professional Body*).
- 8.15.2 **G** The article 55 exemption also requires that:
- (1) the *financial promotion* relates to an activity to which the *Part XX exemption* applies or which would be a *regulated activity* but for the exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) which concerns activities which are a necessary part of professional services; and
 - (2) the activity to which the *financial promotion* relates would be undertaken for the purposes of, and be incidental to, the provision of professional services to or at the request of the recipient.
- 8.15.3 **G** The *FCA* considers that, to satisfy the condition in ■ PERG 8.15.2G (2) that an activity be incidental to the provision of professional services, *regulated activities* cannot be a major part of the practice of the *professional firm*. The *FCA* also considers that the following further factors are relevant.
- (1) The scale of *regulated activity* in proportion to other professional services provided.
 - (2) Whether and to what extent services that are *regulated activities* are held out as separate services.

- (3) The impression given of how the *professional firm* provides *regulated activities*, for example, through its advertising or other promotions of its services.

In the *FCA* opinion, one consequence of this is that the *professional firm* cannot provide services which are *regulated activities* if they amount to a separate business to the provision of professional services. This does not, however, preclude the *professional firm* operating its professional business in a way which involves separate teams or departments one of which handles the *regulated activities*.

- 8.15.4** G One of the effects of the requirements in ■ PERG 8.15.2 G concerns *financial promotions* which relate to an activity which is not a *regulated activity* as the result of an exclusion in the *Regulated Activities Order*. In this case, a *professional firm* using the *Part XX exemption* cannot make a *real time financial promotion* relying on article 55 of the *Financial Promotion Order* unless the exclusion is provided by article 67 of the *Regulated Activities Order*. Neither can a *professional firm* rely on article 55 to make *real time financial promotions*, in connection with the provision of professional services to an existing client, if the *financial promotions* are made to a third party. Third parties may be prospective counterparties, rather than a client. In such circumstances, another exemption would need to be available.

Non-real time financial promotions by professional firms.....

- 8.15.5** G Article 55A of the *Financial Promotion Order* exempts *non-real time financial promotions* where the *financial promotion*:
- (1) is made by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption* (referred to in ■ PERG 8.15.6 G and ■ PERG 8.15.7 G as 'Part XX activities'); and
 - (2) contains a specified statement and is limited in its content to the matters referred to in ■ PERG 8.15.6 G.

- 8.15.6** G A *financial promotion* made under article 55A must contain a statement in the following terms: "The [firm/company] is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment and consumer credit-related and claims-management related services to clients because we are members of [relevant designated professional body]. We can provide these investment and consumer credit-related and claims-management related services if they are an incidental part of the professional services we have been engaged to provide". The *financial promotion* may also set out the *Part XX activities* which the *person* is able to offer to his clients, provided it is clear that these are the incidental services to which the statement relates. The exemption also provides that a defect in the wording of the statement does not affect its validity. This is provided that the defect does not alter the meaning of the communication.

- 8.15.7** G The article 55A exemption should enable *professional firms* to issue brochures, websites and other *non-real time financial promotions* without any need for *approval* by an *authorised person*. This is provided the *financial promotion* does not also contain an invitation or inducement relating to

regulated activities other than those covered by the *Part XX exemption*. In this respect, it should be noted that, unlike article 55, the article 55A exemption does not extend to activities which are excluded under article 67 of the *Regulated Activities Order*. The *FCA* takes the following views in relation to article 55A.

- (1) It is not necessary for the details of the *Part XX* activities to be set out in one place or adjacent to the statement. A brochure or website, for example, may contain details of *Part XX* activities in various places so long as it is made clear that they will be incidental investment activities as referred to in the statement. So, this only needs to be set out once in the brochure or website.
- (2) The inclusion of contact details would be regarded as part of the description of *Part XX* activities.
- (3) A *financial promotion* made under article 55A may be likely, on occasion, to result in the carrying on by the *professional firm* of activities which are excluded under the *Regulated Activities Order*. However, this does not mean that the *financial promotion* will fail to satisfy the terms of article 55A. There will be occasions where a *professional firm* will have to offer to provide services which may or may not involve *Part XX* activities or excluded activities. In the area of corporate finance, for example, a *professional firm* may offer its services in relation to the sale of an incorporated business or a substantial shareholding in such a business. It will not be clear whether the *professional firm's* services will be *Part XX* activities or excluded activities until the details of a proposed deal are known. Similarly, a *professional firm* may offer services which in some instances, will fall under the 'necessary' exclusion in article 67 of the *Regulated Activities Order* but, in others, will be *Part XX* activities. In practice, it will often be impossible for a *professional firm* to distinguish between *Part XX* activities and excluded activities at the preliminary stage of a brochure or website offering its services. In the *FCA's* view, the article 55A exemption will apply provided the only *regulated activities* held out in the brochure, website or other *non-real time financial promotion* are *Part XX* activities. It will, of course, be possible for a *professional firm* to make an offer involving excluded activities to a *person* who responds to a *financial promotion* issued under article 55A. But this is provided another exemption (such as the one-off *financial promotion* exemption (see ■ PERG 8.14.3 G)) is available in respect of any subsequent *financial promotions*.



8.16 Financial promotions concerning funeral plans

8.16.1 **G** [deleted]



8.17 Financial promotions concerning agreements for qualifying credit

8.17.1 G Section 21 applies to *financial promotions* concerning agreements for *qualifying credit* and relevant consumer credit. ■ PERG 8.17.1A G to ■ PERG 8.17.18 G has *guidance* about the treatment of *financial promotions* concerning agreements for *qualifying credit*. PERG 8.17-AG has *guidance* about *financial promotions* concerning relevant consumer credit.

Introduction

8.17.1A G Section 21 also applies to *financial promotions* concerning *home reversion plans*, *home purchase plans* and *regulated sale and rent back agreements*. *Guidance* on these activities and related *financial promotions* is given in ■ PERG 14 (Guidance on home reversion, home purchase and regulated sale and rent back activities).

Controlled investment: agreement for qualifying credit

8.17.2 G Rights under an agreement for *qualifying credit* are a *controlled investment*. *Qualifying credit* is defined in paragraph 10 of Schedule 1 to the *Financial Promotion Order* (Controlled activities) as credit provided pursuant to an agreement under which:

- (1) the lender is a *person* who carries on the *regulated activity* of *entering into a regulated mortgage contract* (whether or not he is an *authorised or exempt person* under the Act); and
- (2) the obligation of the borrower to repay is secured (in whole or in part) on land.

8.17.3 G An agreement for *qualifying credit* includes the following types of loan in addition to those that would be a *regulated mortgage contract*, but in each case only if the lender carries on the *regulated activity* of *entering into regulated mortgage contracts*:

- (1) [deleted]
- (2) secured loans for buy-to-let or other purely investment purposes;
- (3) loans secured on land situated outside the *United Kingdom*;

- (4) loans that include some unsecured credit such as a flexible mortgage that includes an unsecured credit card; and
- (5) commercial mortgages.

Controlled activities

8.17.4 **G** There are four controlled activities involving qualifying credit:

- (1) *providing qualifying credit*;
- (2) *arranging qualifying credit*;
- (3) advising on qualifying credit; and
- (4) agreeing to carry on any of (1) to (3).

8.17.5 **G** *Providing qualifying credit is a controlled activity under paragraph 10 of Schedule 1 to the Financial Promotion Order. In the FCA's view, 'providing' means, in this context, providing as lender; an intermediary does not 'provide' qualifying credit.*

8.17.6 **G** *Arranging qualifying credit is a controlled activity under paragraph 10A of Schedule 1 to the Financial Promotion Order; that is, making arrangements:*

- (1) for another *person* to enter as borrower into an agreement for *qualifying credit*; or
- (2) for a borrower under a *regulated mortgage contract* entered into on or after 31 October 2004 or a borrower under a *legacy CCA mortgage contract* to vary the terms of that contract in such a way as to vary that person's obligations under that contract.

This means that invitations and inducements relating to the services of mortgage arrangers will potentially be within the scope of section 21 of the Act.

8.17.7 **G** Advising on qualifying credit is a *controlled activity* under paragraph 10B of Schedule 1 to the *Financial Promotion Order*; that is, advising a *person* if the advice is:

- (1) given to the *person* in his capacity as a borrower or potential borrower; and
- (2) advice on the merits of that person's doing any of the following:
 - (a) entering into an agreement for *qualifying credit*; or
 - (b) varying the terms of a *regulated mortgage contract* entered into by that person's on or after 31 October 2004 or the terms of a *legacy CCA mortgage contract* entered into by that person in such a way as to vary that person's obligations under that contract.

This means that invitations and inducements relating to the services of mortgage advisers will potentially be within the scope of Section 21 of the Act.

8.17.8 G Agreeing to carry on each of these three *controlled activities* is also a *controlled activity* under paragraph 11 of Schedule 1 to the *Financial Promotion Order*.

Application of exemptions to financial promotions about agreements for qualifying credit

8.17.9 G The exemptions in Part IV of the *Financial Promotion Order* (Exempt communications: all controlled activities) will apply to *financial promotions about qualifying credit*. Some of the exemptions in Part VI of the *Financial Promotion Order* (Exempt communications: certain controlled activities) will also apply. Those of particular note are referred to in ■ PERG 8.17.10 G to ■ PERG 8.17.12 G.

8.17.10 G Article 46 (Qualifying credit to bodies corporate) exempts any *financial promotion* about providing *qualifying credit* (or relevant consumer credit or consumer hire) if it is:

- (1) made to or directed at *bodies corporate* only; or
- (2) accompanied by an indication that the *qualifying credit* to which it relates is only available to *bodies corporate*.

8.17.11 G [deleted]

8.17.12 G Article 28B (Real time communications: introductions) exempts a *real time financial promotion* that relates to one or more of the *controlled activities about regulated mortgage contracts*, as well as *home reversion plans*, *home purchase plans*, *regulated sale and rent back agreements*, certain *consumer hire agreements* and relevant credit agreements. The exemption is subject to the following conditions being satisfied:

- (1) the *financial promotion* must be made for the purpose of, or with a view to, introducing the recipient to a *person* ('N') who is:
 - (a) an *authorised person* who carries on the *controlled activity* to which the communication relates; or
 - (b) an *appointed representative*, where the *controlled activity* is also a *regulated activity* in respect of which the *appointed representative* is exempt or in relation to which sections 20 (1) and (1A) and 23 (1A) of the *Act* do not apply by virtue of section 39(1D) of the *Act* (see ■ SUP 12.2.2AG (3)); or
 - (c) an overseas person who carries on the *controlled activity* to which the communication relates; for this purpose, an 'overseas person' is a *person* who carries on any of the *controlled activities about home finance transactions* or of providing relevant consumer credit or consumer hire but does not do so, or offer to do so, from a permanent place of business maintained by him in the *United Kingdom*; and

- (2) the *person* ('M') communicating the *financial promotion*:
- (a) must not receive any money paid by the recipient in connection with any transaction that the recipient enters into with or through N as a result of the introduction, other than money payable to M on M's own account; and
 - (b) before making the introduction, must disclose to the borrower the following information where it applies to M:
 - (i) whether M is a member of the same *group* as N;
 - (ii) details of any payment which M will receive from N, by way of fee or commission, for introducing the recipient to N; and
 - (iii) an indication of any other reward or advantage arising out of M's introducing to N.

8.17.13 G Introducers can check whether a *person* is an *authorised person* or an *appointed representative* by visiting the FCA's register at www.fca.org.uk/firms/financial-services-register. If an *authorised person* has *permission* to carry on a *regulated activity* (which can be checked on the FCA's register) it is reasonable, in the FCA's view, to conclude that the *authorised person* carries on that activity (but not a *controlled activity* which is not a *regulated activity*). The FCA would normally expect introducers to request and receive confirmation of other facts necessary to satisfy the condition in ■ PERG 8.17.12G (1), prior to proceeding with an introduction.

8.17.14 G In the FCA's view, money payable to an introducer on his own account includes money legitimately due to him for services rendered to the borrower, whether in connection with the introduction or otherwise. It also includes sums payable in connection with transfer of property to an introducer (for example, a housebuilder) by a borrower. For example, article 28B allows a housebuilder to receive the purchase price on a property that he sells to a borrower, whom he previously introduced to an *authorised person* or *appointed representative* to help him finance the purchase in return for a fee payable by the borrower, and still take the benefit of the exclusion. This is because the sums that the housebuilder receives in connection with the introduction and the sale of his property to the borrower are both 'payable to him on his own account'. The housebuilder could also receive a commission from the *person* introduced to.

8.17.15 G In the FCA's view, the provision of details of fees or commission referred to in ■ PERG 8.17.12G (2)(b)(ii) does not require an introducer to provide an actual sum to the borrower, where it is not possible to calculate the full amount due prior to the introduction. This may arise in cases where the fee or commission is a percentage of the eventual loan taken out and the amount of the required loan is not known at the time of the introduction. In these cases, it would be sufficient for the introducer to disclose the method of calculation of the fee or commission, for example the percentage of the eventual loan to be made by N.

8.17.16 G In the FCA's view, the information condition in ■ PERG 8.17.12G (2)(b)(iii) requires the introducer to indicate to the borrower any other advantages accruing to him as a result of ongoing arrangements with N relating to the introduction of borrowers. This may include, for example, indirect benefits

such as office space, travel expenses, subscription fees. This and other relevant information may, where appropriate, be provided on a standard form basis to the borrower. The FCA would normally expect an introducer to keep a written record of disclosures made to the borrower under article 33A of the *Regulated Activities Order* including those cases where disclosure is made on an oral basis only.

8.17.17 **G**

8.17.18 **G**

Interaction with providing relevant consumer credit

8.17.19 **G**

Rights under a relevant credit agreement are also a *controlled investment*. A relevant credit agreement is a *credit agreement* other than a *regulated mortgage contract* or a *regulated home purchase plan*. Entering into a relevant credit agreement as lender, or exercising or having the rights to exercise the rights of the lender under such an agreement, is a *controlled activity* under paragraph 10BA of Schedule 1 to the *Financial Promotion Order*, except where the agreement is for the provision of *qualifying credit*. Further guidance on providing relevant consumer credit is given in ■ PERG 8.17-A.

8.17.20 **G**

■ CONC 3 contains *rules* about *financial promotions* relating to *credit-related regulated activity*. ■ CONC 3 does not apply, however, to the *communication, or approval for communication, of a financial promotion* to the extent it concerns *qualifying credit*. ■ MCOB 3A applies to the *communication or approval of a financial promotion of qualifying credit*. This means that a *financial promotion about credit* will not usually be subject to both ■ MCOB 3A and ■ CONC 3 unless it is about secured and unsecured lending. *Guidance* on the potential application of ■ MCOB 3A and ■ CONC 3 to particular types of *financial promotion of credit* is given in the table in ■ PERG 8.17.21 G. *Firms* must also comply with *Principle 7* (a *firm* must pay due regard to the information needs of its *clients*, and communicate information to them in a way which is clear, fair and not misleading).

8.17.21 **G**

Guide to potential application of ■ MCOB 3A and ■ CONC 3 to *financial promotion of credit*. This table belongs to ■ PERG 8.17.20 G.

	Subject of promotion	MCOB 3A may apply	CONC 3 may apply
(1)	<i>regulated mortgage contracts</i>	Yes	No
(2)	credit agreements secured on land where the lender also enters into <i>regulated mortgage contracts</i> as lender	Yes	No
(3)	credit agreements not secured on land, whether or not the lender also enters into <i>regulated mortgage contracts</i> as lender	No	Yes
(4)	credit agreements secured on land where the lender does not enter into	No	Yes

	Subject of promotion	MCOB 3A may apply	CONC 3 may apply
	<i>regulated mortgage contracts as lender</i>		
(5)	credit agreements partly secured on land that include some unsecured credit and where the lender enters into <i>regulated mortgage contracts as lender</i>	Yes	No
(6)	credit agreements with features as in (1), (2) or (5) promoted in combination with other unsecured credit agreements	Yes	Yes



8.17-A Financial promotions concerning consumer credit and consumer hire

8.17-A.1 **G** Section 21 of the *Act* applies to *financial promotions* in relation to relevant consumer credit and consumer hire. This section sets out guidance about such *financial promotions*.

Controlled investments

8.17-A.2 **G** Rights under a relevant credit agreement are a *controlled investment*. A relevant credit agreement is defined as a *credit agreement* other than a *regulated mortgage contract* or a *regulated home purchase plan*.

8.17-A.3 **G** Rights under a *consumer hire agreement* are also a *controlled investment*.

Controlled activities

8.17-A.4 **G** Providing relevant consumer credit is a *controlled activity*. This is defined as entering into a relevant credit agreement (other than an agreement under which *qualifying credit* is provided) as *lender*, or exercising or having the rights to exercise the rights of the *lender* under such an agreement.

8.17-A.5 **G** The *controlled activities* also include providing consumer hire. A *person* provides consumer hire if he enters into a *regulated consumer hire agreement* (or an agreement that would be such an agreement were it not exempt under article 60O (exempt agreements: exemptions relating to the nature of the agreement) or 60Q (exempt agreement: exemptions relating to nature of hirer) of the *Regulated Activities Order*) as *owner* or exercises or has the right to exercise the rights of the *owner* under such an agreement.

8.17-A.6 **G** Operating an electronic system in relation to lending is a *controlled activity*. For the purposes of this *controlled activity*, the *controlled investment* of rights under a relevant credit agreement includes rights under an agreement within paragraph 4C(4) of Schedule 1 to the *Financial Promotion Order* (which is similar to an agreement within article 36H of the *Regulated Activities Order*, guidance on which is given in ■ PERG 2.7.10 G).

8.17-A.7 **G** There are three other *controlled activities* that involve both of the *controlled investments* of relevant credit agreements and consumer hire agreements:

- (1) credit broking;
- (2) debt adjusting;
- (3) debt counselling;

8.17-A.8 G The *controlled activities* in ■ PERG 8.17-A.6 G and ■ PERG 8.17-A.7 G are substantially the same as the *regulated activities* of *operating an electronic system in relation to lending, credit broking, debt adjusting and debt counselling* (although an activity is not the *controlled activity* of credit broking to the extent that it constitutes the *controlled activity* of arranging *qualifying credit*). *Guidance* on these *regulated activities* is given in ■ PERG 2.7.7E G (credit broking), ■ PERG 2.7.7H G (operating an electronic system), ■ PERG 2.7.8B G (debt adjusting) and ■ PERG 2.7.8C G (debt counselling). Agreeing to carry on the above activities also constitutes a *controlled activity*.

Application of exemptions to financial promotions about agreements for relevant consumer credit or consumer hire

8.17-A.9 G *Financial promotions* about relevant consumer credit or consumer hire are subject to the exemptions in Part IV of the *Financial Promotion Order* (Exempt communications: all controlled activities). A number of the exemptions in Part VI of the *Financial Promotion Order* (Exempt communications: certain controlled activities) also apply. *Guidance* on some of these (which apply to *financial promotions* about both *qualifying credit* and relevant consumer credit) is given in ■ PERG 8.17.10 G to ■ PERG 8.17.12 G. There is one exemption that applies specifically to relevant consumer credit and consumer hire, referred to in ■ PERG 8.17-A.10 G.

Promotions of credit for business purposes (article 46A)

8.17-A.10 G

- (1) Article 46A of the *Financial Promotion Order* exempts a *communication* which relates to the *controlled activities* of operating an electronic system in relation to lending, providing relevant consumer credit or providing consumer hire.
- (2) This exemption applies only if the *communication*:
 - (a) indicates clearly that a *person* is willing to engage in the investment activity for the purposes of another *person's* business; and
 - (b) does not indicate (by express words or otherwise) that the *person* is willing to engage in the investment activity for any other purpose.
- (3) For the purposes of this exemption, references to a "business" do not include a business carried on by the *person communicating* the promotion, or by a *person* who is a *credit broker* in relation to the agreement to which the promotion relates.

8.17A Financial promotions concerning insurance distribution activities

8.17A.1 G The application of section 21 of the *Act* and of exemptions in the *Financial Promotion Order* to invitations or inducements about *insurance distribution activities* will vary depending on the type of activity. The implementation of the *IDD* has not led to any changes in the definitions of a *controlled investment* or a *controlled activity* under the *Financial Promotion Order*. So:

- (1) rights under any *contract of insurance* are a *controlled investment*;
- (2) rights to or interests in rights under *life policies* are *controlled investments* but rights to or interests in rights under other *contracts of insurance* are not;
- (3) the activities of:
 - (a) *dealing in investments as agent*;
 - (b) *arranging (bringing about) deals in investments*;
 - (c) *making arrangements with a view to transactions in investments*;
 - and
 - (d) *advising on investments*;
 where they relate to *contracts of insurance*, are *controlled activities* only where the *contract of insurance* is a *life policy*; and
- (4) the activity of *assisting in the administration and performance of a contract of insurance* is not a *controlled activity*.

8.17A.2 G This means that an *insurance intermediary* will not be *communicating a financial promotion*:

- (1) where the only activity to which the promotion relates is *assisting in the administration and performance of a contract of insurance*; or
- (2) purely by reason of his inviting or inducing *persons* to make use of his advisory or *arranging* services where they relate only to *general insurance contracts* or *pure protection contracts* or both.

But as regards (2), an intermediary will be *communicating a financial promotion* if he is also inviting or inducing *persons* to enter into a *contract of insurance*. This is because the making and performance of the contract by the insurer will be a *controlled activity* (of *effecting and carrying out a contract of insurance*). *Insurance intermediaries* will, however, be able to use the exemptions in Part V of the *Financial Promotion Order* (see ■ PERG 8.13

(Exemptions applying to financial promotions concerning deposits and certain contracts of insurance) where they promote a *general insurance contract* or a *pure protection contract*. Where an *insurance intermediary* is promoting *life policies*, he will be able to use any exemptions in Part VI of the *Financial Promotion Order* that apply to a *contractually based investment*.

8.18 Financial promotions concerning the Lloyd's market

8.18.1

G

A person involved in *insurance business* written at Lloyd's may be making *financial promotions* when attracting another person:

- (1) to effect or carry out contracts of *insurance* written at Lloyd's (where the *controlled activity* which is the subject of the *financial promotion* is effecting and carrying out contracts of *insurance*); or
- (2) to have assets held under funds at Lloyd's (where the *controlled activity* may involve dealing in *securities* and *contractually based investments*, arranging deals in investments, *managing investments* or *safeguarding and administering investments*); or
- (3) to participate in particular *syndicates* at Lloyd's (where the *controlled activity* is advising on *syndicate* participation or arranging deals in *syndicate* participations or underwriting capacity); or
- (4) to participate indirectly in the Lloyd's market as a shareholder of a corporate *underwriting member* or a limited partner in a *limited liability partnership* which is an *underwriting member* (where the *controlled activity* is dealing in, arranging deals in or advising on *shares* or *units*); or
- (5) to take out insurance which is written at Lloyd's (where the *controlled activity* is effecting a contract of *insurance*).

8.18.2

G

Most persons making *financial promotions* as referred to in this section are likely to be *authorised persons*. As such they will be subject to the appropriate *financial promotion rules*. Any persons who are making *financial promotions* as referred to in ■ PERG 8.18.1 G and who do not need to be *authorised persons* will need to ensure that their *financial promotions* are approved by an *authorised person* or that a specific exemption applies (see ■ PERG 8.13).

8.19 Additional restriction on the promotion of life policies

8.19.1

G Article 10 of the *Financial Promotion Order* (Application to qualifying contracts of insurance) precludes any of the exemptions from applying to a *financial promotion* which invites or induces a *person* to enter into a *life policy* with a *person* who is not:

- (1) an *authorised person*; or
- (2) an exempt *person* who is exempt in relation to *effecting or carrying out contracts of insurance* of the class to which the promotion relates; or
- (3) [deleted]
- (4) a *company* authorised in one of the following countries or states to carry on the class of *insurance business* being promoted:
 - (a) Guernsey; or
 - (b) the Isle of Man; or
 - (c) Pennsylvania; or
 - (d) Iowa;
 - (e) Jersey.

■ COBS 4.9.4 R imposes a similar restriction on *authorised persons* concerning their *communicating or approving financial promotions* in the precluded circumstances.

8.20 Additional restriction on the promotion of collective investment schemes

8.20.1 G Where *collective investment schemes* are concerned additional restrictions are placed on their promotion to ensure that only those which are regulated are promoted to the general public. This is achieved by a combination of sections 21 and 238 (Restrictions on promotion) of the Act as explained in ■ PERG 8.20.2 G. A *regulated collective investment scheme* is:

- (1) an *authorised unit trust scheme*; or
- (1A) an *authorised contractual scheme*; or
- (2) an *investment company with variable capital*; or
- (3) [deleted]
- (4) [deleted]
- (5) a *scheme* recognised under section 272 of the Act (Individually recognised overseas schemes).

8.20.2 G Section 21 precludes the promotion by *unauthorised persons* of *unregulated collective investment schemes* unless the *financial promotion* is approved by an *authorised person* or is exempt. Section 238 then precludes the promotion of an *unregulated collective investment scheme* by *authorised persons* except where:

- (1) there is an exemption in an order made by the Treasury under section 238(6); or
- (2) the *financial promotion* is permitted under *rules* made by the FCA under section 238(5) to exempt the promotion, otherwise than to the general public, of *schemes* of certain descriptions; or
- (3) the *scheme* is a single property scheme and its promotion is exempt under regulations made by the Treasury under section 239 of the Act (Single property schemes).

In addition, section 240 of the Act (Restriction on approval of promotion) precludes an *authorised person* from *approving a financial promotion* for the purpose of section 21 if he would not be able to *communicate* it himself under section 238.

8.20.3

G

- (1) The Treasury has made an order under section 238(6). This is the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (as amended by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 (SI 2001/2633), by articles 7 to 10 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157) and, by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion and Promotion of Collective Investment Schemes) (Miscellaneous Amendments) Order 2005 (SI 2005/270) ('the CIS Financial Promotion Order') and by regulation 10 of The Collective Investment in Transferable Securities (Contractual Scheme) Regulations 2013).
- (2) The overall effect of the CIS Financial Promotion Order is to ensure that *authorised persons* are able to promote an *unregulated collective investment scheme* at least as widely as an *unauthorised person* is allowed to do under section 21 without needing the approval of an *authorised person*. In general terms, the order contains exemptions equivalent to those in the *Financial Promotion Order* which are relevant to units in an *unregulated collective investment scheme*. Guidance in ■ PERG 8 relating to exemptions in the *Financial Promotion Order* will apply equally to those exemptions where they appear in the CIS Financial Promotion Order. The main exception to this relates to the exemption for one-off *financial promotions* in article 15 of the CIS Financial Promotion Order. That article provides conditions which, if met, are conclusive proof that a *financial promotion* is one-off. However, these do not include the condition that the identity of the product or service must be determined having regard to the recipient's circumstances (see ■ PERG 8.21.8G (2) and ■ PERG 8.14.4G (2)).

8.20.4

G

The FCA has made *rules* under section 238(5) which allow *authorised firms* to *communicate or approve a financial promotion* for an *unregulated collective investment scheme* in certain specified circumstances. These circumstances are set out in ■ COBS 4.12B.7R. To date, the Treasury has not made an order exempting single property schemes under section 239.

8.20.5

G

In addition, where the *collective investment scheme* is an *AIF*, the *marketing* of that *scheme* is subject to additional restrictions (see ■ PERG 8.37).

8.21 Company statements, announcements and briefings

- 8.21.1** **G** There is a general concern that the practice of *companies* issuing statements and giving briefings may involve a *financial promotion*. These arise sometimes as a result of requirements imposed by a listing authority or an exchange or market, **■ PERG 8.4.14 G** offers *guidance* on when such statements or briefings may amount to or involve an inducement to *engage in investment activity*. It indicates that whilst statements of fact alone will not be inducements, there may be circumstances where there is a promotional element which may amount to an inducement (typically to buy the *company's shares*). In the *FCA's* experience, it is rare for *company* statements or briefings to involve an invitation.
- 8.21.2** **G** It is common practice for *listed companies* to brief analysts, usually at the time of the *company's* preliminary, interim and, if applicable, quarterly results and after the information has been issued to the market as a whole. Briefings may be made personally to a small or large number of analysts in a meeting or through a conference call. It is increasingly becoming the practice for *listed companies* to make their briefings available live to journalists and the general public on the basis that they may listen to or view, but not take part in, the briefing and any question and answer session. This is usually done through a conference call or a live broadcast (usually termed a webcast) through the *company's* website or the website of a specialist provider. Where such briefings include a *financial promotion* they must be *approved* by an *authorised person* (if they are *non-real time financial promotions*) or exempt.
- 8.21.3** **G** **■ PERG 8.21.4 G** to **■ PERG 8.21.21 G** set out the *FCA's* views on the potential relevance of certain exemptions to *company* statements and briefings. The exemptions are referred to in the same order as the *Financial Promotion Order*. In the *FCA's* view, these exemptions (whether alone or, where applicable, in combination) should enable most statements and briefings which involve *financial promotions* to be made by the *company* concerned without the need for *approval*. In particular, the *FCA* considers that article 69 (see **■ PERG 8.21.17 G**) should ensure that *financial promotions* made during the course of analyst briefings by *listed* and *AIM companies* are exempt and do not require *approval*. Some but not all of these exemptions apply equally to *financial promotions* which are *communicated* by a third party (for instance, a public relations adviser) on behalf of its corporate client. Those exemptions which are not available to a third party in such circumstances are those contained in article 20A (see **■ PERG 8.21.6 G**), 59 (see **■ PERG 8.21.11 G**), and 69 (see **■ PERG 8.21.17 G**).

Article 17: Generic promotions

8.21.4 **G** Any statement or briefing which did not identify the *company* as an *issuer* of *securities* (for example, by referring to its *securities*) and which does not identify any other particular *investment* or provider of *investments* or *investment services* will be exempt as a generic promotion (see ■ PERG 8.12.14 G). In practice, it will be unlikely that such a statement or briefing would involve a *financial promotion* but the article 17 exemption may be useful where any doubt arises.

Article 19: Investment professionals

8.21.5 **G** Where statements or briefings are only available to analysts who are, or who work for, *authorised persons* (including *overseas persons* who would need to be *authorised* if they were conducting their business in the *United Kingdom*), article 19 will exempt any *financial promotion* that may be made (see ■ PERG 8.12.21 G). Furthermore, where a *financial promotion* is made in the course of an interactive dialogue with an analyst and is addressed to him, the *financial promotion* will be regarded as having been made to that analyst irrespective of who else may hear or view it (article 6(b) of the *Financial Promotion Order* (see ■ PERG 8.6.9 G). For example, where a representative of the *company* is responding to a particular question article 19 would then apply. This is not to say that every time a *company* representative answers a question his response, if it involves a *financial promotion*, will be addressed to the questioner for the purpose of article 6(b). This will depend upon the particular circumstances.

Article 20A: Promotion broadcast by company director etc

8.21.6 **G** ■ PERG 8.12.32 G contains detailed *guidance* on the exemption in article 20A. The exemption is capable of applying to *financial promotions* in a *company* statement or briefing where they are *communicated* through a webcast if the website is a regularly updated news or information service. For this to be the case, the website must be a service provided to *persons* who use it (so it must not, for example, simply be an advertising vehicle) and that service must be one of providing news or information which will be updated regularly. This is capable of applying to some corporate websites. For example, the website of a *company* may amount to a service of information about the *company's* activities, services and products which is regularly updated and the webcast may be seen as part of that service. Not all corporate websites will qualify, however, and each website must be considered on its merits. *Company* representatives seeking to use this exemption will need to bear in mind any restrictions on the making available of certain information to which they may be subject (for example, under *listing rules*).

Article 28 and 28A: One off promotions

8.21.7 **G** Article 28 applies to one-off *non-real time* and *solicited real time financial promotions*. Article 28A applies to one-off *unsolicited real time financial promotions*. It is possible that articles 28 or 28A could apply to *financial promotions* in *company* statements or briefings if they were to be made other than to an analyst or journalist. In this respect, the comments made in ■ PERG 8.14.3 G about one-off *financial promotions* are relevant.

Article 43: Members and creditors of certain bodies corporate

8.21.8 **G** Article 43 applies to *non-real time* and *solicited real time financial promotions* made by, or on behalf of, a company ('C') to persons who, in broad terms, are:

- (1) members or creditors of C or a *group* member of C ('G');
- (2) entitled to a relevant investment issued by C or G;
- (3) entitled to become a member of C or G;
- (4) entitled to have transferred to them title to a relevant investment issued by C or G.

The *financial promotion* must relate only to relevant investments issued or to be issued by C or G or, in certain circumstances, another *person* (see ■ PERG 8.21.9G (2)). C and G must not be *open-ended investment companies*.

8.21.9 **G** A 'relevant investment' in article 43 means:

- (1) *shares* or *debentures* or *alternative debentures*; and
- (2) *warrants* and *certificates representing certain securities* relating to (1) and issued by G or a *person* acting on behalf of or under arrangements made with C.

Article 43 allows a *company* to *communicate* a *financial promotion* to its shareholders about rights issues or a cash offer by a third party for their *shares*. It also allows a *company* to *communicate* with its creditors about restructuring debt obligations.

Article 47: Persons in the business of disseminating information

8.21.10 **G** Article 47 will exempt *financial promotions* in *company* statements or briefings where they are made to members of the press and may be combined with article 19 (Investment professionals). This means that *companies* will only need to look for other exemptions where the recipients of their *financial promotions* are *persons* other than analysts or journalists or both.

Article 59: Annual accounts and directors' report

8.21.11 **G** Article 59 is capable of applying to *financial promotions* in *company* statements and briefings where they are accompanied by:

- (1) the whole or any part of the annual accounts of the *company* (provided it is not an *open-ended investment company*); or
- (2) any report prepared and approved by the directors of such a *company* under sections 414A and 414D of the Companies Act 2006 (strategic reports) or sections 415 and 419 of that Act (directors' reports).

In this respect, the *FCA* considers that the annual accounts (or part of them) or directors' report accompanies a *financial promotion* where it is made available to the recipients of the *financial promotion* at the same time. The *financial promotion* should refer to the accompanying material. For example, the accounts or report may be available on a *company's* website and referred to in a *financial promotion* on that website. Or they may be contained in or enclosed with a written communication (including an e-mail) or handed over during a meeting or discussion.

8.21.12 G Article 59 imposes certain conditions.

- (1) The *financial promotion* must be an inducement and not be an invitation or amount to advice to acquire or dispose of an *investment*.
- (2) The inducement must not relate to any *investment* other than *shares* or *debentures* or *alternative debentures* issued, or to be issued, by the *company* making the *financial promotion* (or a member of its *group*) or *warrants* relating to or certificates representing such *shares* or *debentures* or *alternative debentures*.
- (3) If the *financial promotion* contains any reference to past prices of or yields on the *company's securities* as referred to in (2), it must be accompanied by a statement that past performance cannot be relied on as guide to future performance.

Article 67: Promotions required or permitted by market rules

8.21.13 G Article 67 exempts any *financial promotion* other than an *unsolicited real time financial promotion* which relates to *shares, debentures, alternative debentures, government and public securities, warrants* or *certificates representing certain securities* which are permitted to be traded or dealt in on a relevant market. A relevant market for the purposes of article 67 is one which meets the criteria in Part I of, or is specified in or established under the rules of an exchange specified in Part III of schedule 3 to the *Financial Promotion Order*. This includes *recognised investment exchanges* and various overseas markets. The *financial promotion* must, however, be required or permitted to be *communicated* by the rules of the market or by a body which either regulates the market or regulates offers or issues of *investments* to be traded on the market.

8.21.14 G The reference to *financial promotions* which are permitted to be *communicated* relates, in the *FCA's* opinion, to something which is expressly permitted rather than simply not expressly prohibited. Article 67 itself does not specify any particular medium for *communicating* required or permitted material. So, it will be enough for the *financial promotion* to be part of a document which is itself required or permitted to be *communicated* (such as reports or financial statements). Market rules or usual market practice may require the *financial promotion* to be *communicated* in a particular form or by a particular medium. However, the exemption will still apply if the *financial promotion* is *communicated* in a different form or by a different medium provided that its substance is unchanged. But article 67 will not apply to a *financial promotion* simply because it is included in another document which is required or permitted where the *financial promotion* amounts to additional information to that which is required or permitted. Neither does article 67 specify what form permission can take. In the *FCA's*

view, however, permission would need to be given either in rules or guidance applicable to the market in question.

8.21.15 G Article 67 refers to an *investment* which is permitted to be traded or dealt in on a relevant market. In the *FCA's* opinion, this includes a situation where a class of *securities* is traded on a relevant market but the *financial promotion* relates to new *securities* of that class which have not yet themselves been issued or started trading. Where *securities* of that class have not yet been admitted to trading on a relevant market, article 68 may apply – see ■ PERG 8.21.16 G.

Article 68: Promotions in connection with admission to certain EEA markets

8.21.16 G Article 68 applies where the *financial promotion* relates to *securities* which have not yet been admitted to trading but for which application has been or is to be made. It exempts a *non-real time* or a *solicited real-time financial promotion* which a relevant *EEA* market requires to be *communicated* before admission to trading can be granted. A relevant *EEA* market for this purpose is a market with its head office in an *EEA State* and which meets the conditions in Part I of Schedule 3 to the *Financial Promotion Order*. Article 68 also requires that the *financial promotion* be one:

- (1) which, if it were included in a prospectus issued in line with prospectus rules made under Part VI of the *Act*, would be required to be *communicated* by those rules; and
- (2) which is not accompanied by any information other than that information which is required or permitted to be published by the rules of the relevant *EEA* market.

Article 69: Promotion of securities already admitted in certain markets

8.21.17 G Article 69 is somewhat similar to article 59 in the conditions it imposes (see ■ PERG 8.21.12 G). There are two main differences between article 69 and article 59.

- (1) Article 69 does not apply to *unsolicited real time financial promotions*.
- (2) The requirement in article 59 that the *financial promotion* be accompanied by accounts or a report is replaced in article 69. It is replaced by a requirement that *shares* or *debentures* or *alternative debentures* of the *company* or another *body corporate* in its *group* (or *warrants* relating to or certificates representing such *investments*) are permitted to be traded on a relevant market (relevant market having the same meaning as in article 67 - see ■ PERG 8.21.13 G).

8.21.18 G [deleted]

8.21.19 G In the *FCA's* opinion, companies whose *securities* are permitted to be traded or dealt in on a relevant market should be able to make good use of the article 69 exemption. But such companies will need to ensure that they meet

the specific requirements in article 69(3). In very general terms, a *financial promotion* will comply with these requirements if:

- (1) the only reason it is a *financial promotion* is that it contains or is accompanied by an inducement about certain *investments* issued, or to be issued, by the *company* or a *group* member; and
- (2) should it contain any reference to past prices of or yields on the *company's investments*, it is accompanied by a statement that past performance cannot be relied on as a guide to future performance.

Article 70: Promotions included in listing particulars, etc

8.21.20

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Article 70 applies to a *non-real time financial promotion* included in:

- (1) *listing particulars*; or
- (2) *supplementary listing particulars*; or
- (3) a prospectus or supplementary prospectus approved in line with *Prospectus Rules* – including part of such a prospectus or supplementary prospectus; or
- (4) any other document required or permitted to be published by *listing rules* or *Prospectus Rules*.

Article 70 also applies to a *non-real time financial promotion* comprising the final terms of an offer or the final offer price or amount of *securities* which will be offered to the public and that complies with articles 8(1), 8(4), 8(5), 8(10), 17 and 21(2) of the *Prospectus Regulation*.

General issues

8.21.21

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A requirement common to the exemptions in articles 59, 67 and 69 is that the *financial promotions* must not relate to *investments* other than those issued, or to be issued, by the *company* or a member of its *group*. The *FCA* is aware that there is concern about comments made in *company statements* or briefings. This is that they may be held to be inducements to acquire or dispose of, or exercise rights conferred by, an *investment* issued by a third party. For example, traded options on or certificates representing the *company's shares*. ■ PERG 8.4 sets out the *FCA's* general views on when a communication is an inducement. It appears to the *FCA* that, for a *company* statement or briefing to involve an inducement to *persons* to, for example, exercise rights under a traded option written on or acquire certificates representing the *securities*, it must seek to persuade or induce *persons* specifically to do that. The mere fact that a *person* reading, hearing or viewing a *company* statement or briefing containing an inducement to acquire the *company's securities* may be influenced to exercise traded options which he holds is not enough to make it an inducement to exercise those rights.

8.22 The Internet

- 8.22.1** **G** The Internet is a unique medium for *communicating financial promotions* as it provides easy access to a very wide audience. At the same time, it provides very little control over who is able to access the *financial promotion*.
- 8.22.2** **G** The test for whether the contents of a particular website may or may not involve a *financial promotion* is no different to any other medium. If a website or part of a website, operated or maintained in the course of business, invites or induces a *person* to *engage in investment activity* or to *engage in claims management activity*, it will be a *financial promotion*. The FCA takes the view that the *person* who caused the website to be created will be a *communicator*. So, any software engineers that may or may not have been involved in establishing the website, provided they have no interest in it other than being paid for its design, will not be *communicating financial promotions* contained in it. Similarly, an Internet services provider who merely manages a website for another *person* and who has no control over or responsibility for its contents will not be *communicating any financial promotion* in the site. An Internet service provider whose circumstances are such that he is *communicating financial promotions* for other *persons* may be able to use the exemption for mere conduits (see ■ PERG 8.12.18 G).
- 8.22.3** **G** The Internet also allows hypertext links, where two different sites in the Internet can be connected almost instantaneously by simply clicking on the link. The FCA's views on the position of hypertext links (which should be read with the remainder of ■ PERG 8, especially ■ PERG 8.4 (Invitation or inducement)) are as follows.
- (1) A hypertext link may or may not be a *financial promotion* in itself. This will depend on the nature of the hypertext link and the context in which it is placed. However, taken in isolation, a hypertext link which is purely the name or logo of the destination will not be a *financial promotion* in its own right. More sophisticated links, such as banners or changeable text, may be *financial promotions*. This will depend upon the facts in each case.
 - (2) The material on a host website which contains the hypertext link may in itself be a *financial promotion*. For example, it may contain text which seeks to encourage or incite *persons* to activate the link with a view to *engaging in investment activity* or *engaging in claims management activity*.
 - (3) Website material which represents a directory of website addresses or e-mail addresses will not be a *financial promotion* in its own right. That is unless the material also contains an inducement to contact a

named addressee with a view to *engaging in investment activity* or *engaging in claims management activity*.

- (4) The destination website (that is, the one that is reached through the hypertext link) may or may not be a *financial promotion*. This will depend upon the content of that website. Website operators are responsible for the contents of their website if it hosts or creates links to the websites of *unauthorised persons*. In most cases they will not be causing the *communication* of any *financial promotion* in those other websites and so will not be responsible for those websites complying with section 21. In some cases, however, the operator ('O') of a website which hosts a link to another website, may be causing the *communication* of a *financial promotion* on that other website. This will only arise when O has made arrangements with the operator of the other website under which O is to procure users of his site to access the link provided with a view to their *engaging in investment activity*.
- (5) An exemption may require certain indications to be made in a *financial promotion* on a website. In these cases, the requirement may be satisfied by putting information on separate pages which can be accessed through a link on the page, or one of the pages, which contains the *financial promotion*.

8.23 Regulated activities

8.23.1 **G** Under section 19 of the *Act* (The general prohibition) no *person* may, by way of business, carry on a *regulated activity* in the *United Kingdom* unless he is *authorised* or exempt. The meaning of *regulated activity* is set out in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) (as amended). Any *person* who breaches section 19 of the *Act* commits a criminal offence for which the maximum penalty is two years' imprisonment and an unlimited fine.

8.23.2 **G** Anyone who is carrying on a *regulated activity* is likely to make *financial promotions* in the course of or for the purposes of carrying on that activity. It is beyond the scope of this *guidance* to cover *regulated activities* as such (for a general guide see ■ PERG 2). There are circumstances, however, where *persons* whose main aim is either:

- (1) to make *financial promotions* for their own purposes or on behalf of others; or
- (2) to help other *persons* to make *financial promotions*;

may find themselves conducting *regulated activities*. Such *persons* may typically include publishers or broadcasters, financial commentators, Internet service providers and website operators and telephone marketing companies.

8.23.3 **G** The *regulated activities* which are likely to be conducted in the circumstances referred to in ■ PERG 8.23.2 G are:

- (1) giving advice on certain investments (articles 53 (Advising on investments), 53A (Advising on regulated mortgage contracts), 53B (Advising on regulated home reversion plans), 53C (Advising on regulated home purchase plans), 53D (Advising on regulated sale and rent back agreements) and 56 (Advice on syndicate participation at Lloyd's) of the *Regulated Activities Order*) - for example, where the *financial promotion* is the advice;
- (2) *making arrangements with a view to transactions in investments* (article 25(2) of the *Regulated Activities Order* (Arranging deals in investments));
- (2A) *making arrangements with a view to regulated mortgage contracts* (article 25A(2) of the *Regulated Activities Order* (Arranging regulated mortgage contracts));

- (2B) *making arrangements with a view to a home reversion plan* (article 25B(2) of the *Regulated Activities Order* (Arranging regulated home reversion plans));
- (2C) *making arrangements with a view to a home purchase plan* (article 25C(2) of the *Regulated Activities Order* (Arranging regulated home purchase plans));
- (2D) *making arrangements with a view to a regulated sale and rent back agreement* (article 25E(2) of the *Regulated Activities Order* (Arranging regulated sale and rent back agreements)); and
- (3) agreeing to carry on either (1) or (2) (article 64 of the *Regulated Activities Order* (Agreeing to carry on specified kinds of activity)).

8.23.4 **G** The *guidance* that follows is concerned with the *regulated activities* of *making arrangements with a view to transactions in investments* and *advising on investments (except P2P agreements)*. *Guidance on the regulated activities of making arrangements with a view to regulated mortgage contracts and advising on regulated mortgage contracts* is in **■ PERG 4** (*Guidance on regulated activities connected with mortgages*). *Guidance on the regulated activities of making arrangements with a view to a home reversion plan and advising on a home reversion plan, making arrangements with a view to a home purchase plan and advising on a home purchase plan, and making arrangements with a view to a regulated sale and rent back agreement and advising on a regulated sale and rent back agreement* is in **■ PERG 14** (*Guidance on home reversion, home purchase and sale and rent back activities*).

8.23.5 **G** As explained in **■ PERG 1.2.3AG**, where the *guidance* that follows uses the defined term *advising on investments*, this term should be read as referring only to the *regulated activity* (in article 53(1) of the *Regulated Activities Order*) of *advising on investments (except P2P agreements)*. Related text should be construed accordingly.

8.23.6 **G** *Guidance on the distinction between controlled claims management activity and regulated claims management activity* can be found at **■ PERG 8.7A.5G** to **■ PERG 8.7A.7G**.

8.24 Advising on investments

- 8.24.-1** **G** The definition of the *regulated activity of advising on investments (except P2P agreements)* differs depending on the *person* giving the advice.
- 8.24.1** **G** Under article 53(1) of the *Regulated Activities Order*, for anyone except a *person* in ■ PERG 8.24.1AG, *advising on investments (except P2P agreements)* covers advice which:
- (1) is given to a *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
 - (2) is advice on the merits of his (whether as principal or agent):
 - (a) *buying, selling*, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security, a structured deposit or a relevant investment; or
 - (b) exercising or not exercising any right conferred by such an *investment to buy, sell*, subscribe for, exchange or redeem such an *investment*.
- 8.24.1A** **G**
- (1) However if a *person* is authorised for the purposes of the Act to carry on any *regulated activity* other than (or in addition to):
 - advising on investments (except P2P agreements)*; or
 - the *regulated activity of agreeing to carry on a regulated activity* in relation to (a);
 that *person* only *advises on investments (except P2P agreements)* if it is providing a *personal recommendation*.
 - (2) A *person* described in (1) is referred to in the *Regulated Activities Order* as appropriately authorised.
 - (3) ■ PERG 8.30B describes *personal recommendations*.
 - (4) The result is that for a *person* in (1), the definition of the *regulated activity of advising on investments (except P2P agreements)* only covers a subset of the advisory activities that apply to other *persons* giving advice.
 - (5) In the FCA's view a *person* is only appropriately authorised for the purposes of (1) if it is a *firm* whose *permission* includes *regulated activities* other than (or in addition to) the ones listed in (1)(a) and (b).

- 8.24.1B** G
- (1) A *firm* that is not appropriately authorised (see ■ PERG 8.24.1AG for what this means) will need *permission* for *advising on investments* (except *P2P agreements*) whether it wants:
 - (a) to give non-personalised advice (see (4)); or
 - (b) to give any other kind of advice coming within the *regulated activity of advising on investments* (except *P2P agreements*).
 - (2) If a *firm* in (1) only wants to give non-personalised advice, it may apply for an appropriate *limitation*.
 - (3) For a *firm* that is appropriately authorised:
 - (a) it may give non-personalised advice without the need to have *advising on investments* (except *P2P agreements*) in its *permission*;
 - (b) giving non-personalised advice will (for it) be an *unregulated activity*; and
 - (c) if it wishes to provide *personal recommendations*, its *permission* should include *advising on investments* (except *P2P agreements*).
 - (4) In this paragraph non-personalised advice means advice that:
 - (a) is covered by ■ PERG 8.24.1G; but
 - (b) is not a *personal recommendation*.

- 8.24.1C** G
- (1) ■ PERG 8.30B (Personal recommendations) is only relevant to a *firm* that is appropriately authorised.
 - (2) The rest of the material in this chapter about *advising on investments* (except *P2P agreements*) is still relevant to a *firm* that is appropriately authorised because, as explained in ■ PERG 8.30B.6G, that material is also relevant to the definition of *personal recommendation*.
 - (3) See ■ PERG 8.24.1AG for what appropriately authorised means.

- 8.24.1D** G For:
- (a) a *firm* that is not appropriately authorised (see ■ PERG 8.24.1AG for what appropriately authorised means); and
 - (b) an *unauthorised person*;
- all the material in this chapter about *advising on investments* (except *P2P agreements*) is relevant, except for ■ PERG 8.30B (Personal recommendations).
- (2) The definition of *advising on investments* (except *P2P agreements*) that applies to a *person* in (1) is the one in ■ PERG 8.24.1G. It is not relevant to such a *person* whether or not the advice is a *personal recommendation*.

- 8.24.2** **G** For advice to be covered by ■ PERG 8.24.1 G:
- (1) it must relate to an *investment* which is a *security, structured deposit* or a *relevant investment*;
 - (2) that *investment* must be a particular *investment*;
 - (3) it must be given to *persons* in their capacity as investors or potential investors;
 - (4) it must be advice (that is, not just information); and
 - (5) it must relate to the merits of investors or potential investors (or their agents) *buying, selling, subscribing for or underwriting* (or exercising rights to acquire, dispose of or underwrite) the *investment*.
- 8.24.3** **G** Each of the requirements referred to in ■ PERG 8.24.2G is considered in greater detail in ■ PERG 8.25 to ■ PERG 8.29.
- PERG 8.30 and ■ PERG 8.30A have further material about the definition of *advising on investments (except P2P agreements)* found in ■ PERG 8.24.1G.
- PERG 8.30B explains what a *personal recommendation* is.
- 8.24.4** **G** ■ PERG 8.24 to ■ PERG 8.30B only cover *advising on investments (except P2P agreements)*. They do not cover the following *regulated activities*, which also cover giving advice:
- (1) providing *basic advice* on a *stakeholder product* under article 52A of the *Regulated Activities Order*;
 - (2) *advising on P2P agreements*;
 - (3) *advising on regulated mortgage contracts*;
 - (4) *advising on a home reversion plan*;
 - (5) *advising on a home purchase plan*;
 - (6) *advising on a regulated sale and rent back agreement*;
 - (7) *advising on regulated credit agreements for the acquisition of land*;
 - (8) *advising on conversion or transfer of pension benefits*;
 - (9) *advising on syndicate participation at Lloyd's*; or
 - (10) *debt counselling*.
- 8.24.5** **G** ■ PERG 5.8 (The regulated activities: advising on contracts of insurance) explains how the material in ■ PERG 8.24 to ■ PERG 8.30A applies in the specific context of *contracts of insurance*.

**8.25 Advice must relate to an
investment which is a security or
contractually based investment**

8.25.1 **G** For the purposes of article 53(1) of the *Regulated Activities Order*, a security or relevant investment is any one of the following:

- (1) shares;
- (2) debentures;
- (2A) alternative debentures;
- (3) government and public securities;
- (4) warrants;
- (5) certificates representing certain securities;
- (6) units in collective investment schemes;
- (7) stakeholder pension schemes or personal pension schemes;
- (7A) emission allowances;
- (8) options;
- (9) futures;
- (10) contracts for differences;
- (11) contracts of insurance;
- (12) funeral plan contracts;
- (13) rights to or interests in such investments.

8.25.2 **G** Article 53(1) does not apply to advice given on any of the following:

- (1) deposit or other bank or building society accounts (but note the exceptions and points in ■ PERG 8.25.3G);
- (2) interests under the trusts of an occupational pension scheme (but rights under an occupational pension scheme that is a stakeholder pension scheme will be securities);

- (3) mortgages or other loans (but note that advising on *regulated mortgage contracts* is a separate *regulated activity* under article 53A of the *Regulated Activities Order* – see the *guidance* in ■ PERG 4 (Regulated activities connected with mortgages));
- (4) National Savings products;
- (5) foreign exchange (or cash);
- (6) commodities (for example, gold);
- (7) real estate;
- (8) any other physical property capable of having investment potential (for example, works of art, racehorses) unless investment is made through a *collective investment scheme*.

8.25.3

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- (1) There are some circumstances in which giving advice about a *deposit* is a *regulated activity*.
- (2) *Providing basic advice on a stakeholder product* is a separate *regulated activity* under article 52A of the *Regulated Activities Order*. A *stakeholder product* includes a stakeholder deposit account. See the *guidance* in ■ PERG 2.7.14AG (Providing basic advice on stakeholder products) for more about this.
- (3) Article 53(1) does apply to advice on *structured deposits*.



8.26 The investment must be a particular investment

- 8.26.1 G For the purposes of article 53(1), advice must relate to a particular *investment* – generic or general advice is not covered. Generic or general advice may, however, be a *financial promotion* (see ■ PERG 8.4).

- 8.26.2 G Generic advice will not be caught by article 53(1). Examples of generic advice may include:
 - (1) financial planning;
 - (2) advice on the merits of investing in Japan rather than Europe;
 - (3) advice on the merits of investing in investment trusts as opposed to unit trusts or unit-linked insurance; and
 - (4) advice on the merits of investing offshore, or in fixed income rather than floating rate bonds.

- 8.26.3 G ■ PERG 8.30A includes material about guiding a *person* through a decision tree.

- 8.26.4 G Examples of a particular investment include:
 - (1) *securities* – shares in ABC plc, Treasury 10% 2001 stock, XYZ plc warrants;
 - (2) *units* in *collective investment schemes* - ABC smaller companies fund, XYZ Growth Trust;
 - (3) exchange-traded derivatives - LME Copper Grade A 3 months, LIFFE Japanese Government bond, ABC plc traded options;
 - (4) contractual *investments*, for example, *futures* and other contracts having specified terms and conditions such as duration, volume, interest rate or price and which are to be entered into with a particular *person*;
 - (5) *contracts of insurance*, which are both products and contractual *investments*; so a particular *investment* would include:
 - (a) the ABC Life Personal Pension or the XYZ Life Guaranteed Bond;
 - or

8.26.5

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- (b) a contract having essential terms and provider specified – for instance, a 25 year with-profits low cost endowment contract covering husband and wife and to be issued by XYZ Life Plc.
- (1) Although giving generic advice is generally not a *regulated activity*, if it is given in the course of or in preparation for a *regulated activity* it can form part of that *regulated activity*.
 - (2) For example, if a *firm* gives generic advice (for instance about the merits of investing in Japan rather than Europe) and then goes on to identify a particular Japanese *share*, the generic advice will form part of the *regulated activity* of *advising on investments* (except *P2P agreements*).
 - (3) Another example is a *firm* that provides generic advice to a customer or a potential customer prior to or in the course of carrying on the *regulated activity* of *arranging (bringing about) deals in investments* for the customer. That generic advice is part of that *regulated activity* of *arranging (bringing about) deals in investments*.



8.27 Advice to be given to persons in their capacity as investors (on the merits of their investing as principal or agent)

- 8.27.1** **G** For the purposes of article 53(1), advice must be given to or directed at someone who either holds *investments* or is a prospective investor (or their agent). Where the *investment* is a risk-only contract of insurance such as house contents insurance, the *policyholder* or prospective *policyholder* is regarded as an investor.
- 8.27.2** **G** Article 53(1) does not apply where the advice is given to *persons* who receive it as:
- (1) an adviser who may use it to inform advice given by him to *persons* for whom he does not act as agent; or
 - (2) a journalist or broadcaster; or
 - (3) an employer (for example, on setting up a pension scheme).
- 8.27.3** **G** Article 53(1) does not apply to advice given to a *person* (such as an independent financial adviser) who is acting as an agent for an investor if it does not relate to a transaction into which the *person* is to enter as agent for the investor.
- 8.27.4** **G** Article 53(1) does apply where the recipient is someone who invests on behalf of other *persons* (whether as a principal or agent), such as:
- (1) a trustee or nominee; or
 - (2) a discretionary fund manager; or
 - (3) an attorney or anyone else who enters into investment transactions as agent for investors;
- where he receives the advice in that capacity.
- 8.27.5** **G** Advice will still be covered by article 53(1) even though it may not be given to or directed at a particular investor (for example, advice given in a periodical publication or on a website). The expression 'investor' has a broad meaning and will include institutional or professional investors.

8.28 Advice or information

- 8.28.1** **G** In the *FCA's* view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures.
- 8.28.2** **G**
- (1) In general terms, simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make is not advice.
 - (2) The provision of purely factual information does not become regulated advice merely because it feeds into the customer's own decision-making process and is taken into account by them.
 - (3) Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.
 - (4) A key to the giving of advice is that the information:
 - (a) is either accompanied by comment or value judgment on the relevance of that information to the customer's investment decision; or
 - (b) is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision.
 - (5) Advice can still be regulated advice if the *person* receiving the advice:
 - (a) is free to follow or disregard the advice; or
 - (b) may receive further advice from another *person* (such as their usual financial adviser) before making a final decision.
- 8.28.3** **G** Information may often involve:
- (1) listings of *share* and *unit* prices; or
 - (2) company news or announcements; or
 - (3) an explanation of the terms and conditions of an *investment*; or
 - (4) a comparison of the benefits and risks of one *investment* as compared to another; or

- (5) league tables showing the performance of *investments* of a particular kind against set published criteria; or
- (6) details of directors' dealings in the *shares* of their own companies; or
- (7) alerting *persons* to the happening of certain events (for example, XYZ shares reaching a certain price).

8.28.4 G In the FCA's opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

- (1) a *person* may offer to provide information on directors' dealings on the basis that, in his opinion, were directors to buy or sell investors would do well to follow suit;
- (2) a *person* may offer to tell a client when certain *shares* reach a certain value (which would be advice if the *person* providing the information has offered to do so on the basis that the price of the *shares* means that it is a good time to buy or sell them); and
- (3) a *person* may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient.

8.28.5 G A key question is whether an impartial observer, having due regard to the regulatory regime and guidance, context, timing and what passed between the parties, would conclude that what the adviser says could reasonably have been understood by the customer as being advice.

8.28.6 G An explicit recommendation to buy or sell is likely to be advice. However, something falling short of an explicit recommendation can be advice too. Any significant element of evaluation, value judgment or persuasion is likely to mean that advice is being given.

8.28.7 G

- (1) A *person* can give advice without saying (or implying) categorically that the customer should invest. The adviser does not have to offer a definitive recommendation as to whether the customer should go ahead.
- (2) For example, saying the following can still be advice:
 - (a) this *investment* is a very good buy but it is your decision whether or not to buy; or
 - (b) this *investment* is a very good buy but I am going to leave it to you to decide because I don't know your up-to-date financial position.

The examples in (2):

- (a) involve advice and not just information; and
- (b) involve advice on the pros and cons of buying the *investment* (see ■ PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment))).

8.28.8 **G** One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If an investor asks for a recommendation, any response is likely to be regarded as advice.

8.28.9 **G** On the other hand, if a customer makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that it does not give advice; or whether the adviser runs an advisory business.



**8.29 Advice must relate to the merits
(of buying or selling a particular
investment)**

- 8.29.1** **G** Advice must relate to the *buying*, holding or *selling* of an *investment* – in other words, the pros or cons of doing so.
- 8.29.2** **G** An explanation of the implications of, for example, exercising certain rights or the happening of certain events (such as death) need not involve advice on the merits of exercising those rights or on what to do following the event.
- 8.29.3** **G** Neither does advice on the merits of using a particular stockbroker or investment manager in his capacity as such amount to advice for the purpose of article 53(1). This is because it is not advice on the merits of *buying* or *selling* an *investment* and it is not advice on the merits of exchanging, redeeming or holding one.
- 8.29.4** **G** Advice in the form of rating issuers of *debt securities* as to the likelihood that they will be able to meet their repayment obligations need not, of itself, involve any advice on the merits of *buying*, *selling* or holding on to that issuer's stock.
- 8.29.5** **G** Without an explicit or implicit recommendation on the merits of *buying*, exchanging, redeeming, holding or *selling* an *investment*, advice will not be covered by article 53(1) if it is advice on:
- (1) the likely meaning of uncertain provisions in an investment agreement; or
 - (2) how to complete an application form; or
 - (3) the value of *investments* for which there is no ready market; or
 - (4) the effect of contractual terms and their commercial consequences; or
 - (5) how to structure a transaction to comply with regulatory, competition and taxation requirements; or
 - (6) terms which are commonly accepted in the market.

8.29.6 **G** Advice as to what might happen to the price or value of an *investment* if certain events were to take place, however, may be covered by article 53(1) in some circumstances.

8.29.7 **G** Typical recommendations and whether they will be regulated as *advising on investments (except P2P agreements)* under article 53(1) of the *Regulated Activities Order*. This table belongs to ■ PERG 8.29.1 G to ■ PERG 8.29.6 G.

Recommendation	Regulated under article 53(1) or not?
I recommend that you take out the ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> in the direction of a particular <i>investment</i> which the <i>client</i> could buy.
I recommend that you do not take out the ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> away from a particular <i>investment</i> which the <i>client</i> could have bought.
I recommend that you take out either the ABC <i>investment</i> or the DEF <i>investment</i> .	Yes. This is advice which steers the <i>client</i> in the direction of more than one particular <i>investment</i> which the <i>client</i> could buy.
I recommend that you sell your ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> in the direction of a particular <i>investment</i> which the <i>client</i> could sell.
I recommend that you do not sell your ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> away from a particular <i>investment</i> which the <i>client</i> could have sold.
I recommend that you transfer ownership of your ABC <i>investment</i> to your spouse.	Advising the <i>client</i> to gift an <i>investment</i> to another person will not be advice because it does not involve advice on buying, selling, subscribing for or underwriting an investment.
I recommend that you increase the regular payments you are making to your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund.
I recommend that you decrease the regular payments you are making to your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund but advises against the <i>client</i> buying as many as he intended.
I recommend that you keep making the same regular payments to your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund.
I recommend that you stop making the regular payments you are making to the GHI fund*.	Yes. This is advice which steers the <i>client</i> away from buying <i>units</i> in a particular fund which the <i>client</i> could have bought.
I recommend that you pay a lump sum into your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund.

Recommendation	Regulated under article 53(1) or not?
I recommend that you do not pay a lump sum into your GHI fund*.	Yes. This is advice which steers the <i>client</i> away from buying <i>units</i> in a particular fund which the <i>client</i> could have bought.
I recommend that you move part of your investment in the JKL <i>investment</i> from fund X into fund Y*.	Yes. This is advice which steers the <i>client</i> in the direction of selling <i>units</i> in a particular fund and buying <i>units</i> in another specific fund. Where the two funds are sub-funds of the same main fund it is still advice. The terms 'bought' and 'sold' are given a wide meaning and include any acquisition or disposal for valuable consideration.
I recommend that you move all of your investment in JKL <i>investment</i> from fund X into fund Y*.	Yes, for the same reason.
I recommend that you keep your investment in fund X*.	Yes. This is advice because it is advice to hold on to an <i>investment</i> and advice not to <i>sell</i> it.
I recommend that you move your MNO <i>investment</i> from platform X and re-register it on platform Y.	This is unlikely to be advice because normally it will not involve buying and selling the <i>investment</i> held on the platform.
A <i>client</i> decides of his own accord to increase, decrease or temporarily suspend his regular payments or the payments are increased automatically into an <i>investment</i> without advice being given.	No. No advice is being given.
The <i>firm</i> is providing discretionary management services under a mandate and makes changes to a <i>client's investment</i> without providing advice.	No. No advice is being given.
Dividends are re-invested into an <i>investment</i> without advice being given.	No. No advice is being given.
* The same answer would apply where the fund is a <i>life policy</i> as rights under a <i>contract of insurance</i> are regulated <i>investments</i> under the <i>Act</i> . The position under a <i>personal pension scheme</i> is similar, as explained in more detail in PERG 12.3.	



**8.30 Medium used to give advice or
information**

- 8.30.1** G With the exception of periodicals, broadcasts and other news or information services (see ■ PERG 8.31.2 G), the medium used to give advice should make no difference to whether or not it is caught by article 53(1).
- 8.30.2** G Advice can be provided in many ways including:

 - (1) face to face;
 - (2) orally to a group;
 - (3) by telephone;
 - (4) by correspondence (including e-mail);
 - (5) in a publication, broadcast or website; and
 - (6) through the provision of an interactive software system.
- 8.30.3** G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The provider of the service will be giving advice for the purpose of article 53(1) only if the service results in something more than a generic recommendation, as with a paper version.
- 8.30.4** G Advice in publications, broadcasts and websites is subject to a special regime – see ■ PERG 8.31.2 G and ■ PERG 7.
- 8.30.5** G Some software services involve the generation of specific *buy, sell* or hold signals relating to particular *investments*. These signals are liable, as a general rule, to be advice for the purposes of article 53(1) (as well as *financial promotions*) given by the *person* responsible for the provision of the software. The exception to this is where the user of the software is required to use enough control over the setting of parameters and inputting of information for the signals to be regarded as having been generated by him rather than by the software itself.



8.30A Pre-purchase questioning (including decision trees)

Introduction

8.30A.1 **G** Pre-purchase questioning involves putting a sequence of questions in order to extract information from a *person* to help them best select an *investment* that meets their needs. A decision tree is an example of pre-purchase questioning. The process of going through the questions will usually narrow down the range of options that are available.

8.30A.2 **G** There are two aspects of the definition of *advising on investments (except P2P agreements)* that are particularly relevant to whether pre-purchase questioning involves *advising on investments (except P2P agreements)*:

- (1) the distinction between information and advice (see ■ PERG 8.28); and
- (2) the fact that advice must relate to a particular *investment* (see ■ PERG 8.29).

8.30A.3 **G** This section deals with *advising on investments (except P2P agreements)* where it is not relevant whether there is a *personal recommendation* (see ■ PERG 8.24.1AG for an explanation of when the definition of *personal recommendation* is relevant to the definition of *advising on investments (except P2P agreements)*).

■ PERG 8.30B.6G explains the relevance of this section where *advising on investments (except P2P agreements)* is restricted to making a *personal recommendation*.

8.30A.4 **G**

- (1) Whether or not pre-purchase questioning in any particular case is *advising on investments (except P2P agreements)* will depend on all the circumstances.
- (2) The pre-purchase questioning process may involve identifying one or more particular *investments*. If so, to avoid *advising on investments (except P2P agreements)*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the *person* as, assisting the *person* to make their own choice of product which has particular features which the *person* regards as important. The questioner will need to avoid providing any judgment on the suitability of one or more products for that *person*.

8.30A.5 **G** There is considerable potential for variation in the form, content and manner of scripted questioning, but there are two broad types, as described in ■ PERG 8.30A.6G and ■ PERG 8.30A.7G.

Identification of product based on facts

- 8.30A.6** **G**
- (1) The first type involves identifying *investments* based on factual matters.
 - (2) For example, the purpose may be to identify funds that invest in debt instruments of European commercial companies.
 - (3) One possible scenario is that the questioner may go on to identify several particular *investments* which match features identified by the scripted questioning; provided these are presented in a balanced and neutral way (for example, they identify all the matching *investments*, without making a recommendation as to a particular one) this need not, of itself, involve *advising on investments* (except *P2P agreements*).
 - (4) Another possible scenario is that the questioner may go on to advise the investor on the merits of one particular *investment* over another; this would be *advising on investments* (except *P2P agreements*).
 - (5) Another possible scenario is that the questioner may, before or during the course of the scripted questioning, give information that considered on its own would not involve *advising on investments* (except *P2P agreements*); but may, following the scripted questioning, identify one or more particular *investments*. The factors described in ■ PERG 8.30A.8G are relevant to deciding whether or not the questioner is *advising on investments* (except *P2P agreements*).

Identification of product based on judgment

- 8.30A.7** **G**
- (1) The second type of scripted questioning referred to in ■ PERG 8.30A.5G involves providing questions and answers incorporating opinion, judgment or recommendations.
 - (2) There are various possible scenarios, including the following.
 - (3) One scenario is that the scripted questioning may not lead to the identification of any particular *investment*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on investments* (except *P2P agreements*).
 - (4) (a) Another scenario is that the scripted questioning may lead to the identification of one or more particular *investment*.
(b) In principle this is likely to involve *advising on investments* (except *P2P agreements*) as regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell (see ■ PERG 8.28.2G).

(c) However, the factors described in ■ PERG 8.30A.8G are still relevant to deciding whether or not the questioner is *advising on investments (except P2P agreements)*.

Factors to take into account

8.30A.8

G

- (1) When the scripted questioning identifies particular *investments* (see ■ PERG 8.30A.6G(5) and ■ PERG 8.30A.7G(4)), the FCA considers that it is necessary to look at the process and outcome of the scripted questioning as a whole in deciding whether or not the process involves *advising on investments (except P2P agreements)*.
- (2) Factors that may be relevant include the following:
 - (a) any representations made by the questioner at the start of the questioning relating to the service they are to provide;
 - (b) the context in which the questioning takes place;
 - (c) the stage in the questioning at which the opinion is offered and its significance;
 - (d) the role played by the questioner who guides a *person* through the pre-purchase questions;
 - (e) the outcome of the questioning (whether particular *investments* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
 - (f) whether the pre-purchase questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the *person* understand what the questions or options are and how to determine which option applies to their particular circumstances.

Filtering: introduction

8.30A.9

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A *firm* selling products through its website might make its list of the *investments* it sells easier to search by allowing the customer to filter products based on factors presented by the website and selected by the customer. Only products that meet the search criteria input by the customer are displayed.

Filtering based on objective factors

8.30A.10

G

- (1) The filtering described in ■ PERG 8.30A.9G might be based upon simple objective factors like price.
- (2) This should not generally involve *advising on investments (except P2P agreements)*, as explained in ■ PERG 8.30A.6G(3).

Filtering based on a factor involving judgment

8.30A.11

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The filtering described in ■ PERG 8.30A.9G might, however, be based upon a factor such as riskiness, which is not a simple objective factor like price.

8.30A.12

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Where all a *firm* is doing is ranking its own *investments'* riskiness with reference to the specific investment objectives for those products, that *firm* is

unlikely to be *advising on investments (except P2P agreements)* as long as it is clear to the customer that this is all the *firm* is doing. A description of a product's investment objectives is not advice, in the same way that an explanation of its terms is not advice (see ■ PERG 8.28.3G).

8.30A.13 G Similarly, where the *firm* is offering *investments* that are issued by a third party and the level of riskiness is drawn directly from the *investment's* disclosure material, the *firm* is unlikely to be *advising on investments (except P2P agreements)* as long as it is clear to the customer that this is all the *firm* is doing. The level of riskiness is the factual representation of the *investment's* disclosure material and therefore information and not advice.

8.30A.14 G

- (1) A *firm* may rank third-party *investments* into risk categories using its own opinion of the level of risk of each *investment*. The ranking is self-generated and not drawn directly from the *investment's* disclosure material.
- (2) As explained in ■ PERG 8.30A.7G(4), this is likely to involve *advising on investments (except P2P agreements)*.
- (3) *Advising on investments (except P2P agreements)* involves advice on the merits of the investor buying or selling *investments*. A factor like riskiness is in itself neutral, because riskiness is not necessarily a good or a bad thing. So the filtering is done on the basis of what the customer wants and not what is right for the customer.
- (4) However, (3) does not mean that the *firm* is not *advising on investments (except P2P agreements)*.
 - (a) By selecting their preferred level of risk, the customer has effectively told the *firm*, via the website, what their investment objectives are; and the purpose of the filtering process is to identify *investments* that are suitable for the customer to buy based on these objectives.
 - (b) In this scenario the *firm* is providing its opinion as to the riskiness of an *investment* to a *person* who is accessing the website in order to buy *investments*, i.e. in their capacity as investor. In that context that opinion (advice) would amount to an opinion about the pros and cons of investing in the particular product (see ■ PERG 8.29.1G).
 - (c) The *firm* is not just supplying information: it is making a skilled value judgment to determine the relative merits of products for an investor with a particular risk appetite.
- (5) It is the combination of self-generated rankings and the fact that these are given to someone in their capacity as an investor, that makes it likely to be *advising on investments (except P2P agreements)*.
- (6) As riskiness taken on its own is a neutral factor in the pros and cons of whether to buy an *investment*, an analysis of riskiness in a technical publication about investment issues rather than in a sales context may not involve *advising on investments (except P2P agreements)* by the *person* writing and issuing it.

8.30A.15 **G**

- (1) If the input from the customer is much more extensive than, and the way that those inputs interact on the website is much more complicated than, the processes described in ■ PERG 8.30A.12G and ■ PERG 8.30A.13G, the website is not simply displaying factual information about the design of the product.
- (2) In that case the production of a list of results uses an element of opinion and skill (albeit automated) in translating the customer's input into a display of a particular product or products. Either explicitly or implicitly this is presented as meeting the customer's requirements and wishes as input into the system.
- (3) The result is that the filtering process is closer to the one in ■ PERG 8.30A.11G than the one in ■ PERG 8.30A.10G and so it is more likely that the *firm* is *advising on investments (except P2P agreements)*.

8.30A.16 **G**

- (1) The table in ■ PERG 8 Annex 1 includes examples of when a *firm* is and is not *advising on investments (except P2P agreements)* when it sells products on a website that allows the customer to filter products based on input from the customer.
- (2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.
- (3) The table in ■ PERG 12 Annex 1 includes an example of when the use of pre-purchase questioning (including, decision trees) in the course of a triage conversation with customers is likely to be *advice on conversion or transfer of pension benefits*.

8.30B Personal recommendations

Purpose of this section

8.30B.1 **G** This section explains what *personal recommendation* means for the purpose of the definition of the *regulated activity of advising on investments (except P2P agreements)*. ■ PERG 8.24.1AG explains when this is relevant.

Basic definition of personal recommendation

8.30B.2 **G** A *personal recommendation* means a recommendation that:

- (1) is made to a *person* in their capacity as:
 - (a) an investor or potential investor; or
 - (b) agent for an investor or a potential investor;
- (2) is for the *person* in (1) to do any of the following (whether as principal or agent):
 - (a) *buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular investment which is a security, a structured deposit or a relevant investment; or*
 - (b) *exercise or not exercise any right conferred by such an investment to buy, sell, subscribe for, exchange or redeem such an investment;*
- (3) is:
 - (a) presented as suitable for the *person* to whom it is made; or
 - (b) based on a consideration of the circumstances of that *person*; and
- (4) is not issued exclusively to the public.

Link to MiFID

8.30B.3 **G**

- (1) The definition of *personal recommendation* in the *Regulated Activities Order* is based on the definition of the *MiFID investment service or activity of making a personal recommendation*.
- (2) *Personal recommendation* should therefore be interpreted for the purpose of the *regulated activity of advising on investments (except P2P agreements)* consistently with *MiFID*.

(3) However the types of *investments* to which the recommendation relates (as listed in ■ PERG 8.30B.2G(2)) are not limited to ones covered by *MiFID*.

8.30B.4 G This section draws on the document “Question & Answers: Understanding the definition of advice under MiFID” (CESR/10-293), published by the Committee Of European Securities Regulators (now *ESMA*).

Examples

8.30B.5 G

(1) ■ PERG 8 Annex 1 sets out some examples of what is and is not a *personal recommendation*.

(2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.

Relevance of the guidance elsewhere in this chapter

8.30B.6 G

(1) ■ PERG 8.25 to ■ PERG 8.30A deal with the meaning of *advising on investments (except P2P agreements)* in ■ PERG 8.24.1G, where it is not relevant whether there is a *personal recommendation*. That material also applies to whether the conditions in ■ PERG 8.30B.2G(1) and (2) are met, as explained in (2) and (3).

(2) If something is regulated advice under ■ PERG 8.25 to ■ PERG 8.30A it meets the conditions in ■ PERG 8.30B.2G(1) and (2). However it is not a *personal recommendation* unless it also meets the conditions in ■ PERG 8.30B.2G(3) and (4).

(3) If something is not regulated advice under ■ PERG 8.25 to ■ PERG 8.30A it is not a *personal recommendation* as it does not meet the conditions in ■ PERG 8.30B.2G(1) and (2).

8.30B.7 G Therefore:

(1) for a communication to be a *personal recommendation* it must:

- (a) relate to an *investment* which is a *security*, a *structured deposit* or a *relevant investment*, as described in ■ PERG 8.25;
- (b) be about a particular *investment*, as described in ■ PERG 8.26;
- (c) be given to *persons* in their capacity as investors or potential investors, as described in ■ PERG 8.27 (although the material in ■ PERG 8.27.5G about advice given in a periodical or website is not relevant);
- (d) be advice (that is, not just information), as described in ■ PERG 8.28; and
- (e) relate to the merits of *buying*, *holding* or *selling* the *investment*, as described in ■ PERG 8.29;

(2) the medium used to give advice should make no difference to whether or not the communication comes within ■ PERG 8.30B.2G(1) and (2), as described in ■ PERG 8.30 (but advice given in periodicals, broadcasts and other news or information services will generally not

be a *personal recommendation* for the reasons described in ■ PERG 8.30B.22G to ■ PERG 8.30B.24G);

- (3) the points in ■ PERG 8.30A about whether pre-purchase questioning or filtering involves regulated advice are also relevant to whether the requirements in ■ PERG 8.30B.2G(1) and (2) are met; and
- (4) a communication is not a *personal recommendation* unless it also meets the conditions in ■ PERG 8.30B.2G(3) and (4).

Presenting a recommendation as suitable

8.30B.8 G An *investment* might be presented as suitable for a customer in an explicit way using words such as, for example, “this product would be the best option for you”. This meets the condition in ■ PERG 8.30B.2G(3)(a).

8.30B.9 G

- (1) However, it is not necessary for a *firm* to tell a customer explicitly that a recommendation it is making is suitable for the customer in order for it to be a *personal recommendation*. If the *firm* implicitly presents an *investment* to the customer as suitable, that can still be a *personal recommendation*.
- (2) The following are examples of implicit recommendations of this type:
 - (a) a *firm* may present several *investments*, with one of them highlighted for the customer by a phrase such as “people like you tend to buy this product”; and
 - (b) a *firm* may contact customers that hold units in a particular fund and say “Our research indicates that Fund X is no longer performing as our customers would wish. We have identified Fund Y as a replacement investment, which can be used to achieve the same investment outcomes”.

8.30B.10 G An *investment* can be presented as suitable for an investor even if in fact the *investment* is not suitable or even if the *firm* does not think it is. While a recommendation of an *investment* that is unsuitable for the investor would be a breach of requirements under *MiFID* and the *Handbook*, it would not stop the recommendation from being presented as suitable.

Recommendation based on a consideration of circumstances

8.30B.11 G Information about a *person’s* circumstances for the purposes of ■ PERG 8.30B.2G(3)(b) can include:

- (1) factual information (for example, their address, income or marital status); or
- (2) more subjective information about their wants and needs (for example, their overall risk appetite, short- and long-term investment objectives and their desire for protection from particular risks).

8.30B.12 G Whether or not a *firm* will be viewed as providing a recommendation based on a consideration of a *person’s* circumstances is likely to depend on factors

such as the nature of the information it collects and the way that it presents its questions.

8.30B.13 G

- (1) For example, if:
 - (a) a *firm* has collected information from a customer on their investment objectives or financial situation; and
 - (b) the customer returns to the *firm* through the same channel for a follow-on service;

it could be reasonable for the customer to expect that the *firm* will use this information when it makes a recommendation as part of the follow-on service.
- (2) The following factors could also show that it would be reasonable for the customer to expect that the *firm* is using previously given information:
 - (a) the contact point with the *firm* is the same; and
 - (b) the nature of the service is similar to that given in the past.

8.30B.14 G

On the other hand, if:

- (1) a customer gives a *firm* information when purchasing a mortgage; and
- (2) the customer later makes use of an execution-only service provided by the *firm* through its online channel to buy *securities*;

the customer cannot reasonably assume that the *firm* makes use of the information in (1) when the *firm* sells the *securities* in (2).

8.30B.15 G

- (1) If :
 - (a) a *firm* makes a recommendation to a customer; and
 - (b) the *firm* presents it as being based on the customer's personal circumstances; but
 - (c) the *firm* in fact fails to use information about that customer's circumstances when making that recommendation;

that recommendation is a *personal recommendation*.
- (2) So for example, if:
 - (a) a *firm* has accumulated relevant information on a customer's circumstances (either during a single interview or during the course of an ongoing relationship); and
 - (b) it would be reasonable for the customer to expect that this information is being taken into account (see ■ PERG 8.30B.13G to ■ PERG 8.30B.14G);

any recommendation will be treated as being based on a consideration of the customer's circumstances.

Where the same recommendation is sent to several customers

8.30B.16 **G** If a *firm* makes a recommendation to multiple customers this does not automatically mean that it is not a *personal recommendation*.

8.30B.17 **G** To assess whether a communication made to several customers is a *personal recommendation*, the following factors are relevant:

- (1) the target audience (■ PERG 8.30B.18G);
- (2) the content of the message (■ PERG 8.30B.19G); and
- (3) the language used (■ PERG 8.30B.20G).

8.30B.18 **G** Target audience:

- (1) For example, when the internal procedures of a *firm* specify that an *investment* may only be sold to a sample of customers selected on the basis of certain factors, such as customers under a certain age or who hold no similar products, the selection of the target audience will not automatically mean that the *firm* is providing *personal recommendations*.
- (2) However, highlighting the particular personal circumstances that led the individual to be contacted, for example, is very likely to mean that the *investment* is being presented as suitable for the particular investor.
- (3) The key factor here is how the recommendation would appear to a reasonable investor and in particular whether it would appear to a reasonable investor contacted in this way that:
 - (a) the communication from the *firm* was sent to that investor because the *investment* is suitable for that investor; or
 - (b) the investor was selected because of their circumstances.

8.30B.19 **G** Content of the message:

- (1) If the message contains a solicitation, a recommendation, an opinion or a judgment about the advisability of a transaction, this could mean that it is a *personal recommendation*.
- (2) This factor is also relevant to whether the message meets the requirements in ■ PERG 8.30B.2G(1) and (2) (whether there is a recommendation).

8.30B.20 **G** The tone of the message and the way it could be understood by the customer are important elements when determining whether a communication amounts to a *personal recommendation*.

Disclaimers

8.30B.21 **G** A disclaimer may help a *firm* to avoid inadvertently presenting *investments* as suitable for particular customers or as being based on a consideration of

the customer’s circumstances. However it will not always be sufficient. For example a disclaimer is unlikely to be effective if:

- (1) a *firm* states that the *investment* would suit a particular customer’s needs; or
- (2) it is reasonable for the customer to expect that the recommendation is based on a consideration of their circumstances.

Recommendation to the public

8.30B.22 G A recommendation is not a *personal recommendation* if it is issued exclusively to the public.

8.30B.23 G Advice about *investments* in a newspaper, a journal, a magazine, a website accessible to the general public or in a radio or television broadcast should not amount to a *personal recommendation*.

8.30B.24 G

- (1) However, use of the internet does not automatically mean that a communication is made to the public and that as a result it is outside the definition of a *personal recommendation*.
- (2) Therefore, for instance, while advice on a generally accessible website is unlikely to be a *personal recommendation*, an email communication provided to a specific *person*, or to several *persons*, may amount to a *personal recommendation*.
- (3) ■ PERG 8.30B.16G to ■ PERG 8.30B.20G (Where the same recommendation is sent to several customers) deal with when a communication, including an email, sent to multiple customers can be a *personal recommendation*.
- (4) See ■ PERG 8.30B.33G(5) for an example of when the output of a website may still be a *personal recommendation* even though the website is accessible to the general public.

Decision trees and filtering

8.30B.25 G (1) A *firm* may sell products through its website and that website may allow the customer to filter products based upon factors presented by the website and selected by the customer.

(2) Someone deciding whether a filtering process meets the requirements in ■ PERG 8.30B.2G(1) and (2) should look at ■ PERG 8.30A (Pre-purchase questioning (including decision trees)).

(3) However, if a filtering process is treated as giving regulated advice under ■ PERG 8.30A it must also meet the requirements in ■ PERG 8.30B.2G(3) and (4) if it is to be a *personal recommendation*.

8.30B.26 G (1) This section ■ PERG 8.30B deals with two basic forms of filtering process.

- (2) The first type involves identifying *investments* based on factual matters, as described in ■ PERG 8.30A.10G.
- (3) The second type involves factors incorporating opinion, judgment or recommendations, as described in ■ PERG 8.30A.11G.

8.30B.27 G A filtering process based on factual matters will generally not involve a *personal recommendation* because it does not meet the requirements in ■ PERG 8.30B.2G(1) and (2) (see ■ PERG 8.30A.6G (as applied by ■ PERG 8.30B.6G)).

8.30B.28 G In the *FCA's* view, a filtering process based on a single subjective factor such as riskiness may meet the requirements in ■ PERG 8.30B.2G(1) and (2) but still not be a *personal recommendation* because it does not meet the requirements in ■ PERG 8.30B.2G(3) and (4). It need not meet those requirements for the following reasons taken together.

- (1) The filter is simple because:
 - (a) the number of inputs by the customer is small;
 - (b) the translation from the customer's input to the list of displayed products does not involve any opinion or complicated processing;
 - (c) if the customer chooses high-risk products there is a pre-existing list of products that are displayed for that customer;
 - (d) if the customer chooses low-risk products there is a pre-existing list of products that are displayed for that customer; and
 - (e) the same results will be displayed for any other customer that chooses that category of risk.
- (2) This sort of filtering is just a form of indexation of pre-existing information.
- (3) It would be perfectly possible to arrange the *investments* the *firm* sells into categories based on riskiness in hard copy form, and to make that hard copy available to the public. However it cannot be said that a hard copy arranged and published in that way is based on the personal circumstances of the *person* reading it.
- (4) The website output from the process does not become a *personal recommendation* just because it is on a website or just because the website screens out information the customer asks not to see.
- (5) All the filtering does is to eliminate *investments* that do not fall within the specified category.

8.30B.29 G ■ PERG 8.30B.28G is based on the nature of the filtering process.

- (1) ■ PERG 8.30B.28G is not based on the view that an investment factor such as riskiness cannot be part of the customer's personal circumstances. The customer's attitude to risk can form part of the customer's personal circumstances.
- (2) ■ PERG 8.30B.28G is not based on the view that there is no *personal recommendation* where the advice is about whether a product meets

the customer's objectives rather than the product being good or bad. A *personal recommendation* may relate to the customer's objectives.

- (3) ■ PERG 8.30B.28G is not based solely on the fact that the website only takes into account a narrow range of factors. The fact that a *firm* has not considered all the customer's circumstances does not necessarily mean that there is no *personal recommendation*.

8.30B.30 G

- (1) The conclusion in ■ PERG 8.30B.28G is given some support by the *ESMA* guidance referred to in ■ PERG 8.30B.4G.
- (2) That guidance states that where the filtering process is limited to assisting the customer to make their own choice of product with particular features which the customer regards as important, then it is unlikely that the process will involve a *personal recommendation*.

8.30B.31 G

- (1) Whether or not a *personal recommendation* is given depends in part on whether the customer is led to think that one is being given.
- (2) Therefore it is important that the customer understands that:
 - (a) the *firm* is not advising on whether the products are suitable for the customer; and
 - (b) instead the *firm* is assisting the customer to make their own choice of product with particular features which the customer regards as important.
- (3) If buying the *investments* identified in the website's output is positioned as the appropriate action for the customer to take, the overall service might be viewed as a *personal recommendation*.
- (4) The customer should understand that, because the website takes into account a narrow range of the customer's personal circumstances and preferences and because the customer rather than the *firm* has established what those circumstances and preferences are, the result may be that the customer ends up with products that are unsuitable for them.

8.30B.32 G

- (1) As described in ■ PERG 8.30B.21G, including a disclaimer is not enough on its own to prevent a *personal recommendation*.
- (2) For example, if the *firm* says that the filtered *investments* displayed by the website would suit the customer's needs, the inclusion of a disclaimer saying that this is not advice or a *personal recommendation* would be unlikely to change the nature of the communication.
- (3) A legalistic disclaimer is unlikely to be enough to prevent a *firm* from giving a *personal recommendation*. Instead, the material should prominently and clearly explain the limited nature of the service that the *firm* provides and the risk that the customer will end up with unsuitable *investments*.

8.30B.33 G

- (1) If the filtering is based on more than one factor chosen by the consumer that does not mean that the *firm* is making a *personal recommendation*.
- (2) However the output from the website may be a *personal recommendation* if the way that the customer's inputs interact on the website is more complicated than with a simple filtering system under which:
 - (a) the *firm* assigns a limited number of characteristics (such as levels of riskiness) to each product;
 - (b) the customer chooses the characteristics they want; and
 - (c) the system displays all the products that meet all the characteristics chosen by the customer and does not show the other products.
- (3) As explained in ■ PERG 8.30A.15G (as applied by ■ PERG 8.30B.6G), this type of filtering meets the requirements in ■ PERG 8.30B.2G(1) and (2).
- (4) This type of filtering also meets the requirements in ■ PERG 8.30B.2G(3) and (4) because:
 - (a) the factors in ■ PERG 8.30A.15G mean that the website is going beyond simply indexing pre-existing information as described in ■ PERG 8.30B.28G (so the approach in ■ PERG 8.30B.28G does not apply);
 - (b) if the customer has to input a large range of personal information the *firm* cannot argue that it has not taken into account the customer's personal circumstances and preferences when in fact it actually has; and
 - (c) either explicitly or implicitly the output is presented as meeting the customer's requirements and wishes.
- (5) A recommendation issued exclusively to the public is not a *personal recommendation*. But the output of the website in this paragraph ■ PERG 8.30B.33G is not excluded from being a *personal recommendation* for this reason: the output of the website in this example is tailored to the individual and is only made available to them.

8.30B.34 G

- (1) The approach described in ■ PERG 8.30B.28G only applies if it is clear to the customer that the *firm* is presenting to the customer all the products it sells coming within the category selected by the customer (see ■ PERG 8.28.4G (information presented on a selected basis)).
- (2) For example, if the customer filters the products based on how risky they are, the *firm* should present to the customer all the products it sells falling within the risk category the customer chooses.

8.30B.35 G

- (1) An example of ■ PERG 8.30B.33G is a *firm* that presents a suggested portfolio of investments to the customer.
- (2) For example, if the customer filters the products based on how risky they are, and the *firm* presents a number of investment products and a suggestion of what percentage of the customer's investment should

be invested in each, it is likely that the *firm* will be making a *personal recommendation*.

8.30B.36 **G** The examples in ■ PERG 8 Annex 1 include examples of a *firm* selling products on a website which allows the customer to filter products based on input from the customer.

8.31 Exclusions for advising on investments

- 8.31.1** G The *Regulated Activities Order* contains a number of exclusions which prevent certain activities from being a *regulated activity*.
- 8.31.2** G With regard to article 53(1), the main exclusion relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54: Advice given in newspapers etc). The exclusion applies if the principal purpose of any of these is not to give advice covered in article 53(1) or to lead or enable *persons* to acquire or dispose of *securities* or *contractually based investments*. This exclusion does not apply when the definition of *advising on investments* (except *P2P agreements*) is based on giving a *personal recommendation* (see ■ PERG 8.24.1AG for when this is the case). All this is explained in greater detail, together with the provisions on the granting of certificates, in ■ PERG 7.
- 8.31.3** G It is also possible for advice to be excluded if it is given by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is if it is reasonably to be regarded as necessary for him to give the advice to provide his professional or other services and he is not separately paid for giving the advice (article 67: Activities carried on in the course of a profession or non-investment business). This could arise in the context of advice given by *persons* such as:
- (1) a solicitor, accountant or tax adviser; or
 - (2) a debt counsellor; or
 - (3) an employment agency.
- 8.31.3A** G The exclusion in article 67 will not apply to a *person* who is *advising on investments* when he does so as a *MiFID investment firm* or a *third country investment firm* (see ■ PERG 2.5.4 G to ■ 2.5.5 G (Investment services and activities)).
- 8.31.4** G For example, it may be necessary for a *person* referred to in ■ PERG 8.31.3G (1) or ■ PERG 8.31.3G (2) to advise a client to sell all his assets for tax, legal or debt reduction reasons. However, it may not be necessary for him to recommend selling some *investments* and not others. Whether or not this is the case will depend on the circumstances in which the advice is given.

8.31.5

G

Certain of the exclusions in the *Regulated Activities Order* that apply to the *regulated activity of advising on investments* are not available where the advice either relates to a *contract of insurance* or amounts to *insurance distribution* or *reinsurance distribution*. This results from the requirements of the *IDD* and is explained in more detail in ■ **PERG 5** (Guidance on insurance distribution activities).

8.32 Arranging deals in investments

- 8.32.1** **G** Under article 25 of the *Regulated Activities Order*, *arranging deals in investments* covers:
- (1) making arrangements for another *person* (whether as principal or agent) to *buy, sell*, subscribe for or underwrite a particular *investment* which is:
 - (a) a *security* or a *structured deposit*; or
 - (b) a *relevant investment*; or
 - (c) an *investment* of the kind specified by article 86, or article 89 so far as relevant to that article (Lloyd's *syndicate* membership and capacity and rights to or interests in such *investments*); or
 - (2) making arrangements with a view to a *person* who participates in the *arrangements buying, selling*, subscribing for or underwriting *investments* falling within ■ PERG 8.32.1G (1)(a) to ■ (c) (whether as principal or agent).
- 8.32.2** **G** Article 25(1) applies only where the arrangements bring about or would bring about the particular transaction in question. This is because of the exclusion in article 26. In the *FCA's* view, a *person* brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place. The second limb (article 25(2)) is potentially much wider as it does not require that the arrangements would bring about particular transactions. It is this limb which is of potential relevance within the scope of this *guidance*.
- 8.32.3** **G** In the course of their business, people such as publishers or broadcasters, Internet service providers, website operators or telephone marketing companies may provide services for *authorised* or *exempt persons* or other *persons* (such as *overseas persons*) who carry on *regulated activities*. This does not necessarily mean that any arrangements they make with such *persons* will fall within the scope of article 25(2). For that to be the case, the arrangements must be made with a view to the *authorised* or *exempt* (or *overseas*) *person* or that *person's* customers or counter parties or any or all of them *buying* or *selling investments*. This means that a *person* making arrangements must take account of the purpose for which he makes them.
- 8.32.4** **G** The ordinary business of a publisher or broadcaster can involve him in publishing or broadcasting *financial promotions* (for example,

advertisements) on behalf of *authorised* or *exempt persons*. Journalists who write about *investments* or financial services may promote the services of an *authorised* or *exempt person*. In the FCA's opinion, such *persons* would not normally be regarded as making arrangements under article 25(2). This is the case even if any arrangements they may have made may lead their readers or viewers to *buy* or *sell investments* in response to the promotions. In the FCA's view, the publisher or broadcaster may normally be seen to be making arrangements with a view to publishing or broadcasting promotions which may include *financial promotions*. The same may apply to arrangements made by Internet website operators who may allow the promotion on their site of services including *financial promotions* through the setting up of hypertext links or the placing of banner advertisements.

8.32.5 **G** The *Regulated Activities Order* contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties. In the FCA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2).

8.32.6 **G** For example, in the FCA's view a publisher or broadcaster would be likely to be making arrangements within the meaning of article 25(2) and be unable to make use of the exclusion in article 27 if:

- (1) he enters into an agreement with a provider of investment services such as a broker or product provider for the purpose of carrying their *financial promotion*; and
- (2) as part of the arrangements, the publisher or broadcaster does one or more of the following:
 - (a) brands the investment service or product in his name or joint name with the broker or product provider;
 - (b) endorses the service, or otherwise encourages readers or viewers to respond to the promotion;
 - (c) negotiates special rates for his readers or viewers if they take up the offer;
 - (d) holds out the service as something he has arranged for the benefit of his readers or viewers.

8.32.7 **G** It would also be an indicator that a publisher or broadcaster might be making arrangements falling within article 25(2) if he receives a commission or other form of reward based on the amount of regulated business done as a result of his carrying the promotion. This would be on the basis that the existence of the financial interest will inevitably have a bearing on the purpose for which the arrangements are viewed as having been made by him. However, the article 27 exclusion will apply in cases where there is such a reward provided the arrangements are made merely to allow the communication to be made.

- 8.32.8** **G** So, the same considerations are liable to apply to a website operator or an operator of a similar service (such as an intranet or closed user electronic service) who is carrying banner advertising from, or otherwise setting up links to the sites of, *authorised or exempt persons*.
- 8.32.9** **G** Other *persons* who may benefit from the exclusion in article 27 include *persons* who provide the means for someone to route an order to another *person*. A *person* providing such order routing services would not, in the FCA's view, be merely facilitating communication (of the orders) if he provides added value. This added value could be in the form, for example, of such things as formatted screens, audit trails, checking completeness of orders or matching orders or reconciling trades.
- 8.32.10** **G** Companies providing telephone marketing and related services to investment firms will face similar issues. If their services are entirely passive – for example, answering telephone calls, sending out literature upon request or referring enquirers to representatives of their client – they may simply be regarded as making arrangements with a view to their providing telephone answering services. On the other hand, where a telephone marketing company:
- (1) makes proactive calls to prospective customers of its clients; or
 - (2) is expected proactively to raise the possibility, during a call made by the prospective customer, of a meeting with or visit by a representative of their client or of the caller being sent promotional literature;
- the arrangements are liable to be made with a view to the company's client and its prospective customers *buying or selling investments*. So such arrangements will be likely to fall within article 25(2) unless another exclusion applies (such as that for introductions – see ■ PERG 8.33).
- 8.32.11** **G** The mere provision by a website operator of a bulletin board or chat room ought not to amount to making arrangements under article 25(2) unless making such arrangements is the specific purpose of the facility. However, operators of websites with such facilities will clearly need to be aware of potential implications (such as the service being used by *unauthorised persons* to give advice or make *financial promotions* or to make misleading statements with a view to manipulating market prices). They may wish to consider drawing such matters to the attention of *persons* who use the facility.
- 8.32.12** **G** Where *persons* are making arrangements concerning *contracts of insurance* or are carrying on *insurance distribution* or *reinsurance distribution* certain exclusions to article 25 are not available. This results from the requirements of the *IDD* and is explained in more detail in ■ PERG 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance).

8.33 Introducing

8.33.1 **G** As with advice, there are various exclusions in the *Regulated Activities Order* which take certain arrangements out of the scope of article 25. Two of these are likely to be particularly relevant to *persons* who are mainly concerned with making or helping others to make communications.

8.33.2 **G** Article 29 of the *Regulated Activities Order* states that certain arrangements are not covered by article 25. These are arrangements made by an *unauthorised person* ('A'). The arrangements must be made for or with a view to a transaction which is or is to be entered into by another *person* (the client) with or through an *authorised person*. It must also be the case that:

- (1) the transaction is or will be entered into on advice given to the client by an *authorised person*; or
- (2) it is clear, in all the circumstances, that the client, in his capacity as an investor, is not seeking and has not sought advice from A on the merits of his entering into the transaction (or, if the client has sought such advice, A has declined to give it but has recommended that the client seek such advice from an *authorised person*).

For article 29 to apply, it is also necessary that, in return for making the arrangements, A does not receive from any *person* other than the client financial reward or other advantage, for which he does not account to the client, arising out of his making the arrangements (■ PERG 8.12.11 G gives *guidance* on when a *person* will be regarded as having received reward from someone other than his client).

8.33.3 **G** This exclusion may apply, for example, where a website operator, without offering any advice, sets up links to the sites of investment firms but does not receive any form of payment from any of the firms for doing so.

8.33.4 **G** Of potentially greater significance is the exclusion in article 33 of the *Regulated Activities Order* which excludes arrangements where:

- (1) they are arrangements under which *persons* will be introduced to another *person*;
- (2) the *person* to whom introductions are to be made is:
 - (a) an *authorised person*; or
 - (b) an *exempt person* acting in the course of business comprising a *regulated activity* in relation to which he is exempt; or

(c) a *person* who is not unlawfully carrying on *regulated activities* in the *United Kingdom* and whose ordinary business involves him in engaging in certain activities; and

(3) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to *investments* generally or in relation to any class of *investments* to which the arrangements relate.

8.33.5 **G** In the *FCA's* view, article 33 will apply, for example, where *persons* are finding potential customers for independent financial advisers, advisory stockbrokers or independent investment managers. In this case, the introducer is allowed to receive a payment for making introductions. However, it will not apply where the introductions are made either to a *person* whose advice or management services would not be independent (for example, a product provider such as a life office or a manager of unit trust schemes or contractual schemes) or for the purposes of execution-only dealing.

8.33.6 **G** The exclusions in articles 29 and 33 of the *Regulated Activities Order* are not available where the *investment* is a *contract of insurance* (unless, as regards article 33, the relevant arrangements meet the requirements of article 33B). However, certain other exclusions do apply. This results from implementation of the requirements of the *IDD* and is explained in more detail in ■ PERG 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance).

8.33.7 **G** The exclusion in article 29 will not apply to a *person* who is carrying on an *arranging* activity when he does so as a *MiFID investment firm* or a *third country investment firm* (see ■ PERG 2.5.4 G to ■ 2.5.5 G (Investment services and activities)).



8.34 The business test

8.34.1 **G** *Persons* who may be carrying on the activity of *advising on investments* or *making arrangements with a view to transactions in investments* will only require *authorisation* or exemption if they are carrying on those activities by way of business. This is the effect of section 22(1) of the Act. Under section 419 of the Act, the Treasury has the power, by order, to require activities which would otherwise be treated as carried on by way of business to be treated as not carried on by way of business and vice versa. The Treasury has used this power to restrict the business test when applied to *regulated activities* such as *advising on investments* or *making arrangements with a view to transactions in investments* to situations where a *person* is carrying on the business of engaging in those activities. This is the effect of article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (as amended).

8.34.2 **G** In the FCA's view, for a *person* to be carrying on the business of *advising on investments* or *making arrangements with a view to transactions in investments*, he will usually need to be carrying on those activities with a degree of regularity. The *person* will also usually need to be carrying on the activities for commercial purposes. That is to say, he will normally be expecting to gain a direct or indirect financial benefit of some kind. Activities carried on out of friendship or for altruistic purposes will not normally amount to a business. However, in the FCA's view, it is:

- (1) not necessary that a *person* be seeking to profit from carrying on activities; for example a *company* set up by a number of other companies operating in a particular area to provide research may simply charge to recover its costs but may still be regarded as carrying on its activities as a business; and
- (2) not necessarily the case that services provided free of charge will not amount to a business; for example, much investment advice is provided free of charge to investors but in the course of a business funded by commission payments; services (particularly advice, information or links) available on a website may also be free of charge to users of the site but be part of a business funded by advertising fees or sponsorship; and free newspapers may well represent a business for similar reasons.

8.34.3 **G** The 'by way of business' test for *insurance distribution activities* is distinguished from the standard test for 'investment business' in article 3 of the *Business Order*. The business test for *persons* carrying on *insurance distribution activities* is in article 3(4) of the *Business Order*. See ■ PERG 5.4 (The business test).

8.35 Authorisation and exemption

8.35.1

G

Any *person* who is contemplating carrying on the *regulated activities* of *advising on investments* or *making arrangements with a view to transactions in investments* by way of business will need *authorisation* or exemption. Exemption would usually be obtained by a *person* entering into an agreement with an *authorised person* under section 39 of the Act and the Financial Services and Markets Act 2000 (Appointed Representative) Regulations 2001.



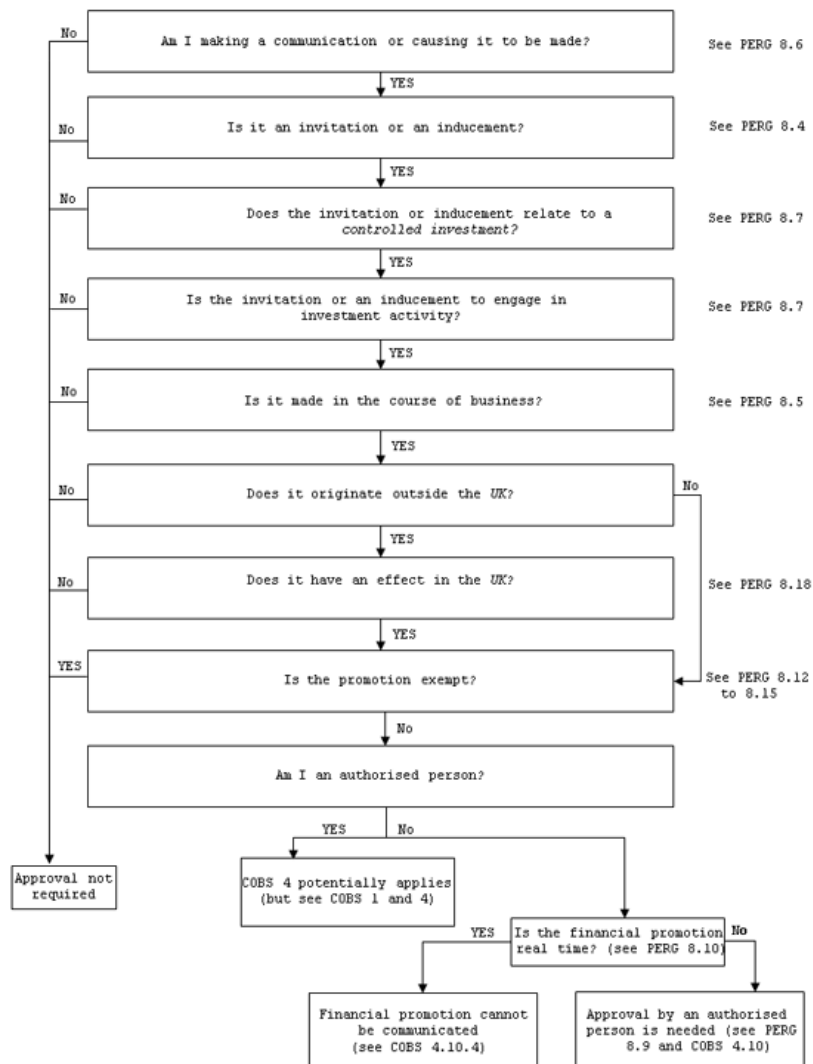
8.36 Illustrative tables

Financial Promotions: flowchart

8.36.1

G

This flowchart sets out the matters which a *person* will need to consider to see if the restriction in section 21 of the *Act* applies to his communications. It is referred to in ■ PERG 8.2.5 G.



Controlled activities and controlled investments

8.36.2

G

These tables list the activities that are *controlled activities* and the *investments* that are *controlled investments* under the *Financial Promotion Order*. It is referred to in ■ PERG 8.7.2 G.

8.36.3 **G** Table Controlled activities

1.	Accepting deposits
2.	Effecting and carrying out contracts of insurance
3.	Dealing in securities, structured deposits, <i>qualifying cryptoassets</i> and contractually based investments
4.	Arranging deals in investments
4A.	Operating a multilateral trading facility
4B.	Credit broking
4C.	Operating an electronic system in relation to lending
4D.	Operating an organised trading facility
5.	Managing investments
5A.	Debt adjusting
5B.	Debt counselling
6.	Safeguarding and administering investments
7.	Advising on investments
8.	Advising on syndicate participation at Lloyd's
9.	Entering into funeral plan contracts
9A.	Carrying out funeral plan contracts
10.	Providing qualifying credit
11.	Arranging qualifying credit etc
12.	Advising on qualifying credit etc
12A.	Providing relevant consumer credit
12B.	Providing consumer hire
13.	Providing a home reversion plan
14.	Arranging a home reversion plan
15.	Advising on a home reversion plan
16.	Providing a home purchase plan
17.	Arranging a home purchase plan
18.	Advising on a home purchase plan
18A.	Providing a regulated sale and rent back agreement
18B.	Arranging a regulated sale and rent back agreement
18C.	Advising on a regulated sale and rent back agreement
19.	Agreeing to do anything in 3 to 18C above

8.36.4 **G** Table Controlled investments

1.	A deposit.
2.	Rights under a contract of insurance.
3.	Shares etc.
4	Instruments creating or acknowledging indebtedness (referred to in the Glossary as debentures and alternative debentures).
5.	Government and public securities.
6.	Instruments giving entitlement to investments (referred to in the Glossary as warrants).
7.	Certificates representing certain securities.
8.	Units in a collective investment scheme.
9.	Rights under a stakeholder pension scheme or a <i>personal pension scheme</i> .
10.	Options.
11.	Futures.
12.	Contracts for differences etc.
12A.	Emission allowances
13.	Lloyd's syndicate capacity and syndicate membership.
14.	Funeral plan contracts
15.	Agreements for qualifying credit
16.	Rights under a home reversion plan.
17.	Rights under a home purchase plan.
17A.	Rights under a regulated sale and rent back agreement
17B.	Rights under a relevant credit agreement (including rights under a paragraph 4C agreement)
17C.	Rights under a consumer hire agreement
17D.	Qualifying cryptoassets
18.	Rights to or interests in anything falling under 1 to 14or 17D above.

Application of exemptions to forms of financial promotion

8.36.5 **G** This table identifies the types of *financial promotion* to which each exemption in the *Financial Promotions Order* applies. It is referred to in ■ PERG 8.11.2 G and ■ PERG 8.14.1 G.

8.36.6 **G** Table Application of Exemptions to Forms of Promotions

Financial Promotion Order		Applies to		
Article No.	Title and PERG 8 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)
12	Communications to overseas recipients (8.12.2G)	* ¹	*	*
13	Communications from customers and potential customers (8.12.9G)	*	*	*
14	Follow up non-real time communications and solicited real time communications (8.12.10G)		*	*
15	Introductions (8.12.11G)	*	*	*
16	Exempt persons (8.12.12G)	* ²	* ³	* ³
17	Generic promotions (8.12.14G and 8.21.4G)	*	*	*
17A	Communications caused to be made or directed by unauthorised persons (8.6.7AG)	*	*	*
18	Mere conduits (8.12.18G)	*	*	*
18A	Outgoing electronic commerce communications: mere conduits, caching and hosting (8.12.18G)	*	*	*
19	Investment professionals (8.12.21G and 8.21.5G)	*	*	*
20	Communications by journalists (8.12.23G)			*
20A	Promotion broadcast by company director etc (8.12.23G and 8.21.6G)	*	*	*
22	Deposits : non-real time communications (8.13)			*
23	Deposits : real time communications (8.13)	*	*	
24	Relevant insurance activity : non-real time communications (8.13)			*
25	Relevant insurance activity : non-real time communications : reinsurance and large risks (8.13)			*
26	Relevant insurance activity : real time communications (8.13)	*	*	
28	One-off non-real time communications and solicited real time communications (8.14.3G)		*	*
28A	One-off unsolicited real time communications (8.14.11G)	*		

Financial Promotion Order		Applies to		
28B	Real time communications: introductions in connection with qualifying credit (8.17.12G)	*	*	
29	Communications required or authorised by enactments	*	*	*
30	Overseas communicators: solicited real time communications (8.14.15G)		*	
31	Overseas communicators: non-real time communications to previously overseas customers (8.14.17G)			*
32	Overseas communicators: unsolicited real time communications to previously overseas customers (8.14.16G)	*		
33	Overseas communicators: unsolicited real time communications to knowledgeable customers (8.14.16G)	*		
34	Governments, central banks etc		*	*
35	Industrial and provident societies		*	*
37	Financial markets		*	*
38	Persons in the business of placing promotional material	*	*	*
39	Joint enterprises (8.14.19G)	*	*	*
40	Participants in certain recognised collective investment schemes		*	*
41	Bearer instruments: promotions required or permitted by market rules (8.14.42G)		*	*
42	Bearer instruments: promotions to existing holders (8.14.42G)		*	*
43	Members and creditors of certain bodies corporate (8.14.41G and 8.21.8G)		*	*
44	Members and creditors of open-ended investment companies		*	*
45	Group companies	*	*	*
46	Qualifying credit to bodies corporate (8.17.10G)	*	*	*
46A	Promotions of credit etc. for business purposes (8.17-A.10G)	*	*	*

Financial Promotion Order		Applies to		
47	Persons in the business of disseminating information (8.21.10G)	*	*	*
48	High net worth individuals (8.14.21G)		*	*
49	High net worth companies, unincorporated associations etc (8.14.25G)	*	*	*
50	Sophisticated investors (8.14.27G)	*	*	*
50A	Self-certified sophisticated investors (8.14.28AG)	*	*	*
51	Associations of high net worth or sophisticated investors (8.14.29G)		*	*
52	Common interest group of a company (8.14.30G)		*	*
53	Settlers, trustees and personal representatives	*	*	*
54	Beneficiaries of trust, will or intestacy	*	*	*
55	Communications by members of professions (8.15.1G)	*	*	
55A	Non-real time communication by members of the professions. (8.15.5G)			*
56	Remedy following report by Parliamentary Commissioner for Administration	*	*	*
57	Persons placing promotional material in particular publications	*	*	*
58	Acquisition of interest in premises run by management companies		*	*
59	Annual accounts and directors' report (8.21.11G)	*	*	*
60	Participation in employee shares schemes	*	*	*
61	Sale of goods and supply of services		*	*
62	Sale of body corporate (8.14.35G)	*	*	*
64	Takeovers of relevant unlisted companies	*	*	*
65	Takeovers of relevant unlisted companies: warrants etc	*	*	*
66	Takeovers of relevant unlisted companies: application forms	*	*	*

Financial Promotion Order		Applies to		
67	Promotions required or permitted by market rules (8.21.13G)		*	*
68	Promotions in connection with admission to certain EEA markets (8.21.16G)		*	*
69	Promotions of securities already admitted to certain markets (8.21.17G)		*	*
70	Promotions included in listing particulars etc (8.21.20G)			*
71	Material relating to prospectus for public offer of unlisted securities			*
72	Pension products offered by employers (8.14.40AG)	*	*	*
72A	Pension product offers communicated to employees by third parties (8.14.40AAG)	*	*	*
72B	Insurance product offers communicated to employees by employers (8.14.40ABG)	*	*	*
72C	Insurance products offers communicated to employees by third parties (8.14.40ACG)	*	*	*
72D	Staff mortgage offers communicated to employees by employers (8.14.40ADG)	*	*	*
72E	Staff mortgage offers communicated to employees by third parties (8.14.40AEG)	*	*	*
72F	Credit agreements offered to employees by employers	*	*	*
73	Advice centres (8.14.40B)	*	*	*
¹ in limited circumstances only – see article 12(2) of the <i>Financial Promotion Order</i> ² for the purpose of article 16 (2) only ³ for the purpose of article 16 (1) only				

8.37 AIFMD Marketing

Introduction and purpose

8.37.1

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- (1) Part 6 (Marketing) of the *AIFMD UK regulation* contains restrictions on an *AIFM* or an *investment firm marketing an AIF*. Such a *person* may not *market* an *AIF* in the *UK* or *Gibraltar* unless the relevant conditions set out in the *AIFMD UK regulation* are met.
- (2) The purpose of this section is to give *guidance* on:
 - (a) the restrictions on an *AIFM* or *investment firm marketing an AIF* (■ PERG 8.37.2 G and ■ PERG 8.37.3 G);
 - (b) the circumstances in which an *AIFM* or an *investment firm markets an AIF* (■ PERG 8.37.4 G to ■ PERG 8.37.10 G);
 - (c) the exemptions from the *marketing* restrictions (■ PERG 8.37.11 G and ■ PERG 8.37.12 G);
 - (d) the penalties for breach of the *marketing* restrictions (■ PERG 8.37.13 G);
 - (e) the application of the *financial promotion* and *scheme promotion* restrictions (■ PERG 8.37.14 G); and
 - (f) the interaction between the *marketing* of an *AIF* and the *Prospectus Regulation* (see ■ PERG 8.37.15G);
- (3) [deleted]
- (4) References to regulations in this section are to regulations of the *AIFMD UK regulation*.

This section is not intended to have a more general application and, therefore, where *guidance* is given this should be interpreted as being limited to the *marketing* of *AIF* under the *AIFMD UK regulation*.

Restrictions on an AIFM marketing an AIF

8.37.2

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Regulations 49 and 50 place restrictions on an *AIFM marketing an AIF*. These regulations provide that the following types of *AIFM* may not *market* the following types of an *AIF* in the *UK* unless the conditions summarised below are met.

- (1) The conditions that need to be met vary depending on whether the *AIF* falls within regulation 57(1) or not. An *AIF* falls within this regulation if it is:

- (a) a *feeder AIF* that is a *UK AIF*, a *Gibraltar AIF* or an *EEA AIF*, the *master AIF* of which is either managed by a *non-UK AIFM* or is a *non-UK AIF*, and where the *feeder AIF* is managed by a *full-scope UK AIFM* or a *full-scope Gibraltar AIFM*; or
 - (b) [deleted]
 - (b) a *non-UK AIF* which is managed by a *full-scope UK AIFM* or a *full-scope Gibraltar AIFM*.
- (2) Regulation 49 (Marketing by full scope AIFMs of certain AIFs) provides that a *full-scope Gibraltar AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless:
- (a) when *marketing* to a *professional client*, the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act*, as it applies in relation to *Gibraltar AIFMs* and *Gibraltar AIFs*; or
 - (b) when *marketing* to a *retail client*:
 - (i) the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act*, as it applies in relation to *Gibraltar AIFMs* and *Gibraltar AIFs*; or
 - (ii) the *FCA* has approved the *marketing*, in accordance with regulation 54 (*FCA approval for marketing*) (see ■ FUND 3.12 (*Marketing in the home Member State of the AIFM*)) and has not suspended or revoked that approval.
- (3) Regulation 50 (Marketing by AIFMs of other AIFs) provides that:
- (a) a *full-scope UK AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless the *FCA* has approved the *marketing* in accordance with regulation 54; and
 - (b) the following types of *AIFM* may not *market* the following types of *AIF* unless the *AIFM* has complied with the national private placement provisions set out in chapter 3 (National private placement) of Part 6 of the *AIFMD UK regulation* (see FUND 10.5 (National private placement)):
 - (i) a *full-scope UK AIFM* of an *AIF* falling within regulation 57(1);
 - (ii) a *full-scope Gibraltar AIFM* of an *AIF* falling within regulation 57(1); and
 - (iii) a *non-UK AIFM* (ie a *small non-UK AIFM* or an *above-threshold non-UK AIFM*) of a *UK AIF*, or a *non-UK AIF*.

Restrictions on an investment firm marketing an AIF

8.37.3

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Regulation 51 (Marketing of AIFs by investment firms) places a restriction on an investment firm marketing an AIF. This provides that where regulation 49 or 50 requires a condition to be met before an *AIFM* may *market* an *AIF*, an *investment firm* may not *market* that *AIF* unless that condition is met. However, as explained in ■ PERG 8.37.4G (1)(b), an *investment firm* only *markets* an *AIF* if it does so at the initiative of, or on behalf of, the *AIFM* of that *AIF*.

The circumstances in which an AIFM or an investment firm markets an AIF

- 8.37.4 G
- (1) Regulation 45 (References in this part to an AIFM or an investment firm marketing an AIF) provides that:
- (a) an *AIFM markets an AIF* when the *AIFM* makes a direct or indirect offering or placement of *units or shares* of an *AIF* managed by it to an investor domiciled or with a registered office in the *United Kingdom or Gibraltar*, or when another *person* makes such an offering or placement at the initiative of, or on behalf of, the *AIFM*; and
 - (b) an *investment firm markets an AIF* when it makes a direct or indirect offering or placement of *units or shares* of the *AIF* to an investor domiciled or with a registered office in the *United Kingdom or Gibraltar* at the initiative of, or on behalf of, the *AIFM* of that *AIF*.
- (2) *Marketing*, therefore, has a specific meaning in the context of the *AIFMD UK regulation* which is, in some respects, different from the ordinary meaning of the term.

The meaning of an offering or placement

- 8.37.5 G
- (1) The terms 'offering' or 'placement' are not defined in the *AIFMD UK regulation* but, in our view, an offering or placement takes place for the purposes of the *AIFMD UK regulation* when a *person* seeks to raise capital by making a *unit of share* of an *AIF* available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment.
- (2) An 'offering' includes situations where the *units or shares* of an *AIF* are made available to the general public and a 'placement' includes situations where the *units or shares* of an *AIF* are only made available to a more limited group of potential investors.
- (3) However, an 'offering' or 'placement' does not include secondary trading in the *units or shares* of an *AIF*, because this does not relate to the capital raising in that *AIF*, except in situations where there is an indirect offering or placement (see ■ PERG 8.37.7 G). Similarly, the listing of the units or shares of an *AIF* on the official list maintained by the *FCA* in accordance with section 74(1) of the *Act* will not in and of itself constitute an offering or placement, although it may be accompanied by such an offering or placement.

Communications with investors in relation to draft documentation

- 8.37.6 G
- (1) Under the *UK* provisions which implemented article 31 *AIFMD*, an *AIFM* is required to submit the documentation and information set out in the law that implemented Annex III to *AIFMD* with its application for permission to *market* an *AIF* managed by it and to notify the *FCA* of any material changes to this documentation and information. Therefore, the prescribed documentation and

information should be in materially final form before the *AIFM* may apply for permission to *market* an *AIF*. Any communications relating to this draft documentation do not, in our view, fall within the meaning of an 'offer' or 'placement' for the purposes of the law that relates to the regulation of *AIFMs* in the *United Kingdom*, as the *AIFM* cannot apply for permission to *market* the *AIF* at this point. For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the *AIF*. However, a *unit* or *share* of the *AIF* should not be made available for purchase as part of the capital raising of the *AIF* on the basis of draft documentation in order to circumvent the *marketing* restriction.

- (2) In our view, the position for draft documentation set out in (1) should apply to *marketing* under the national private placement provisions.
- (3) Regard should be had to national law in relation to a communication which does not amount to an offering or a placement. In the *UK*, consideration needs to be given to whether such a communication is a *financial promotion* (see ■ PERG 8.37.14 G).

The meaning of indirect offering or placement

8.37.7

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- (1) Marketing may take place by a direct or indirect offering or placement of *units* or *shares* of an *AIF*. The reference to indirect offering or placement would include situations where an *AIFM* distributes *units* or *shares* of an *AIF* through a chain of intermediaries.
- (2) For example, if the *units* or *shares* of an *AIF* are temporarily purchased by a third party (eg, an underwriter or placement agent) with the objective of distributing them to a wider investor base, this could be an indirect offering or placement when those *units* or *shares* are made available for purchase by investors, if the third party is acting at the initiative of, or on behalf of, the *AIFM*.

The meaning of a unit or share of an AIF

8.37.8

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The terms 'unit' and 'share' in the *AIFMD UK regulation* are generic and can be interpreted as encompassing all forms of equity of, or other rights in, an *AIF*. As such, the terms are not limited to *AIFs* which are structured as companies or unitised funds and may include other forms of collective investment undertakings, such as partnerships or non-unitised trusts.

The meaning of investor

8.37.9

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- (1) The reference to 'investor' in the *AIFMD UK regulation* should be regarded as a reference to the *person* who will make the decision to invest in the *AIF*. Where that *person* acts on its own behalf and subscribes directly to an *AIF*, the investor should be considered to be the *person* who subscribes to the *unit* or *share* of the *AIF*.
- (2) However, where that *person* engages another *person* to subscribe to the *AIF* on its behalf, including, for example, where:
 - (a) a nominee company will subscribe as bare trustee for an underlying beneficiary; or

(b) a custodian will subscribe on behalf of an underlying investor, the *AIFM* or *investment firm* that is marketing the *AIF* should 'look through' the subscriber to find the underlying investor who will make the decision to invest in the *AIF* and that *person* should be regarded as the investor.

(3) Where a discretionary manager subscribes, or arranges for another *person* to subscribe, on behalf of an underlying investor to the *AIF* and the discretionary manager makes the decision to invest in the *AIF* on that investor's behalf without reference to the investor, it is not necessary to 'look through' the structure and the discretionary manager should be considered to be the investor for the purposes of the *AIFMD UK regulation*.

Territorial scope of the marketing restrictions

8.37.10

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(1) The restrictions on the *marketing* of an *AIF* in regulations 49 to 51 only apply to *marketing* that takes place in the *UK*. In addition, under regulation 45, an *AIFM* or an *investment firm* only *markets* an *AIF* if the investor is domiciled in the *United Kingdom* or *Gibraltar* or has its registered office in the *United Kingdom* or *Gibraltar*.

(2) Under regulation 2(2)(a) (Interpretation), the reference to 'domicile' should be construed in line with its meaning in *AIFMD*. This may be different to the domicile of an investor for tax purposes.

[Note: see section 6 of the *EUWA*]

Marketing at the initiative of the investor

8.37.11

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(1) Regulation 47 (Marketing at the initiative of the investor) states that regulations 49 to 51 do not apply to an offering or placement of *units* or *shares* of an *AIF* to an investor made at the initiative of that investor.

(2) A confirmation from the investor that the offering or placement of *units* or *shares* of the *AIF* was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, *AIFMs* and *investment firms* should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of the legislation that implemented *AIFMD*.

Marketing under the designation "SEF" and "RVECA"

8.37.12

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Regulation 48 (Marketing under the designation "SEF" and "RVECA") provides that regulations 49 to 51 do not apply to the *marketing* of an *AIF* under the designation "SEF" and "RVECA". To be designated as such the *AIFM* of the *AIF* is required to apply for registration of the *AIF* with its *Home State* under the *EuSEF regulation* or the *EuVECA regulation* (and in the *UK* make a notification under regulation 14 (Notification of new funds under the *EuSEF Regulation* or the *EuVECA Regulation*)). Where the *AIFM* is established in the *UK*, it must also register as a *small registered UK AIFM* under regulation 10. The *AIFM* of an *AIF* is then entitled to *market* the *AIF* to *professional clients* and certain categories of *retail clients* (see article 6 of the *EuSEF regulation* and article 6 the *EuVECA regulation*) under those regulations.

Contravention of the marketing restrictions

8.37.13

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An *AIFM* or an *investment firm* that acts in contravention of the *marketing* restrictions in regulations 49 to 51, or an *AIFM* that acts in contravention of a provision of the *SEF regulation* or the *RVECA regulation*, is deemed to have been carrying out "unlawful marketing" under regulations 52 and 53. The consequences of carrying out unlawful marketing vary, depending on whether the *AIFM* or *investment firm* concerned is an *authorised person* or an *unauthorised person*.

- (1) If the *AIFM* or *investment firm* is an *unauthorised person*, regulation 52 (Contravention by an unauthorised person) provides that:
 - (a) section 25 of the *Act* (contravention of section 21) applies to the unlawful marketing as it applies to the contravention of section 21(1) of the *Act* (although under regulation 52(3) the reference in section 25(1)(a) to imprisonment for a term not exceeding six months is to be read as a reference to imprisonment for a term not exceeding three months);
 - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 21 of the *Act* included reference to unlawful marketing; and
 - (c) section 30 of the *Act* (enforceability of agreements resulting from unlawful communications) applies in relation to:
 - (i) controlled agreements entered into in consequence of unlawful marketing, as it applies in relation to controlled agreements entered into in consequence of an unlawful communication; and
 - (ii) the exercise of rights conferred by a *controlled investment* in consequence of unlawful marketing, as it applies in relation to the exercise of such rights in consequence of an unlawful communication.
- (2) If the *AIFM* or *investment firm* is an *authorised person*, regulation 53 (Contravention by an authorised person) provides that:
 - (a) unlawful marketing is actionable at the suit of a private person who suffers loss as a result of such *marketing*, subject to the defences and other incidents applying to actions for breach of statutory duty; and
 - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 238 of the *Act* included reference to unlawful marketing.

Application of the financial promotion and scheme promotion restrictions

8.37.14

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- (1) Regulation 46 (Application of the financial promotion and scheme promotion restrictions) provides that where a *person* may *market* an *AIF* under regulation 49, 50 or 51:
 - (a) to the extent that such *marketing* falls within section 21(1) (restrictions on financial promotion) or 238(1) (restrictions on promotion) of the *Act*, the *person* may *market* the *AIF* to a *retail*

client only if the *person* does so without breaching the restriction in that section; and

- (b) to the extent that any activity falling within section 21(1) or 238(1) of the *Act* does not amount to *marketing* by an *AIFM* or an *investment firm* for the purposes of Part 6 of the *AIFMD UK regulations*, the restriction in that section applies to the *person*.
- (2) The effect of the provision referred to at (1)(a) is to require an *AIFM* or an *investment firm* that *markets* an *AIF* to a *retail client* to comply with the *financial promotion* and scheme promotion restrictions in relation to that *marketing*. The provision referred to at (b) is designed to clarify that the *financial promotion* and scheme promotion restrictions continue to apply to communications by an *AIFM* or an *investment firm* that do not constitute *marketing*.
- (3) In addition, the *AIFMD UK regulation* has made amendments to article 29 (Communications required or authorised by enactments) of the *Financial Promotion Order* and article 16 (Communications required or authorised by enactments) of the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/2157). The effect of which is to exempt communications to *professional clients* which are approved by the *FCA* under regulation 49 or 50 of the *AIFMD UK regulation* from the *financial promotion* and scheme promotion restrictions.
- (4) There is likely to be a considerable overlap between *marketing* and *financial promotion*, and in the case of *marketing* to retail clients, this can only be done if a *financial promotion* can be made to that investor, but the two concepts are not the same. In particular, it is possible for a *person* to make a *financial promotion* without *marketing* an *AIF*. For example, an *AIFM* that makes a communication in relation to an *AIF* would be making a *financial promotion* if that communication was a significant step in the chain of events leading to an agreement to engage in investment activity (see ■ PERG 8.4.7 G (Inducements)), but would not be *marketing* an *AIF* if this communication was in relation to draft documentation (see ■ PERG 8.37.6 G).

The interaction between marketing and the prospectus directive

8.37.15

G

- (1) The *UK* provisions which implemented the *prospectus directive* were not amended by the *UK* provisions which implemented the *AIFMD* and closed-ended AIFs that are making an offer of securities to the public as defined in the *prospectus directive* need to comply with the requirements under the *UK* provisions which implemented both Directives.
- (2) However, where the AIF is required to publish a *prospectus* under section 85 of the *Act*, only information referred to in ■ FUND 3.2.2 R and ■ FUND 3.2.3 R that is additional to that contained in the *prospectus* needs to be disclosed, either separately or as additional information in the *prospectus*.

Examples of what is and is not a personal recommendation and advice

- Notes:
- (1) The purpose of this annex is to give examples in general terms of what is and is not *advising on investments (except P2P agreements)*. The examples are relevant both to someone who is not appropriately authorised and someone who is. See paragraph (5) for what appropriately authorised means.
 - (2) If the answer in the column in the table of examples headed 'Is this regulated advice for someone other than a firm with an appropriate authorisation?' is that there is no regulated advice, then the example does not involve *advising on investments (except P2P agreements)* by anyone, whether or not they are appropriately authorised. Where this is the case, the column headed 'Is there a personal recommendation?' is marked 'No' because in those circumstances there is no *personal recommendation* either.
 - (3) If the answer in the column in the table of examples headed 'Is this regulated advice for someone other than a firm with an appropriate authorisation?' is that there is regulated advice:
 - (a) the example involves *advising on investments (except P2P agreements)* for someone who is not appropriately authorised; and
 - (b) the example only involves *advising on investments (except P2P agreements)* for someone who is appropriately authorised if the column headed 'Is there a personal recommendation?' says that there is a *personal recommendation*.
 - (4) Therefore:
 - (a) column (2) of the table (Is there a personal recommendation?) is not relevant to someone who is not appropriately authorised; and
 - (b) all columns of the table are relevant to someone who is appropriately authorised.
 - (5) PERG 8.24.1AG explains what appropriately authorised means.
 - (6) The examples should be read together with PERG 8.24 to PERG 8.30B.
 - (7) Except where stated otherwise, the examples all involve *firms* and so they are most relevant to a *firm* wanting to know whether it is *advising on investments (except P2P agreements)*.
 - (8) The examples assume that the *person* in the example is not doing anything else relevant that is not described in the scenario set out in column (1) of the table.
 - (9) The tables do not consider whether the examples involve *financial promotions*.

(A) Website with generic information without filtering

(1) Example	header Is there a personal recommendation?	header Is this regulated advice for someone other than a firm with an appropriate authorisation?
Firm A has a website through which it provides a range of information about the world of investments. This includes generic explanations of the different asset classes available and	No	Not regulated advice because simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make does not involve ad-

(A) Website with generic information without filtering		
(1) Example	header Is there a personal recommendation?	header Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>the likely risks that may attach to each, the benefits of diversification and the different types of investment strategies used in the market. The information does not have a bias towards a particular type of investment, strategy or asset allocation. There is no interactivity.</p> <p>The website provides lists of <i>investments</i> for purchase without additional comment (but has links to the relevant disclosure material for the individual products).</p>		<p>Is this regulated advice for someone other than a firm with an appropriate authorisation?</p> <p>vising on investments (see PERG 8.28.2G).</p>

(B) Website without filtering but which classifies the available products		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>In each example the categorisation by <i>Firm B</i> is not interactive. The investments are not displayed or filtered in accordance with information input by the customer. The ranking is set out in the way it would be in a hard copy document.</p>		
<p>(1) <i>Firm B</i> ranks the products it sells into risk categories. One set of categories could be Low Risk, Low-Medium Risk, Medium Risk, Medium-High Risk and High Risk. <i>Firm B</i> allocates each investment using its own opinion on the level of risk of each product (i.e. it is self-generated and not drawn directly from each product's disclosure material). For example a list of funds' riskiness based on the <i>firm's</i> analysis and metrics.</p> <p>The website also has material elsewhere explaining investment risk and material to help customers self-determine the level of risk they are willing and able to take. Each risk category description includes notional customer attitudes, the types of investments that may be found within funds/portfolios matching this risk level and also historic factual data on the volatility of such investments.</p>	<p>Not a <i>personal recommendation</i>.</p> <p>The recommendation is not presented as suitable for the customer or based on a consideration of their personal circumstances. The customer reads both sets of information (list of products and explanatory material) and makes any investment decision on that basis.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice.</p> <p>Please see the reasons in PERG 8.30A.14G.</p> <p>Although that <i>guidance</i> refers to an Internet-based filtering process, this example (B1) is also based on value judgments about the relative merit of specific <i>investments</i> given to someone interested in buying or selling them.</p> <p>As explained in PERG 8.30A.14G(6) classifying products based on risk categories need not be regulated advice outside the sales context.</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(B) Website without filtering but which classifies the available products</p> <p>Customers are prompted to read the risk category descriptions and to use this material to think about which category best fits their circumstances.</p> <p>(2) <i>Firm B</i> classifies the products it sells by reference to a number of factors:</p> <ul style="list-style-type: none"> ●Riskiness, as in example (B1). ●High-level investment objectives, for example capital growth, income, or a balance of both. ●Whether the <i>investments</i> are designed for long- or short-term investment. <p>For example, each fund may have three boxes next to it on the website. One box has a riskiness rating. One is about the investment objectives. The other is about whether it is designed for long- or short-term investment.</p> <p>There is material elsewhere on the website to help customers self-determine what their investment objectives should be.</p> <p>Each customer that uses the website sees the same information. The groups and investment objectives do not change based on information that the customer has provided to the <i>firm</i>.</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (B1).</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>
<p>(3) Same as example (B2), except that the products are manufactured and issued by the <i>firm</i> itself and the website is describing the specific investment objectives for those products.</p>	<p>No</p>	<p>May not be regulated advice, for the reasons in PERG 8.30A.12G.</p>
<p>(4) <i>Firm B</i> gives each fund it lists a star rating based on whether the fund is good value. The star rating is supplied by an external unconnected party and does not reflect past performance. The rating is not exclusive to <i>Firm B</i></p>	<p>Even if this involves regulated advice under column (3) of this example, it is not a <i>personal recommendation</i>, for the same reason as in example B1.</p>	<p>If the <i>firm</i>:</p> <ul style="list-style-type: none"> (a) is not providing its 'self-generated assessment of riskiness'; (b) is only providing the star rating supplied by a third party; and (c) is not endorsing the rating;

(B) Website without filtering but which classifies the available products		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>and is widely used in the industry. This might be something like the Morningstar Analysts' Rating.</p> <p>(5) <i>Firm B</i> gives each fund it lists a star rating based on whether it thinks that the fund is good value. <i>Firm B</i> uses skill and expertise in putting together the ranking by, for example, adjusting figures from the product providers to take into account the different ways that the product providers calculate growth and the different reporting periods and by taking into account management charges.</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example B1.</p>	<p>the <i>firm</i> is, depending on the circumstances, unlikely to be giving regulated advice. It will only be giving information.</p> <p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice. The term 'good value' is itself implicit advice on the merits of buying.</p> <p>In addition, the reason in example (B1) applies to this example too. Good value is a strong example of a classification factor based on judgment and skill rather than simple objective facts.</p>

(C) Website with pop-up boxes		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>Same as example (A). In addition the website has pop-up boxes that come up when the customer picks an <i>investment</i> to buy. They prompt the customer to think about the customer's circumstances, such as health, financial circumstances and retirement date. The pop-up boxes have links to website material explaining the importance of those factors.</p> <p>(This example may be particularly relevant to firms who wish to offer pension related products without a <i>personal recommendation</i>).</p>	<p>No</p> <p>(The pop-up box only prompts the customer to think about various factors rather than advising the customer based on the customer's personal circumstances.)</p>	<p>Not likely to be regulated advice as long as the pop-up boxes contain objective information on what should be considered when making investment decisions. The reason is the same as for example (A).</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
(D) Website with filtering		
<p><i>Firm D</i> decides to make its list of the investment products it sells easier to search. The website allows the customer to filter products based upon specified factors. Only products that meet the search criteria input by the customer are displayed.</p> <p>(1) The website enables the customer to filter the products by reference to objective factors of the type in section (A) of this table (e.g. 'UK Equity funds').</p>	<p>No</p>	<p>Not likely to be regulated advice as the filtering tool is based on objective factors.</p> <p>The reason is explained in PERG 8.30A.10G.</p>
<p>(2) The filtering is based on riskiness as described in example (B1).</p>	<p>Not a <i>personal recommendation</i>, for the reasons in PERG 8.30B.28G.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>
<p>(3) The filtering is based on a number of factors as described in example (B2).</p>	<p>Not a <i>personal recommendation</i>, for the reasons in example PERG 8.30B.28G.</p> <p>The customer's inputs are filtered in a straightforward way and so the approach in PERG 8.30B.33G (multiple customer inputs means that there is a <i>personal recommendation</i>) does not apply.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>
<p>(4) The filtered results are ranked by the <i>firm</i> manufacturing the investment in accordance with the investment objectives as described in example (B3).</p>	<p>No</p>	<p>Likely not to be regulated advice, for the reasons in example (B3)</p>
<p>(5) The filtered results are ranked in accordance with the ratings of a third party as described in example (B4).</p>	<p>No</p>	<p>Likely not to be regulated advice, for the reasons in example (B4)</p>
<p>(6) The filtered results are ranked based on the <i>firm's</i> judgment about how good value they are, in the way described in example (B5).</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (D2).</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the reasons in example (B5).</p>
<p>(7) Materials including narrative on investment risk alongside a risk profiling tool are used to help educate a customer make a decision on their investment.</p>	<p>No</p>	<p>Not likely to be regulated advice. The reason is the same as in example (A).</p>
<p>(8) A <i>firm</i> runs a <i>personal pension scheme</i>. It provides a filtering process of the type described in example (D4).</p> <p>In addition, it provides an on-line calculation tool that allows its customers to calculate what</p>	<p>No</p>	<p>Likely not to be regulated advice.</p> <p>The contribution calculator is not regulated advice taken on its own. It does not recommend that the customer buy any particular investment.</p>

(D) Website with filtering		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>their regular contribution rates would need to be to meet a level of income that the customer wishes to have in retirement.</p> <p>The tool also allows the customer to calculate their spare income, as in example (F17).</p> <p>The <i>firm</i> makes available information, from a neutral third party source like the <i>MoneyHelper</i>, about suggested contribution rates.</p>		<p>It should also not involve regulated advice taken with the other customer tools in this example, for the following reasons taken together. The contribution calculator just helps the customer decide how much they want to invest and not whether they should invest. The contribution calculator provides additional information about the way that the <i>firm</i> has designed its funds to perform (see PERG 8.30A.12G).</p>

(E) Guided sales and limited advice		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(1) The filtering process is not based solely on the customer's risk appetite and preferences in relation to other factors. The filtering process is also based on facts relating to the customer's life and situation. For example, it might take into account:</p> <ul style="list-style-type: none"> ●the customer's current use of tax wrappers; ●the customer's financial resources and commitments; ●whether the customer is in a long-term relationship and the customer's marital status; ●the customer's age; ●the customer's plans for their family in the short- and long-term (e.g. a new car, work on the family home or school fees); ●what other investments and assets the customer has; and ●the customer's career and retirement plans. <p>(2) <i>Firm E</i> provides advice on a limited straightforward issue at the request of the customer, such as which <i>ISA</i> product to in</p>	<p>This is likely to be a <i>personal recommendation</i>, for the reasons in PERG 8.30B.33G.</p> <p>This is a <i>personal recommendation</i>.</p> <p>This example is not about structured sales. Its purpose is to il-</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, as all the elements in PERG 8.24.2G are met. See PERG 8.30A.15G.</p> <p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, as all the elements in PERG 8.24.2G are met.</p>

(E) Guided sales and limited advice		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>vest in. The wider financial situation is not covered. The advice is limited to the specific issue in hand and the information collected on that basis. The treatment of suitability reflects that narrower customer objective.</p>	<p>illustrate that the answer to example E1 is not based on the view that there is no <i>personal recommendation</i> unless the advice takes into account a wide range of factors. The point in example (E1) is that the range of the factors taken into account is relevant in the specific context of filtered sales, as explained in PERG 8.30B.29G.</p>	

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(1) Towards the end of the tax year, a <i>firm</i> sends a communication to all of its customers who hold <i>investments</i> in their <i>ISA</i> with the <i>firm</i> and who have not used their entire <i>ISA</i> allowance for the year.</p> <p>The <i>firm</i> informs each customer of the amount of unused allowance that they have remaining and when they must transact by to use this allowance. The communication also describes the general tax benefits of the <i>ISA</i> wrapper.</p>	<p>No</p>	<p>Not likely to be regulated advice.</p> <p>The first reason is that, as long as the information is presented neutrally, the information is factual (the amount of the unused <i>ISA</i> allowance and the tax benefits of <i>ISAs</i>).</p> <p>The same answer would apply whether the <i>firm</i> has a single <i>ISA</i> product or several. As long as the information is presented neutrally, the communication does not implicitly recommend that the customer buy an <i>ISA</i> from the <i>firm</i>. There may also be a second reason. If the customer can choose what <i>investments</i> go into the <i>ISA</i> wrapper, the <i>firm</i> will not be advising about a particular <i>investment</i>. Therefore the <i>firm</i> will be giving generic advice rather than regulated advice (see PERG 8.26 (The investment must be a particular investment)).</p>
<p>(2) A <i>firm</i> sends a communication to all of its existing customers who hold a self-invested <i>personal pension scheme</i> with the <i>firm</i> and who have not increased their monthly contribu-</p>	<p>No</p>	<p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information is factual or generic (the benefits of pensions generally).</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>tions over the previous five years.</p> <p>The communication alerts the customers to this fact and includes generic information about the benefits of pension investment and recommends that they contact an adviser to discuss their contribution rate.</p> <p>The <i>firm</i> does not highlight any particular product or pressure the customer into any course of action.</p>	<p>No</p>	<p>A factor that would normally point towards this being regulated advice for someone who is not appropriately authorised is that the communication is made in the context of a possible purchase of a particular <i>investment</i> (e.g. a new payment into the customer’s existing pension fund). However, in this example:</p> <ul style="list-style-type: none"> ● The customer was not asking for advice. Instead the <i>firm</i> has contacted the customer on its own initiative. ● The information is presented neutrally. ● The <i>firm</i> tells the customer to get advice elsewhere and that the <i>firm</i> is not advising the customer. ● The information is general and not detailed. ● The information is about the benefits of pensions generally not the benefit of this particular <i>personal pension scheme</i>. <p>This general context means that a reasonable customer would not think that this was an implicit recommendation.</p> <p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information does not identify any particular <i>investment</i> to be bought or sold.</p> <p>The risk of poor diversification is generic advice about investment strategy and is not linked to particular investments. It does not recommend anyone to buy or sell particular <i>investments</i>.</p>
<p>(3) A <i>firm</i> sends a general communication to its customer base suggesting that they review the products that they hold on a regular basis.</p> <p>This communication explains the general risks of poor diversification and of underperforming products in a way that is not linked to any particular product.</p> <p>The communication also explains certain criteria that customers can look out for e.g. how a fund has performed against its benchmark.</p>	<p>No</p>	<p>This general context means that a reasonable customer would not think that this was an implicit recommendation.</p> <p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information does not identify any particular <i>investment</i> to be bought or sold.</p> <p>The risk of poor diversification is generic advice about investment strategy and is not linked to particular investments. It does not recommend anyone to buy or sell particular <i>investments</i>.</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>It suggests that if customers do have any concerns then they should speak to an adviser.</p> <p>(4) A <i>firm</i> has a number of its customers that it believes are invested in products that do not align with their needs.</p> <p>The <i>firm</i> contacts those customers to inform them that based on a review of the customers' holdings, the <i>firm</i> believes that the products that they hold may not be suitable for their needs. It explains that:</p> <ul style="list-style-type: none"> ●the products the customer holds are poorly diversified; ●the portfolio of products has underperformed compared to the products' benchmarks; and ●the portfolio of products is not suitable for what the <i>firm</i> understands the customer's investment purpose to be (e.g. a high proportion of cash funds in a pension wrapper). <p>The <i>firm</i> invites the customers to contact an adviser with whom the customer may discuss alternative options.</p>	<p>If this does involve regulated advice under column (3) of this example it will also involve a <i>personal recommendation</i>.</p> <p>This is because the communication refers to the customer's individual portfolio and investment purposes. The fact that the communication may in fact be standardised across a large number of customers does not mean that it is not a <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> does not identify either what part of the customer's portfolio should be sold or how the customer should reinvest the proceeds, the <i>firm</i> is giving advice but as that advice does not relate to particular <i>investments</i> it is not regulated advice.</p>
<p>(5) A <i>firm</i> sends a 'markets outlook and investment information' communication to its customers. This includes a summary of the <i>firm's</i> views of markets outlooks together with an appendix setting out high level 'house views' on specific investment products.</p>	<p>Publishing 'house views' would not, in itself, normally be regarded as a <i>personal recommendation</i>.</p>	<p>The markets outlook part of the communication is not likely to be regulated advice taken on its own.</p>
<p>This information is sent to customers on a general basis. It is not targeted on the basis that the customers hold specific products which are covered in the appendix.</p>	<p>The communication is not addressed to a <i>person</i> as such but rather to the <i>firm's</i> entire customer base. It is not therefore presented as suitable for a particular <i>person</i> and is not based on a consideration of the circumstances of a particular <i>person</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, the house view appendix is likely to be regulated advice, as it is about the merits of specific identified products. All the elements in PERG 8.24.2G are met.</p>
<p>(6) A <i>firm</i> makes the communication in example (F5) avail-</p>	<p>The <i>firm</i> has incorporated that communication into its <i>personal</i></p>	<p>If the <i>firm</i> is not appropriately authorised, this will be regu-</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
able to a customer and later goes on to make a <i>personal recommendation</i> to that customer, basing that recommendation in part on the communication.	<i>recommendation</i> so it forms part of that <i>personal recommendation</i> .	lated advice, as all the elements in PERG 8.24.2G are met.
(7) A <i>firm</i> advises on <i>personal pension schemes</i> . It has a list of 'Best Buy' funds for investors with different risk appetites in which its pension customers can invest. It takes a fund off that list because of persistent underperformance and then replaces the fund on its list with an alternative fund. It writes to each of its customers who have invested in that fund telling them that it has done this.	This is a <i>personal recommendation</i> , for the reason in PERG 8.30B.9G(2).	If the <i>firm</i> is not appropriately authorised, this is regulated advice for the reasons in example (B5).
(8) A <i>firm</i> regularly publishes a newsletter on its website which among other things contains its most recent 'Best Buy' list of funds, including details of which funds have come on and off the list. It sends the list to its customers, who may include customers who have invested in those funds. In contrast to example (F7), the <i>firm</i> does not send the newsletter under cover of an email or letter that links the revised 'Best Buy' list to the customer's circumstances.	This is not a <i>personal recommendation</i> . A recommendation included in a newsletter available to the general public does not become a <i>personal recommendation</i> just because some of the people who read it are existing customers affected by its recommendation. A customer reading it would not think that it addresses their personal circumstances.	If the <i>firm</i> is not appropriately authorised, this is regulated advice for the reasons in example (B5).
(9)(a) A <i>firm</i> (<i>firm</i> F) increases the annual management charge for a fund it manages. It informs investors in the fund that it has done so. A distributor (<i>firm</i> G) also sends a letter to its customers who hold this fund to inform them of the change. No other information is included in either communication.	No	Neither <i>firm</i> F nor <i>firm</i> G gives regulated advice by telling the customers of the change in management charges. They are giving information about the terms of the fund of the type described in PERG 8.28.3G.
(b) <i>Firm</i> G decides to remove the fund from its 'Best Buy' list.	If this does involve regulated advice under column (3) of this ex-	<i>Firm</i> G does not necessarily give regulated advice. Whether or

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>It tells its customers it has done so in the letter informing them of the increase in the charge.</p>	<p>ample it is likely also to involve a <i>personal recommendation</i>.</p>	<p>not there is a suggestion that the customer should sell any part of their holding in the fund would depend on the wording of the letter and the basis on which the 'Best Buy' products are selected by the <i>firm</i>.</p>
<p>(10) A customer is speaking with a <i>firm</i>. The customer tells the <i>firm</i> that they have a number of small <i>personal pension scheme</i> pots with a range of providers that they would like to consolidate into a single <i>personal pension scheme</i> with the <i>firm</i>.</p> <p>The <i>firm</i> informs the customer that it is possible to consolidate pensions and that this can be done through the <i>firm</i> or another provider. The <i>firm</i> tells the customer that this might make it easier for the customer to consider their pension holistically. However the <i>firm</i> also tells the customer that they should take advice from a financial adviser beforehand as the adviser will be able to consider whether any existing pensions have valuable benefits that could be lost if transferred.</p>	<p>No</p>	<p>Consolidating <i>personal pension scheme</i> pots involves <i>buying and selling investments</i>.</p> <p>This is similar to example (F2) as the information is factual or generic (the benefits of consolidating pensions generally). It is different as the communication is made in the context of an individual discussion with a single customer.</p> <p>However although the context of the communication is not quite the same, the answer is the same as it is for the example in (F2) as long as it is clear to the customer that they are not getting advice about whether to consolidate.</p>
<p>(11) A customer contacts a <i>firm</i> to purchase a specific investment fund from the <i>firm</i> on an execution- only basis. Over the course of their discussions with the <i>firm</i>, the customer mentions that they are purchasing the product because they would like to receive an income from it. However the fund in question has been designed for growth and all income is re-invested.</p> <p>The <i>firm</i> informs the customer that the fund is an accumulation fund and does not provide any income. The <i>firm</i> further informs the customer that the customer can proceed with the</p>	<p>No</p>	<p>This will normally not be regulated advice.</p> <p>As explained in PERG 8.28.3G, an explanation of the terms of an investment need not be regulated advice.</p> <p>The fact that the <i>firm</i> gives the information pre-emptively should not change this.</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>transaction if the customer wishes or the <i>firm</i> can provide the customer with information about the income funds that the <i>firm</i> offers.</p> <p>(12) A customer over the age of 55 contacts a <i>firm</i> because they would like to take out an annuity with the <i>firm</i>. However they only have a very small <i>personal pension scheme</i> fund which will only generate an annuity income of a few pounds a month. In the <i>firm's</i> opinion this means that the transaction would not be a worthwhile thing to do.</p> <p>The <i>firm</i> tells the customer how much income an annuity bought with the customer's fund is likely to generate. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity.</p>	No	<p>The <i>firm</i> does not identify any particular <i>investment</i> that the customer should buy. This aspect of what the <i>firm</i> says should not be regulated advice.</p> <p>The next question is whether the <i>firm</i> is giving the customer regulated advice not to buy the annuity.</p> <p>It is likely that this will not be regulated advice if the <i>firm</i> tells the customer that they should not buy the annuity but makes it clear that this is not because this particular annuity is unsuitable but because it is likely that it will not be worthwhile for the customer to buy any annuity issued by any issuer. It is not regulated advice because it is generic advice rather than advice about a specific <i>investment</i>, as described in PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment)).</p> <p>The <i>firm</i> will also not give regulated advice in these circumstances if it tells the customer that it will not sell an annuity to the customer. The <i>FCA</i> thinks that the definition of <i>advising on investments (except P2P agreements)</i> should not be interpreted in such a way that would require a <i>firm</i> to apply to include this <i>regulated activity</i> in its <i>permission</i> in order to turn down business it does not want to carry out. Refusing to do business with someone is not consistent with an advisory relationship with them.</p>
<p>(13) The <i>firm</i> in example (F12) also gives the customer alternative options, such as taking the</p>	No	<p>The answer in example (F12) applies. Presenting the range of alternative options in a neutral</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>whole amount in cash. The <i>firm</i> explains the effect of each option and signposts sources of information on them. The <i>firm</i> includes taking advice as one of the options. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>		<p>way should not involve regulated advice.</p>
<p>(14) A customer with a short life expectancy (due to ill health) is seeking to buy from a <i>firm</i> a single life one-year guaranteed annuity with their <i>personal pension scheme</i> fund monies which is likely to provide very poor value for money.</p> <p>The <i>firm</i> tells the customer how much income their pension policy is likely to pay and that the customer may be able to take out a tax-free sum from the pension fund. The <i>firm</i> explains the other options and signposts sources of information on them, including an option to take advice. The <i>firm</i> explains the effect of each option. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>	<p>The <i>firm</i> may give a <i>personal recommendation</i> if it recommends an alternative option.</p> <p>The answers in examples (F12) and (F13) apply.</p>	<p>If the <i>firm</i> is not appropriately authorised, it may give regulated advice if it recommends an alternative option.</p> <p>The answers in examples (F12) and (F13) apply.</p>
<p>(15) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer approaches the <i>firm</i> to draw out some money from that <i>personal pension scheme</i>. The <i>firm</i> wishes to draw the customer's attention to the tax consequences of what the customer wants to do. For example:</p> <p>(a) The customer wants to cash in their pension fund in one go, facing a significant tax bill</p>	<p>No</p>	<p>An explanation of the tax consequences of a proposed transaction need not be regulated advice, in the same way that, as explained in PERG 8.29.5G, advice on how to structure a transaction to comply with taxation requirements need not be.</p> <p>A <i>firm</i> does not necessarily give advice by bringing an obviously relevant fact to the attention of a customer who wants to buy an investment, even if that fact</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>when a more tax-effective option is available.</p> <p>(b) The customer wants to withdraw some of their uncrystallised funds pension as a lump sum (UFPLS). Doing that reduces their 'Money Purchase Annual Allowance'. On the other hand a single lump sum payment will not reduce that allowance.</p> <p>(c) The customer wants to take a full lump sum from an 'old style' pension which does not allow for tax-free redemptions. The more tax-efficient option would be to transfer to a scheme that allows such redemptions.</p> <p>In each case, the <i>firm</i> explains the other options and signposts sources of information on them, including an option to take advice. The <i>firm</i> explains the effect of each option and leaves the customer to decide what to do. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>	<p>The <i>firm</i> may give a <i>personal recommendation</i> if it recommends an alternative option.</p>	<p>shows that the purchase would be a poor investment, as long as this information is presented neutrally and the <i>firm</i> also mentions any other relevant facts.</p> <p>This is the case even if the customer chooses to go ahead with one of the options described by the <i>firm</i> and the <i>firm</i> carries out the transaction with the customer.</p>
<p>(16) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer tells the <i>firm</i> that they wish to draw down part of that <i>personal pension scheme</i> as a lump sum and then set up the rest as income.</p> <p>The customer does not specify the amount that they wish to draw down. The customer's current <i>personal pension scheme</i> product also does not offer the facility to set up an income.</p> <p>The <i>firm</i> informs the customer that the customer is able to draw down up to 25% of their pension pot tax free. The <i>firm</i></p>	<p>No</p>	<p>If the <i>firm</i> is not appropriately authorised, it may give regulated advice if it recommends an alternative option.</p> <p>This will generally not be regulated advice.</p> <p>As explained in PERG 8.29.5G, an explanation of the terms of an investment or of how to meet tax requirements need not be regulated advice.</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>further informs the customer that if they wish to set up a regular income they will need to transfer to a different <i>personal pension scheme</i> product which allows this. The <i>firm</i> tells the customer that this can either be done through the <i>firm</i> or with another provider. The <i>firm</i> does not highlight any particular product or pressure the customer into any course of action.</p> <p>(17) A <i>firm</i> offers an online affordability calculator that helps a customer determine what their surplus income is once all their outgoings are taken into consideration. The website suggests a list of possible outgoings but allows the customer to add figures for others.</p> <p>There is a link to material that gives guidance on what a prudent size of someone’s surplus income could be, taking into account both outgoings and payments for <i>investments</i>. The website suggests that the consumer takes this into account when deciding whether the <i>investment</i> is affordable for them.</p> <p>The calculator has its own page on the website which can be linked to using a ribbon at the top of the page from which the <i>firm</i> sells its products.</p>	<p>No</p>	<p>This will generally not be regulated advice because:</p> <ul style="list-style-type: none"> ● the advice about a prudent level of surplus income is not regulated advice on its own; ● the customer makes up their own mind what they can afford; ● the information that the customer inputs is purely factual; ● the calculator is straightforward as it just adds up the outgoings; and ● the calculator is in effect a method of organising information that the customer already has.
<p>(18) A <i>firm</i> operates a platform through which customers can purchase a range of funds from different providers.</p> <p>Its website includes a ‘Best Buys’ list of products which the <i>firm</i> believes to be of particularly high quality. The list appears on a side bar.</p> <p>This information appears in a consistent way to all users of the website.</p>	<p>Publishing a list of ‘best products’ or ‘funds of the month’ would not, in itself, normally be regarded as a <i>personal recommendation</i>:</p> <ul style="list-style-type: none"> ● As with example (F5), the communication is not personalised. ● As the information is provided on a public page of a website and appears in a consistent way to all users of the website, it can be seen as issued exclusively to the public. 	<p>If the <i>firm</i> is not appropriately authorised, the ‘Best Buys’ list is likely to be regulated advice, for the same reason as in example (B5).</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(19) A <i>firm</i> operates a platform through which customers can purchase a range of funds from different providers.</p> <p>The website includes a banner at the top which includes details of sponsored products and other offers where the <i>firm</i> has managed to negotiate a discount to product charges.</p> <p>This information appears in a consistent way to all users of the website.</p>	No	<p>Providing a list of products for which the <i>firm</i> has negotiated a discount is not, by itself, regulated advice, in the same way that an explanation of the terms of an <i>investment</i> is not (as explained in PERG 8.28.3G).</p>
<p>(20) <i>Firm F</i> is a <i>personal pension scheme</i> provider. It provides a number of products into which pensioners can invest pension monies on retirement.</p> <p>It has a product specially designed for investors who cannot or will not take advice on what to do with their pension monies. The sales literature specifically explains this.</p>	No	<p><i>Firm F</i> will generally not be giving regulated advice, for the same reason as in PERG 8.30A.12G.</p>
<p>A distributor (<i>Firm G</i>) sets out this information alongside these products on its platform.</p>		<p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in PERG 8.30A.13G.</p>
<p>(21) A product provider (<i>Firm F</i>) designs its products for a particular target market, which may be the same for each product or different.</p> <p>The target market is defined by reference to high level characteristics such as investment duration, risk profile and investment objectives.</p>	No	<p><i>Firm F</i> will generally not be giving regulated advice, for similar reasons to the ones in examples (D4) and (F20).</p>
<p>A distributor (<i>Firm G</i>) sets out this information alongside these products on its platform.</p>	No	<p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in example (F20).</p>
<p>(22)(a) A <i>firm</i> runs a <i>personal pension scheme</i>. The <i>firm</i> has a range of <i>lifestyling options</i> for investors with different intentions at retirement. For example, those options could be ones designed for investors who want to buy an annuity,</p>	No	<p>This will generally not be regulated advice, for the same reasons as in example (F21).</p> <p>If the <i>firm</i> uses sales material of the kind described in paragraphs (b) or (c) of example (F23) there will generally not be regulated advice for the</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>draw down income and take the sum in cash. The <i>firm</i> has a website through which a customer can invest in the scheme and choose which of these options they wish to be applied.</p> <p>(b) The <i>firm</i> currently runs the scheme based on a single life-style investment strategy, based on moving customer into cash over time in advance of an expected retirement date. The <i>firm</i> writes to investors in the scheme informing them of the new options in (a).</p>	No	<p>reasons described in those paragraphs.</p> <p>This example is different from the one in paragraph (a) of this example as the information is sent to customers who already hold investments in the scheme and the customers may be prompted to consider whether they should adjust their investment.</p> <p>However this need not be regulated advice, for the reasons in paragraph (a) of this example. A description of investment objectives does not become regulated advice just because the description is given to customers for whom the information is particularly relevant.</p>
<p>(23) A <i>firm</i> runs a <i>personal pension scheme</i>. It has a number of funds within that scheme designed to run different levels of risk. A customer has been in one of the higher risk funds but is now coming up to retirement. This means that the customer may be in an unsuitable fund: a lower risk fund could be more appropriate in these circumstances.</p> <p>In all the scenarios in this example (F23) the <i>firm</i> does not pressure the customer into any course of action.</p>	No	<p>This will generally not be regulated advice, for the first of the reasons in example (F1).</p>
<p>(a) The <i>firm</i> reminds the customer that they need to keep their funds under review and points the customer to literature that explains what factors an investor should think about at different stages of their working life leading up to retirement. For example it might say:</p>		

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>●During the first part of an investor’s working life an investor will generally look for capital growth and as a result invest in higher risk funds.</p> <p>●When moving towards retirement an investor generally looks for capital protection and as a result will generally invest in lower risk funds.</p>		
<p>(b) The <i>firm</i> combines the information in (a) with information about the investment strategy of the different funds in its scheme and how they are designed to work through a typical lifecycle of a customer. This information is contained in standardised written information, either in hard copy or online.</p>	No	<p>This will generally not be regulated advice, because describing the investment objectives of a fund is not itself regulated advice (see PERG 8.30A.12G).</p>
<p>(c) The <i>firm</i> has case studies to help their investors decide the funds into which they are to invest and the amount of their contribution. The examples are based on age, salary, attitude to risk and intentions about what they will do with the pension fund on retirement.</p>	No	<p>This will generally not be regulated advice. It involves presentation of the information in (b) and the contribution calculator in example (D8) in a different format and so the same answer should apply.</p>
<p>(d) The <i>firm</i> gives the information in (a) to (c) to the customer on a one-to-one basis.</p>	See the answer to example (F24)	See the answer to example (F24)
<p>(e) The <i>firm</i> tells the customer that it thinks that their present fund is unsuitable given how near to retirement they are and that they should get out of it and go into another fund.</p>	This is a <i>personal recommendation</i> to sell.	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice to sell.</p>
<p>(24) A <i>firm</i> sells <i>investments</i> using the processes described in examples (D2) to (D8) except that the filtering process takes place face-to-face or over the telephone and is carried out by the <i>firm’s</i> representative asking questions.</p>	Where examples (D2) to (D8) say that there is regulated advice under the definition in PERG 8.24.1G (definition of advice that does not refer to a <i>personal recommendation</i>) but no <i>personal recommendation</i> , there may be a <i>personal recommendation</i> in this example (F24).	<p>The one-to-one format is more likely to lead a customer to think that they have received advice on the merits of investing in a particular <i>investment</i>, both because of the more personal nature of the interaction between the <i>firm</i> and customer and because what happens during the conversa</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(25) A <i>firm</i> operates funds. It classifies its funds on the basis of riskiness as described in example (D4). A customer completes an online questionnaire on their attitude to risk. The <i>firm</i> follows this up with a telephone call to provide details of funds matching the customer's risk tolerance as established by the questionnaire.</p> <p>The only subject discussed during the telephone call is the terms and conditions of the fund. The customer can agree to buy the fund during the conversation although the formal subscription document will be sent by post later. The <i>firm</i> does not discuss the personal circumstances of the customer. The <i>firm</i> does pressure the customer into any course of action.</p>	<p>For the reasons in column (3) of this example, it is more likely that a customer will think that an <i>investment</i> identified by the process is being presented as suitable for them or based on a consideration of their circumstances.</p> <p>Also, an online filtering process of the type in PERG 8.30B.28G is different from the filtering process in this example as the customer can:</p> <ul style="list-style-type: none"> •stop and start the online process at any time; •repeat it when and as often as they like; and •put in different figures or answers either to check the result of different scenarios or just out of curiosity. <p>No</p>	<p>tion cannot always be as tightly controlled as an online process. The factors in PERG 8.30A.8G are relevant to what impression the customer is given.</p> <p>In principle (as with example (D4)), if the scope of the conversation is narrowly restricted in the way described in the example, the <i>firm</i> should not be giving regulated advice as long as it is made clear to the customer that no advice is being given.</p> <p>However, the answer in example (F24) applies. The answer in a particular case depends on exactly what is said and the surrounding circumstances, as described in PERG 8.30A.8G.</p>
<p>(26) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer takes tax-free cash from that <i>personal pension scheme</i> at 55 and enters into drawdown with the remainder</p>	<p>No</p>	<p>A <i>firm</i> that is not appropriately authorised is not likely to give regulated advice merely by prompting a customer to think about options, for the first reason in example (F1).</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>of their pot in cash. The <i>firm</i> has provided them with additional material about options available but the money remains in cash. The <i>firm</i> prompts the customer to consider basic questions about what they want to do upon eventual retirement, and describes the different options the customer can take with their pension pot. The <i>firm</i> does not highlight any particular option, does not pressure the customer into any course of action and does not repeatedly contact the customer.</p>		<p>Describing the different options need not be regulated advice, because describing the investment objectives of a fund is not itself regulated advice (see PERG 8.30A.12G).</p>
<p>(27) The <i>firm</i> in example (F26) tells the customer that it has selected the options presented to the customer by selecting those relevant to people with a similar age and risk profile as the customer.</p>	<p>If there is regulated advice it is likely that the <i>firm</i> will be giving a <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, this may involve regulated advice.</p> <p>It may be reasonable for a customer to take the material as implicit advice that the identified products are suitable for them.</p>
<p>(28) An <i>unauthorised person</i> that is a professional services business (F) has a customer approaching retirement. The customer wants to decide whether to use their <i>personal pension scheme</i> fund to buy an annuity. F advises the customer whether or not this is a good idea. This advice is given about annuities generally and not a particular annuity.</p> <p>If F advises that buying an annuity is a good idea, it does not advise on what annuity to buy.</p> <p>If F advises that buying one would be a bad idea it does not advise on the alternative options and in particular does not recommend whether the customer should do nothing or should crystallise or realise their benefits in some other way.</p> <p>F does not itself sell <i>investments</i> and the customer will go to another adviser if they de</p>	<p>No</p>	<p>This is not likely to be regulated advice. It is generic advice of the type described in PERG 8.26.4G.</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>side to buy an annuity or an alternative product.</p> <p>(29) A <i>firm</i> advises a customer whether to exercise an option under their <i>personal pension scheme</i> to take a lump sum or whether they should leave their <i>personal pension scheme</i> pot untouched for the moment.</p> <p>(30) A <i>firm</i> makes available an online questionnaire to potential customers. It contains questions on their:</p> <ul style="list-style-type: none"> •personal circumstances; •investment knowledge; •personal investment objectives; •trading experience; and •financial circumstances, with a view to establishing what level of losses they can bear. <p>On the basis of the information provided, an algorithm creates a suggested model portfolio.</p> <p>(31) A <i>firm</i> offers <i>pathway investments</i> in accordance with the requirements in COBS 19.10.14R to 19.10.21R.</p> <p>The <i>firm</i> interacts with the customer online or in writing.</p> <p>At step 3 the <i>firm</i> offers the customer a <i>pathway investment</i> that it manufactures.</p> <p>(32) Same as (31) except the <i>firm</i> offers the customer a <i>pathway investment</i> manufactured by another <i>firm</i> and available for investment in the <i>retail client's</i> drawdown fund.</p> <p>(33) Same as (31) except that a <i>firm</i> offers <i>pathway investments</i> that have been designed for <i>retail clients</i> in various age groups. The <i>firm</i> offers different <i>pathway investments</i> to <i>retail clients</i> who select the same <i>investment pathway</i> option, based on the age of each <i>retail client</i>.</p>	<p>This is a <i>personal recommendation</i>.</p> <p>If the <i>firm</i> gives regulated advice under column (3) of this example, this is a <i>personal recommendation</i> (see PERG 8.30B.35G).</p> <p>No</p> <p>No</p> <p>No, so long as the <i>firm</i> is merely describing the design and investment objectives of the investment and is not presenting the investment as suitable for the <i>retail client</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice (see Q16 and Q17 in PERG 12.3 (Rights under a <i>personal pension scheme</i>)).</p> <p>If the <i>firm</i> is not appropriately authorised, this is regulated advice (see PERG 8.30A.15G).</p> <p>If however the customer just receives a suggestion which lists different asset classes or industries, given in percentages, without naming any specific <i>investments</i>, the <i>firm</i> is giving unregulated generic advice.</p> <p>Essentially this process involves the <i>firm</i> filtering its investment products based on the investment objectives of the fund. This will generally not be regulated advice for the reasons in PERG 8.30A.12G.</p> <p>This process amounts to filtering as described in example F(31). Therefore, the <i>firm</i> will generally not be giving regulated advice, for the reasons in PERG 8.30A.13G.</p> <p>This process involves the <i>firm</i> filtering its investment products based on the investment objectives and target age range of the fund. This will generally not be regulated advice for the reasons in PERG 8.30A.12G, so long as the <i>firm</i> is merely describing the design and investment objectives of the invest-</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>The <i>firm</i> informs the <i>retail client</i> that this is the <i>pathway investment</i> for the relevant <i>investment pathway</i> option and it has been designed for people in the relevant age range. The <i>firm</i> makes clear to the <i>retail client</i> that it is describing the <i>pathway investment's</i> design and investment objectives, and is not presenting the <i>pathway investment</i> as suitable for the <i>retail client</i>.</p>		<p>ment and is not presenting the investment as suitable for the <i>retail client</i>.</p>
<p>(34) A <i>firm</i> offers <i>pathway investments</i> in accordance with the requirements in COBS 19.10.14R to 19.10.21R.</p> <p>The <i>firm</i> interacts with the customer on the telephone or face to face.</p> <p>At step 3 the <i>firm</i> offers the customer a <i>pathway investment</i> that it manufactures.</p>	<p>See the answer to example F(24)</p>	<p>See the answer to example F(24)</p>
<p>(35) Same as (34) except that a <i>firm</i> offers the customer a <i>pathway investment</i> manufactured by another <i>firm</i> and available for investment in the <i>retail client's</i> drawdown fund.</p>	<p>See the answer to example F(24)</p>	<p>See the answer to example F(24)</p>
<p>(36) A <i>firm</i> gives a cash warning to a <i>retail client</i> in accordance with the requirements in COBS 19.10.38R and the <i>guidance</i> in COBS 19.10.39G, or in accordance with the requirements in COBS 19.12.31R and the <i>guidance</i> in COBS 19.12.32G.</p>	<p>No. This is not a recommendation to <i>buy, sell, subscribe for, exchange, redeem, hold or underwrite</i> a particular <i>investment</i>; or exercise or not exercise any right conferred by such an investment to <i>buy, sell, subscribe for, exchange or redeem</i> such an <i>investment</i>.</p>	<p>No. This is not advice on the merits of <i>buying, holding or selling</i> a particular <i>investment</i>.</p>

Chapter 9

Meaning of open-ended investment company

9.1 Application and Purpose

Application

- 9.1.1 **G** This *guidance* applies to *persons* who need to know whether a *body corporate* is an *open-ended investment company* as defined in section 236 of the *Act* (Open-ended investment companies). This would mean that it is a *collective investment scheme*.

Purpose

- 9.1.2 **G** The purpose of this *guidance* is to outline the circumstances in which a *body corporate* will be an *open-ended investment company* and, in so doing, to:
- (1) give an overview of the definition (see ■ PERG 9.3 (The definition)) and describe its three main elements:
 - (a) an *open-ended investment company* must be a *collective investment scheme* (see ■ PERG 9.4 (Collective investment scheme (section 235 of the Act)));
 - (b) it must satisfy the 'property' condition in section 236(2) of the *Act* (see ■ PERG 9.5 (The property condition (section 236(2) of the Act))); and
 - (c) it must satisfy the '*investment*' condition in section 236(3) of the *Act* (see ■ PERG 9.6 (The *investment* condition (section 236(3) of the Act): general) to ■ PERG 9.9 (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act))); and
 - (2) outline the implications for a *body corporate* if it does, or does not, fall within the definition of an *open-ended investment company* (see ■ PERG 9.10 (Significance of being an open-ended investment company)).

Effect of guidance

- 9.1.3 **G** This *guidance* is issued under section 139A of the *Act* (Guidance). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* in the circumstances it contemplates, the *FCA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates. Rights conferred on third parties cannot be affected by *guidance* given by the *FCA*. This *guidance* represents the *FCA's* view, and does not bind the courts. For example, it would not bind the courts in relation to an action for damages brought by a *private person* for breach of a *rule* (see section 138D of the *Act* (Action for damages)), or in relation to the enforceability of a contract where there has been a breach of

the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (Enforceability of agreements)). A *person* may need to seek his own legal advice. Anyone reading this *guidance* should refer to the *Act* and to the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*.

Other guidance that may be relevant

- 9.1.4 G The only kind of *body corporate* of an open-ended kind that may currently be formed under the law of the *United Kingdom* is one that is authorised by the *FCA*. A *person* intending to form an open-ended *body corporate* that has its head office in Great Britain should refer to the Open-ended Investment Companies Regulations 2001 (SI 2001/1228). *Bodies corporate* formed under these Regulations are referred to in the *Handbook* as *investment companies with variable capital* (or ' *ICVCs* '). ■ COLL 2 (Authorised fund applications) contains *rules* and *guidance* on forming such *bodies corporate*.

- 9.1.5 G [deleted]

- 9.1.6 G [deleted]

9.2 Introduction

- 9.2.1** **G** The nature of many *bodies corporate* means that they will, in most if not all circumstances, come within the definition of *collective investment scheme* in section 235(1) to (3) of the Act (Collective investment schemes). The property concerned will generally be managed as a whole under the control of the directors of the *body corporate* or some other *person* for the purpose of running its business. The idea underlying the investment is that the investors will participate in or receive profits or income arising from the operation of the *body corporate's* business.
- 9.2.2** **G** However, there are a number of exclusions that apply to prevent certain arrangements from being a *collective investment scheme*. These are in the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme). The exclusion in paragraph 21 of the Schedule to that Order is of particular significance for *bodies corporate*. It excludes from being a *collective investment scheme* certain specified *bodies corporate* (such as *building societies* and *friendly societies*) as well as any other *body corporate* except a *limited liability partnership* or an *open-ended investment company*. This means that if a *body corporate* is an *open-ended investment company* it will not be excluded from the definition in section 235(1) to (3) of the Act. So it will be a *collective investment scheme*. Of course, it may be that other exclusions in the Schedule to the Order are available but this will depend on the circumstances of a particular *body corporate* (see ■ PERG 9.4.5 G (Collective investment scheme (section 235 of the Act))).
- 9.2.3** **G** Certain consequences flow according to whether or not a *body corporate* is an *open-ended investment company*. Different requirements apply to the marketing of the shares or securities issued by a *body corporate* which is an *open-ended investment company*, compared with one that is not (see ■ PERG 9.10.1 G to ■ PERG 9.10.6 G (Marketing of shares or securities issued by a body corporate)). In addition, the *regulated activities* that require *permission* may differ (see ■ PERG 9.10.7 G to ■ PERG 9.10.10 G (Implications for regulated activities)).
- 9.2.4** **G** *Guidance* on the application of the definition in particular circumstances is in ■ PERG 9.11 (Frequently asked questions)).

9.3 The definition

- 9.3.1** **G** For a *body corporate* to be an *open-ended investment company*, as defined in section 236(1) of the Act:
- (1) it must be a *collective investment scheme*;
 - (2) it must satisfy the property condition in section 236(2); and
 - (3) it must satisfy the investment condition in section 236(3).
- 9.3.2** **G** Each of these aspects of the definition is considered in greater detail in **■ PERG 9.4** (Collective investment scheme (section 235 of the Act)) to **■ PERG 9.9** (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act)). Although the definition has a number of elements, the *FCA* considers that it requires an overall view to be taken of the *body corporate*. This is of particular importance in relation to the investment condition (see **■ PERG 9.6.3 G** and **■ PERG 9.6.4 G** (The investment condition (section 236(3) of the Act: general))).
- 9.3.3** **G** An *open-ended investment company* may be described, in general terms, as a *body corporate*, most or all of the *shares* in, or *securities* of, which can be realised within a reasonable period. Realisation will typically involve the redemption or repurchase of shares in, or securities of, the *body corporate*. This realisation must be on the basis of the value of the property that the *body corporate* holds (that is, the net asset value).
- 9.3.4** **G** In the *FCA's* view, all of the elements of the definition are clearly objective tests. In applying the definition to any particular case, a *person* would need to have regard to all the circumstances. This includes any changes in the way that the *body corporate* operates.
- 9.3.5** **G** The *FCA* understands that the aim of the definition in section 236 of the *Act* is to include any *body corporate* which, looked at as a whole, functions as an open-ended investment vehicle. The definition operates against a background that there is a wide range of different circumstances in which any particular *body corporate* can be established and operated. For example, the definition applies to *bodies corporate* wherever they are formed. So, in the application of the definition to different cases, the law applicable to, and the detailed corporate form of, particular *bodies corporate* may differ considerably.

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For a *body corporate* formed outside the *United Kingdom*, there is an additional issue as to how the applicable corporate law and the definition of *open-ended investment company* in the *Act* relate to one another. The *FCA* understands this to operate as follows. The term 'body corporate' is defined in section 417(1) of the *Act* (Interpretation) as including 'a body corporate constituted under the law of a country or territory outside the *United Kingdom*'. So, whether or not any particular overseas person is a body corporate will depend on the law applicable in the country or territory in which it is constituted. But if it is a *body corporate* under that law, the question whether it is an *open-ended investment company* is determined, as a matter of *United Kingdom* law, by the definition in section 236 of the *Act*. This is regardless of whether or not the *body corporate* would be considered to be open-ended under the laws of the country or territory in which it is constituted.

9.4 Collective investment scheme (section 235 of the Act)

9.4.1 **G** The first element of the definition is that *open-ended investment companies* are a corporate form of *collective investment scheme*. This means that they must have the features in section 235 of the *Act*.

9.4.2 **G** Section 235(1) states that a *collective investment scheme* means any arrangements with respect to property of any description. The purpose or effect of the arrangements must be to enable the *persons* taking part in them to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The participants must not have day-to-day control over the management of the property (section 235(2)) and the arrangements must provide:

- (1) for the contributions of the participants and the profits or income to be pooled (section 235(3)(a)); or
- (2) for the property to be managed as a whole by or on behalf of the operator of the scheme (section 235(3)(b)); or
- (3) for both (1) and (2).

9.4.3 **G** In the *FCA's* view, it is the very existence of the *body corporate* that is the *collective investment scheme*. There are a number of statutory references that support this view. For example, it is clear that paragraph 21 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme) is drafted on the basis that it is the *body corporate* itself that is (or would be) the *collective investment scheme*. This provision sets out that no *body corporate* other than an open-ended investment company, a limited liability partnership or certain other types of mutual *body* amounts to a collective investment scheme. So, any particular *body corporate* is either an *open-ended investment company* or it is not. It cannot be both at the same time, although it may change from one to the other over time (see ■ PERG 9.7.5 **G** (The investment condition: the 'reasonable investor') for further *guidance* on this point).

9.4.4 **G** Analysing a typical corporate structure in terms of the definition of a *collective investment scheme*, money will be paid to the *body corporate* in exchange for *shares* or *securities* issued by it. The *body corporate* becomes the beneficial owner of that money in exchange for rights against the legal entity that is the *body corporate*. The *body corporate* then has its own duties

and rights that are distinct from those of the holders of its shares or securities. Such arrangements will, in the *FCA's* view, qualify as arrangements of the kind described in ■ PERG 9.4.2 G. The holders of the *shares* or *securities* in the *body corporate* do not have day-to-day control over the management of the property (as specified in section 235(2) of the *Act*) and the property is managed as a whole by or on behalf of the *body corporate* (as specified in section 235(3) of the *Act*).

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Where a *body corporate* does come within the definition of a *collective investment scheme* in section 235(1) to (3), the only relevant issue is to determine whether or not it is excluded. As ■ PERG 9.2.2 G (Introduction) explains, the exclusions are in the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme). If a *body corporate* satisfies any of the exclusions in paragraphs 1 to 20 of the Schedule to the Order it will not be a *collective investment scheme*. This means that it will not then be necessary to consider whether or not it is an *open-ended investment company*. In any other case, it will be necessary to consider whether the *body corporate* is an *open-ended investment company* to see whether the exclusion in paragraph 21 of the Schedule to the Order (Bodies corporate) for *bodies corporate* other than *open-ended investment companies* and *limited liability partnerships* applies.

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In the *FCA's* view, the question of what constitutes a single scheme in line with section 235(4) of the *Act* does not arise in relation to a *body corporate*. This is simply because the *body corporate* is itself a *collective investment scheme* (and so is a single scheme). Section 235(4) contemplates a 'separate' pooling of parts of the property that is subject to the arrangements referred to in section 235(1). But to analyse a *body corporate* in this way requires looking through its corporate personality and ignoring the legal entity that exists separately from the holders of *shares* or *securities* and their rights. As a corporate entity, it cannot be broken up into component parts in this way. This is so even though a *body corporate* may issue *shares* or *securities* of deferred classes or of classes carrying different rights.

9.5 The property condition (section 236(2) of the Act)

- 9.5.1 **G** If a particular *body corporate* ('BC') comes within the definition of a *collective investment scheme*, the second element in the definition is whether the property to which the scheme relates meets the property condition. This condition is that the property must belong beneficially to, and be managed by or on behalf of, BC. In addition, BC must have as its purpose the investment of its funds to:
- (1) spread investment risk; and
 - (2) give its members the benefit of the results of the management of those funds by or on behalf of BC.
- 9.5.2 **G** The property belonging to BC may be property of any description, including money. For example, the arrangements may relate to real estate, works of art or a particular enterprise or rural activity. It must, of course, be possible to value the property if the requirements of the investment condition concerned with the link to net asset value are to be met (see ■ PERG 9.9 (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act))).
- 9.5.3 **G** The property of the *collective investment scheme* must belong beneficially to BC, although the legal title to it may be held by a third party. However, the holders of shares or securities issued by BC may not have a beneficial interest in that property. In exchange for their contributions, they will only have rights against BC.
- 9.5.4 **G** The purpose of BC will need to be determined bearing in mind its constitutional instruments and any other relevant material: for example, material in a prospectus or offer document or other promotional material. The prevailing law may also be relevant.
- 9.5.5 **G** In the FCA's view, the question of whether funds are invested by BC with the aim of spreading investment risk is not affected by the levels of risk involved in particular investments. What matters for these purposes is that the aim is to spread the risk, whatever it may be. For example, the value of each of BC's investments, if taken separately, might be subject to a high level of risk. However, this would not itself result in BC failing to satisfy the property condition as long as it could be said that the range of different investments demonstrated that the aim was to spread investment risk.

9.6 The investment condition (section 236(3) of the Act): general

9.6.1 **G** If BC comes within the definition of a *collective investment scheme*, the third element in determining whether it is an *open-ended investment company* is whether the 'investment condition' is satisfied. This condition is that, in relation to BC, a reasonable investor would, if he were to participate in the scheme:

- (1) expect that he would be able to realise his investment in the scheme, within a period appearing to him to be reasonable; his investment would be represented, at any given time, by the value of the shares in, or securities of, BC held by him as a participant in the scheme; and
- (2) be satisfied that his investment would be realised on a basis calculated wholly or mainly by reference to the value of the property for which the scheme makes arrangements.

9.6.2 **G** Under the investment condition, the reasonable investor is looking to satisfy two criteria. Both of these are fundamental to his decision to invest. But the thresholds referred to in **■ PERG 9.6.1 G (1)** and **■ PERG 9.6.1 G (2)** are different. In the *FCA's* view, a *person* expects something where he regards it as likely to happen or anticipates that events will turn out in a particular way. A *person* is satisfied of something where he has made up his mind or is persuaded that it is the case. The first of these criteria is referred to in this *guidance* as the 'expectation test' and the second as the 'satisfaction test'.

9.6.3 **G** Section 236(3) of the *Act* states clearly that the investment condition must be met 'in relation to BC'. In the *FCA's* view, this means that the investment condition should not be applied rigidly in relation to specific events such as particular issues of shares or securities or in relation to particular points in time. The requirements of the investment condition must be satisfied in relation to the overall impression of the *body corporate* itself, having regard to all the circumstances.

9.6.4 **G** In the *FCA's* view, and within limits, the investment condition allows for the possibility that a *body corporate* that is an *open-ended investment company* may issue shares or securities with different characteristics. Some shares or securities may clearly satisfy the condition whereas others may not. The *FCA* considers that a reasonable investor contemplating investment in such a *body corporate* may still take the view, looking at the *body corporate* overall, that the investment condition is satisfied. In the *FCA's* view, a *body corporate* issuing a number of different classes of shares or securities on different terms might be expected to satisfy the investment condition where

the overall balance between those that do and those that do not is strongly in favour of those that do satisfy the investment condition. The *FCA* considers that, in any case where there is a genuine and reasonable doubt as to where the balance between the different classes lies, it is very likely that the *body corporate* would not be an *open-ended investment company*.

■ PERG 9.8.8 G (Some relevant factors in applying the 'expectation test') comments further on this aspect of the investment condition in the specific context of the 'expectation test'.

9.6.5

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Certain matters are to be disregarded in determining whether the investment condition is satisfied. Section 236(4) of the *Act* states that, for these purposes, no account is to be taken of any actual or potential redemption or repurchase of *shares* or *securities* under:

- (1) Chapters 3 to 7 of Part 18 of the Companies Act 2006; or
- (2) [deleted]
- (3) [deleted]
- (4) provisions in force in a country or territory which the Treasury has, by order, designated as corresponding provisions (no orders have yet been made).

9.6.6

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[deleted]

9.6.7

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The *FCA*'s views on the following three elements of the investment condition are explained separately:

- (1) the 'reasonable investor' (see ■ PERG 9.7 (The investment condition: the 'reasonable investor'));
- (2) the 'expectation' test (see ■ PERG 9.8 (The investment condition: the 'expectation test' (section 236(3)(a) of the Act))); and
- (3) the 'satisfaction' test (see ■ PERG 9.9 (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act))).

9.7 The investment condition: the 'reasonable investor'

9.7.1 G The investor is specifically a reasonable investor and not just a reasonable *person*. This simply means that the objective standard to be applied is that of the reasonable investor. In all other respects the test is the same as any other objective test applying the standards of the reasonable *person*.

9.7.2 G The characteristics that a reasonable investor can be expected to have will inform the use of judgment required by the 'expectation test' and the 'satisfaction test'. These tests relate to the investor's ability to realise an investment within a reasonable period and to do so on the basis of the net value of its assets. In the *FCA's* view, the characteristics of the reasonable investor include:

- (1) sound judgment based on good sense;
- (2) some knowledge of, and possibly experience in, the field of investment in property of the same kind as that in which the *body corporate* is to invest; and
- (3) some knowledge of the characteristic features of collective investment.

Where investment in a particular *body corporate* is clearly targeted at investors with certain characteristics, the reasonable investor can be assumed to have those characteristics.

9.7.3 G The reasonable investor is a hypothetical investor. The implications of this are that the test does not relate to actual investment by a particular *person* at a particular time or in relation to a particular issue of any class of shares or securities. In the *FCA's* view, what underlies the test is what a reasonable investor would think he was getting into if he were contemplating investment in a particular *body corporate*. In addition, because the investor is hypothetical, the investment condition is capable of operating on a rolling basis over time.

9.7.4 G In practice, the assessment of the nature of a particular *body corporate* will have to be made by applying the definition whenever an *authorised person* proposes to communicate an invitation or inducement to others for them to participate in the *body corporate* by buying shares or securities issued by it.

- 9.7.5** **G** After an initial assessment, however, the *FCA's* view is that subsequent applications of the investment condition could produce a different result, but only if there is a change to the constitution or practice of the *body corporate* which is significant and sustained. For example, this may happen if there is a change in the *body corporate's* published intentions or regular practices. As the Economic Secretary to the Treasury said in parliamentary debate when commenting on the definition, "It is a test that can be applied from time to time to allow for the possibility that a closed-ended company can become open-ended and vice versa, on account of significant changes to the way in which the operation of the company and its constitution are structured and which push the company over the boundary between the two types". (Hansard HC, 5 June 2000 Col 123).
- 9.7.6** **G** Section 236(3) uses the words "the investor would, if he were to participate in the scheme". This is consistent with the fact that the reasonable investor is hypothetical. But applying the test at this early stage makes it clear that there must be objectively justifiable grounds on which the reasonable investor could base the expectation in section 236(3)(a). And on which he could be satisfied on the matters in section 236(3)(b). In the *FCA's* view, this requires, for example, that there must be something in the nature of the *body corporate* or the law applicable to it to give rise to the required expectation or on which to satisfy the investor. The established practice of the *body corporate* may also provide the necessary grounds.



9.8 The investment condition : the 'expectation test' (section 236(3)(a) of the Act)

9.8.1 G The test in section 236(3)(a) of the Act is whether the reasonable investor would expect that, were he to invest, he would be in a position to realise his investment within a period appearing to him to be reasonable. In the FCA's view, this is an objective test with the appropriate objective judgment to be applied being that of the hypothetical reasonable investor with qualities such as those mentioned in ■ PERG 9.7.2 G (The investment condition: the 'reasonable investor').

'Realisation' of investment

9.8.2 G In the FCA's view, the 'realisation' of an investment means converting an asset into cash or money. The FCA does not consider that 'in specie' redemptions (in the sense of exchanging shares or securities of BC with other shares or securities) will generally count as realisation. Section 236(3)(a) refers to the realisation of an investment, the investment being represented by the 'value' of shares or securities held in BC. In the FCA's view, there is no realisation of value where shares or securities are simply replaced by other shares or securities. However, an 'in specie' redemption might, in limited circumstances, satisfy the expectation test. This is where shares or securities are exchanged for other shares or securities in the same *body corporate* and those replacement shares or securities can be converted into cash or money within a period which, for both transactions taken together, can be said to be 'reasonable'. This involves looking through the series of transactions and considering whether their overall effect would satisfy the expectation test.

9.8.3 G The most typical means of realising BC's shares or securities will be by their being redeemed or repurchased, whether by BC or otherwise. There are, of course, other ways in which a realisation may occur. However, the FCA considers that these will often not satisfy all the elements of the definition of an *open-ended investment company* considered together. For example, the mere fact that shares or securities may be realised on a market will not meet the requirements of the 'satisfaction test' for the reasons given in ■ PERG 9.9.4 G to ■ PERG 9.9.6 G (Effect of realisation on a market).

9.8.4 G An investor in a *body corporate* may be able to realise part, but not all, of his investment. The FCA considers that the fact that partial realisations may take place at different times does not prevent the *body corporate* coming within the definition of an *open-ended investment company*. But, in any particular case, the 'expectation test' will only be met if the overall period for realising the whole of the investment can be considered to be

reasonable. Apart from this, the simple fact that an investor has the opportunity to realise part of his investment at pre-determined times would not itself make a *body corporate* open-ended.

Illustrations of 'expectation'

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The use of an expectation test ensures that the definition of an *open-ended investment company* is not limited to a situation where a holder of shares in, or securities of, a *body corporate* has an entitlement or an option to realise his investment. It is enough if, on the facts of any particular case, the reasonable investor would expect that he would be able to realise the investment. The following are examples of circumstances in which the *FCA* considers that a reasonable investor may have such an expectation.

- (1) Where a *body corporate*, in practice, regularly redeems or repurchases its shares or securities.
- (2) Where a *body corporate* has a declared policy of redeeming or repurchasing its shares or securities; even if it is possible for the *body corporate* to change its policy, the *FCA* takes the view that the *body corporate* is open-ended unless and until it does so. In such cases it would, however, be necessary for the change of policy to be documented and for there to be a public statement or other public evidence of the change.
- (3) Where a *body corporate* makes a public announcement that it will redeem or repurchase its shares or securities on a number of pre-arranged occasions that are identified at the time of the announcement. The issue here is whether there is a demonstrable intention to redeem or repurchase the whole of a *person's* investment. If there is, then a *body corporate* may be an *open-ended investment company* even before it has carried out any actual redemption or repurchase. This is provided that the redemption or repurchase can take place within a reasonable period. In contrast, a *body corporate* that simply offers the possibility that it may, at some stage, decide to offer redemption, or partial redemption, at certain specified times would not, in the *FCA's* view, give rise to the expectation required by section 236(3)(a).

9.8.6

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However, a reasonable investor's expectation of being able to realise his investment is not displaced simply because, in certain circumstances, no active steps need to be taken to realise the investment. This might happen where a redemption or repurchase of shares or securities may become compulsory as a result of some aspect of the applicable law.

Some relevant factors in applying the 'expectation test'

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In the *FCA's* view, the fact that a *person* may invest in the period shortly before a redemption date would not cause a *body corporate*, that would not otherwise be regarded as such, to be open-ended. This is because the investment condition must be applied in relation to BC as a whole (see ■ PERG 9.6.3 G (The investment condition (section 236(3) of the Act): general).

9.8.8

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Similarly, if BC issues shares or securities on different terms as to the period within which they are to be redeemed or repurchased (see ■ PERG 9.6.4 G (The

investment condition (section 236(3) of the Act): general), BC must be considered as a whole. Whether or not the expectation test is satisfied in relation to a particular *body corporate* is bound to involve taking account of the terms on which its shares or securities, or classes of shares or securities, are issued. But this is only one of a number of factors to be taken into account. It is subject to any indications there may be in the other relevant factors (such as those in ■ PERG 9.8.9 G).

9.8.9

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As indicated in ■ PERG 9.3.5 G (The definition), the potential for variation in the form and operation of a *body corporate* is considerable. So, it is only possible in general *guidance* to give examples of the factors that the *FCA* considers may affect any particular judgment. These should be read bearing in mind any specific points considered elsewhere in the *guidance*. Such factors include:

- (1) the terms of the *body corporate's* constitution;
- (2) the applicable law;
- (3) any public representations that have been made by or on behalf of the *body corporate*;
- (4) the actual behaviour of the *body corporate* or of a *person* acting on its behalf in relation to investors seeking to realise their investment in it;
- (5) whether investors in the *body corporate* are in a position to take advantage of fluctuations in property value in the particular market in which the *body corporate* invests;
- (6) the existence of a guarantee, which may mean that a longer period may appear reasonable than would be the case without the guarantee;
- (7) where the underlying property in which the *body corporate* invests is relatively illiquid; in this case, the period within which realisation of an investment may be regarded as reasonable may be longer than it would be for property which has greater liquidity;
- (8) the levels of disclosure of the terms on which investment is made;
- (9) the nature of the investment objectives or policy of the *body corporate*; and
- (10) the appropriateness of the name of the *body corporate*.



9.9 The investment condition : the 'satisfaction test' (section 236(3)(b) of the Act)

- 9.9.1** **G** The test in section 236(3)(b) of the Act is whether the reasonable investor would, before he makes a decision to invest, be satisfied that the value of his investment would be realised on a basis calculated wholly or mainly by reference to the value of the property belonging to BC.
- 9.9.2** **G** In the FCA view, this means that the reasonable investor must be satisfied that what he will get when he realises his investment is his proportionate share in the value of BC's underlying assets, less any dealing costs. In other words, that he is satisfied he will get net asset value. The investment condition focuses on the way the *body corporate* operates over time, and not by reference to particular issues of shares or securities (see ■ PERG 9.6.3 G (The investment condition (section 236(3) of the Act): general)). This means that this part of the investment condition looks to the general method used to calculate the value of the investment.
- 9.9.3** **G** For the 'satisfaction test' to be met, there must be objectively justifiable grounds on which the reasonable investor could form a view. He must be satisfied that the value of BC's property will be the basis of a calculation used for the whole, or substantially the whole, of his investment. The FCA considers that the circumstances, or combination of circumstances, in which a reasonable investor would be in a position to form this view include:
- (1) where the basis of net asset valuation is stated in constitutional documents of BC;
 - (2) where there is a separate agreement or arrangement made outside BC's constitution under which a *person* other than BC undertakes:
 - (a) to redeem or repurchase any shares or securities issued by BC; or
 - (b) to take steps to ensure that the market value of the shares or securities reflects the value of BC's property (see ■ PERG 9.9.4 G (Effect of realisation on a market)); and
 - (3) where an undertaking to intervene in the market to support the price of the shares or securities at net asset value has been made publicly known by BC or by another *person* (see ■ PERG 9.9.4 G (Effect of realisation on a market)).

Effect of realisation on a market

9.9.4 **G** ■ PERG 9.9.3 G (2) and ■ PERG 9.9.3 G (3) refer to circumstances where the reasonable investor may be satisfied that he can realise his investment at net asset value because of arrangements made to ensure that the shares or securities trade at net asset value on a market. There may, for example, be cases of market dealing where the price of shares or securities will not depend on the market. An example is where BC or a third party undertakes to ensure that the market value reflects the value of BC's property. This includes taking steps such as intervening in the market. In this case, it seems to the FCA that such an undertaking will constitute the necessary objective grounds on which an investor can be satisfied as to the basis on which the value of his investment will be realised. Unless arrangements of this kind exist, the FCA considers that the satisfaction test will not be met if the primary means for realising any investment in BC is on a market.

9.9.5 **G** However, where there is a market, the FCA does not consider that the test in section 236(3)(b) would be met if the price the investor receives for his investment is wholly dependent on the market rather than specifically on net asset value. In the FCA's view, typical market pricing mechanisms introduce too many uncertainties to be able to form a basis for calculating the value of an investment (linked to net asset value) of the kind contemplated by the satisfaction test. As a result, the FCA takes the view that, subject to ■ PERG 9.9.4 G, market dealings or facilities relating to the shares in, or securities of, BC will generally not be relevant in assessing whether or not BC comes within the definition of an *open-ended investment company*.

9.9.6 **G** The fact that the definition must be applied to BC as a whole (see ■ PERG 9.6.3 G (The investment condition (section 236(3) of the Act): general)) is also relevant here. So, for example, in a take-over situation the fact that a bidder may be willing to provide an exit route for an investment at net asset value will be irrelevant within the context of the definition. This is so even if an investor invests in particular shares or securities in the knowledge or expectation or in anticipation of such an offer being made. In the FCA's opinion, this is not a typical situation and does not affect the nature of BC as a whole or the manner in which it functions characteristically.

'Wholly or mainly'

9.9.7 **G** The expression 'wholly or mainly' in section 236(3)(b) determines the extent of the permissible departure from the link between the price of BC's shares or securities and the value of its net assets. The word 'mainly' introduces some flexibility to the process to allow for limited account to be taken of factors other than the value of BC's assets that may result in the sum realised failing to reflect the true net asset value. Such factors may include:

- (1) the payment by the investor of charges; or
- (2) the payment by the investor of an early redemption penalty; or
- (3) a discount on a repayment or repurchase of the shares or securities to reflect the payment by or on behalf of BC of the charges required to fund payment from a source other than BC's assets; for example, this might be a loan that is to be repaid from BC's assets once they are available.



9.10 Significance of being an open-ended investment company

Marketing of shares or securities issued by body corporate

- 9.10.1** **G** A number of controls apply under the *Act* to the promotion of *shares* or *securities* that are issued by any *body corporate*. These controls differ according to whether the *person* making the promotion is an *unauthorised person* (see ■ PERG 9.10.2 G) or an *authorised person* (see ■ PERG 9.10.3 G to ■ PERG 9.10.6 G). In addition, where a *body corporate* is not an *open-ended investment company*:
- (1) the requirements of *Prospectus Rules* relating to the publication of an approved prospectus may apply if its *securities* are offered to the public in the *United Kingdom*; and
 - (2) the listing requirements under Part VI of the *Act* (Official listing) will apply if its *securities* are to be *listed*.
- 9.10.2** **G** The controls under the *Act* that apply to promotions of *shares* or *securities* by *unauthorised persons* are in section 21 of the *Act* (Restrictions on financial promotion). These controls apply where an *unauthorised person* makes a *financial promotion* in, or from, the *United Kingdom* that relates to the *shares* in or *securities* of any *body corporate*. The same controls apply regardless of whether the *shares* or *securities* being promoted are issued by a *body corporate* that is an *open-ended investment company* or one that is not. There are a number of exemptions from the restriction in section 21 of the *Act*. These are explained in ■ PERG 8 (Financial promotion and related activities).
- 9.10.3** **G** Promotions made by *authorised persons* in the *United Kingdom* are generally subject to the controls in ■ COBS 4 (Communicating with clients, including financial promotions). However, in the case of *shares* in, or *securities* of, a *body corporate* which is an *open-ended investment company*, additional controls are imposed by Chapter II of Part XVII of the *Act* (Restrictions on promotion of collective investment schemes) (see ■ PERG 8.20). Section 238 of the *Act* (Restrictions on promotion) prevents an *authorised person* communicating any invitation or inducement to buy *shares* or *securities* issued by an *open-ended investment company*. Section 240 of the *Act* (Restriction on approval of promotion) prevents an *authorised person* approving a *financial promotion* to be communicated by an *unauthorised person*. This is if the *authorised person* would not be able to promote the share or security himself.

9.10.4 **G** The restrictions mentioned in **■ PERG 9.10.3 G** are subject to a number of exemptions. For example, the controls in sections 238 and 240 do not apply to *financial promotions* about certain kinds of *collective investment scheme*. These are:

- (1) *open-ended investment companies* formed in Great Britain and authorised by the *FCA* under the *Open-ended Investment Companies Regulations 2001*;
- (2) *authorised unit trust schemes*;
- (2A) *authorised contractual schemes*; and
- (3) *collective investment schemes* that are *recognised schemes* (see **■ COLL 9 (Recognised schemes)**).

9.10.5 **G** There are a number of other exemptions in the *Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060)*. In general terms, these exemptions are equivalent to the exemptions from section 21 of the *Act* that apply to *units*. There is *guidance* on those exemptions in **■ PERG 8.20.3 G (Additional restriction on the promotion of collective investment schemes)**.

9.10.6 **G** The *FCA* has also made *rules* under section 238(5) which allow *authorised persons* to *communicate* or *approve* a *financial promotion* for an *open-ended investment company* that is an *unregulated collective investment scheme* (that is, one that does not fall within **■ PERG 9.10.4 G**). The circumstances in which such a communication or approval is allowed are explained in **■ COBS 4.12B.7R**.

Implications for regulated activities

9.10.7 **G** In the *Regulated Activities Order*, shares in or securities of an *open-ended investment company* are treated differently from *shares* in other *bodies corporate*. They are treated as *units* in a *collective investment scheme* under article 81 of the *Regulated Activities Order* (*Units in a collective investment scheme*) rather than *shares* under article 76 (*Shares etc*).

9.10.8 **G** A *person* who carries on in the *United Kingdom* the business of engaging in any *regulated activity* that relates to *units* or *shares* will need to be an *authorised person* (see **■ PERG 2.7** and **■ PERG 2.8 (Authorisation and regulated activities)**).

9.10.9 **G** In order to be *authorised*, a *person* must have *permission* to carry on the *regulated activities* in question. What the *permission* needs to cover may differ according to whether the *regulated activity* being carried on relates to *units* or *shares*. So, for example, a *body corporate* that is an *open-ended investment company* will need *permission* if it carries on the *regulated activity* of *dealing as principal or agent, arranging* (bringing about) or *making arrangements with a view to transactions* in its own *shares* or securities in the *United Kingdom*. This applies also to a *body corporate* that is not an *open-ended investment company* except that it will not need *permission* to issue or arrange for the issue of its own *shares* or securities.

9.10.10

G

- (1) A person carrying on the regulated activity of establishing, operating or winding up a collective investment scheme that is constituted as an open-ended investment company will need permission for those activities. In line with section 237(2) of the Act (Other definitions), the operator of a collective investment scheme that is an open-ended investment company is the company itself and therefore the starting point for an open-ended investment company that is incorporated in the United Kingdom is that it needs permission to operate itself. However, where an open-ended investment company is managed by a firm with a Part 4A permission to manage an AIF or manage a UK UCITS the exclusion described in ■ PERG 2.8.10 G (2)(b) means that the open-ended investment company would not carry on the regulated activity of establishing, operating or winding up a collective investment scheme.
- (2) If an open-ended investment company is authorised by the FCA under the OEIC Regulations it is an authorised person under Schedule 5 of the Act. As a result of paragraph 2(2) of Schedule 5 of the Act the company has permission, in so far as it is a regulated activity (other than managing an AIF), to carry on the operation of the scheme and any regulated activity in connection with or for the purposes of the operation of the scheme. As explained in (1) the company may not need the permission of establishing, operating or winding up a collective investment scheme in any event. However, as a result of article 18 of the Regulated Activities Order it would otherwise need permission to deal as principal because an open-ended investment company is excluded from the definition of a "company" for the purposes of that article.
- (3) If an open-ended investment company is authorised by the FCA under the OEIC Regulations and has only one director, the OEIC regulations require that director to be a body corporate which is an authorised person and which has a Part 4A permission to carry on the regulated activity of managing a UK UCITS or managing an AIF. This reflects the fact that, in those circumstances, the director is a separate legal person who is responsible for overseeing compliance by the company with requirements implementing the UCITS Directive or AIFMD.

9.11 Frequently Asked Questions

9.11.1 **G** Table There are some frequently asked questions about the application of the definition of an *open-ended investment company* in the following table. This table belongs to ■ PERG 9.2.4 G (Introduction).

Question	Answer
1	<p>Can a <i>body corporate</i> be both open-ended and closed-ended at the same time?</p> <p>In the <i>FCA's</i> view, the answer to this question is 'no'. The fact that the investment condition is applied to BC (rather than to particular shares in, or securities of, BC) means that a <i>body corporate</i> is either an <i>open-ended investment company</i> as defined in section 236 of the <i>Act</i> or it is not. Where BC is an <i>open-ended investment company</i>, all of its securities would be treated as <i>units</i> of a <i>collective investment scheme</i> for the purpose of the <i>Act</i>. A <i>body corporate</i> formed in another jurisdiction may, however, be regarded as open-ended under the laws of that jurisdiction but not come within the definition of an <i>open-ended investment company</i> in section 236 (and vice versa).</p>
2	<p>Can an <i>open-ended investment company</i> become closed-ended (or a closed-ended body become open-ended)?</p> <p>In the <i>FCA's</i> view, the answer to this question is 'yes'. A <i>body corporate</i> may change from open-ended to closed-ended (and vice versa) if, taking an overall view, circumstances change so that a hypothetical reasonable investor would consider that the investment condition is no longer met (or vice versa). This might happen where, for example, an <i>open-ended investment company</i> stops its policy of redeeming shares or securities at regular intervals (so removing the expectation that a reasonable investor would be able to realise his investment within a period appearing to him to be reasonable). See also PERG 9.7.5 G.</p>
3	<p>Does the liquidation of a <i>body corporate</i> affect the assessment of whether or not the body is an</p> <p>The <i>FCA</i> considers that the possibility that a <i>body corporate</i> that would otherwise be regarded as closed-ended may be wound up has no effect at all on the nature of the <i>body corporate</i> before the winding up. The fact that, on a winding up, the shares or securities of any in-</p>

Question	Answer
	<p><i>open-ended investment company</i> investor in the <i>body corporate</i> may be converted into cash or money on the winding up (and so 'realised') would not, in the <i>FCA's</i> view, affect the outcome of applying the expectation test to the <i>body corporate</i> when looked at as a whole. The answer to Question 4 explains that investment in a closed-ended fixed term <i>company</i> shortly before its winding up does not, in the <i>FCA</i> view, change the closed-ended nature of the <i>company</i>. For <i>companies</i> with no fixed term, the theoretical possibility of a winding up at some uncertain future point is not, in the <i>FCA's</i> view, a matter that would generally carry weight with a reasonable investor in assessing whether he could expect to be able to realise his investment within a reasonable period.</p>
4	<p>Does a fixed term closed-ended investment <i>company</i> become an <i>open-ended investment company</i> simply because the fixed term will expire?</p> <p>In the <i>FCA's</i> view, the answer to this is 'no'. The termination of the <i>body corporate</i> is an event that has always been contemplated (and it will appear in the <i>company's</i> constitution). Even as the date of the expiry of the fixed term approaches, there is nothing about the <i>body corporate</i> itself that changes so as to cause a fundamental reassessment of its nature as something other than closed-ended. Addressing this very point in parliamentary debate, the Economic Secretary to the Treasury stated that the "aim and effect [of the definition] is to cover companies that look, to a reasonable investor, like open-ended investment companies". The Minister added that "A reasonable investor's overall expectations of potential investment in a company when its status with respect to the definition is being judged will determine whether it meets the definition. The matter is therefore, definitional rather than one of proximity to liquidation". (Hansard HC, 5 June 2000 col 124).</p>
5	<p>In what circumstances will a <i>body corporate</i> that issues a mixture of redeemable and non-redeemable shares or securities be an <i>open-ended investment company</i>?</p> <p>In the <i>FCA's</i> view, the existence of non-redeemable shares or securities will not, of itself, rule out the possibility of a <i>body corporate</i> falling within the definition of an <i>open-ended investment company</i>. All the relevant circumstances will need to be considered (see PERG 9.6.4 G, PERG 9.2.8.8G and PERG 9.8.9 G). So the following points need to be taken into account.</p> <p>(1) The precise terms of the issue of all the shares or securities will be relevant to the question whether the investment condition is met, as will any arrangements that may exist to allow the</p>

Question	Answer
	<p>investor to realise his investment by other means.</p> <p>(2) The proportions of the different share classes will be relevant to the impression the reasonable investor forms of the <i>body corporate</i>. A <i>body corporate</i> that issues only a minimal amount of redeemable shares or securities will not, in the <i>FCA's</i> view, be an <i>open-ended investment company</i>. A <i>body corporate</i> that issues a minimal amount of non-redeemable shares or securities will be likely to be an <i>open-ended investment company</i>. A <i>body corporate</i> that falls within the definition of an <i>open-ended investment company</i> is likely to have (and to be marketed as having) mainly redeemable shares or securities. However, whether or not the <i>body corporate</i> does fall within the definition in any particular case will be subject to any contrary indications there may be in its constitutional documents or otherwise.</p> <p>(3) Where shares or securities are only redeemable after the end of a stated period, this factor will make it more likely that the <i>body corporate</i> is open-ended than if the shares or securities are never redeemable.</p>
6	<p>Does "realised on a basis calculated wholly or mainly by reference to..." in section 236(3)(b) apply to an investor buying investment trust company <i>shares</i> traded on a <i>recognised investment exchange</i> because of usual market practice that the <i>shares</i> trade at a discount to asset value?</p>
7	<p>Does the practice of UK investment trust companies buying back <i>shares</i> result in them becoming <i>open-ended investment companies</i>?</p> <p>In the <i>FCA's</i> view, it does not, because its actions will comply with company law: see section 236(4) of the Act and PERG 9.6.5 G.</p>

Question	Answer	
8	<p>Would a <i>body corporate</i> holding out redemption or repurchase of its shares or securities every six months be an <i>open-ended investment company</i>?</p>	<p>In the <i>FCA's</i> view a period of six months would generally be too long to be a reasonable period for a liquid securities fund. A shorter period affording more scope for an investor to take advantage of any profits caused by fluctuations in the market would be more likely to be a reasonable period for the purpose of the realisation of the investment (in the context of the 'expectation' test, see PERG 9.8 and, in particular, PERG 9.8.9 G which sets out the kind of factors that may need to be considered in applying the test).</p>
9	<p>Would an initial period during which it is not possible to realise investment in a <i>body corporate</i> mean that the <i>body corporate</i> could not satisfy the investment condition?</p>	<p>In the <i>FCA's</i> view, the answer to that question is 'no'. In applying the investment condition, the <i>body corporate</i> must be considered as a whole (see PERG 9.6.3 G). At the time that the shares or securities in a <i>body corporate</i> are issued, a reasonable investor may expect that he will be able to realise his investment within a reasonable period notwithstanding that there will first be a short-term delay before he can do so. Whether or not the 'expectation test' is satisfied will depend on all the circumstances (see PERG 9.8.9 G).</p>

Chapter 10

Guidance on activities related to pension schemes

10.1 Background

Q1. What is the purpose of these questions and answers ("Q&As") and who should be reading them?

These Q&As are aimed at *persons* involved in the establishment or running of a pension scheme or in providing services to such persons and should be read, in particular, by:

- pension scheme trustees;
- those who provide services to pension schemes or their trustees; and
- employers or affinity groups who provide pension schemes for their employees or members.

They are intended to help such persons understand:

- whether they will be carrying on a *regulated activity* and so need to be an *authorised or exempt person* under section 19 of the Financial Services and Markets Act 2000; and
- whether their communications are *financial promotions* and, if so, whether they will be exempt from the restriction in section 21 of that Act.

The Q&As are primarily concerned with identifying the regulated activities (such as dealing or arranging deals in investments, managing investments or advising on investments) that may be carried on by persons (including trustees) who are involved with *occupational pension schemes, personal pension schemes* or any pension scheme that provides *safeguarded benefits*. They are also concerned, but only in relation to *personal pension schemes* and *stakeholder pension schemes*, with identifying when the regulated activity of operating such a scheme will be carried on (see Q26).

The Q&As complement the general *guidance* on regulated activities in Chapter 2 of our Perimeter Guidance Manual ("PERG"), the general guidance on insurance distribution activities in Chapter 5 of *PERG* (■ PERG 5), the guidance about the scope of the *Markets in Financial Instruments Directive* in Chapter 13 of *PERG* (■ PERG 13) and the relevant legislation. In addition, Chapter 12 of *PERG* (■ PERG 12) has further guidance about the regulated activities relating to the operation and sale of personal pension schemes that came into force on 6 April 2007.

The Q&As that follow are set out in sections:

- general issues (■ PERG 10.2);
- issues for pension scheme trustees (■ PERG 10.3);
- issues for pension scheme service providers other than trustees (■ PERG 10.4);
- the application of EU Directives (■ PERG 10.4A); and
- issues for employers or affinity groups (■ PERG 10.5);

and are complemented by:

- Annex 1 : Flow chart showing the steps to be considered in deciding whether authorisation is needed;
- Annex 2: Flow chart showing the additional steps to be considered by trustees of occupational pension schemes and other persons in deciding whether authorisation is needed for managing the assets of such a scheme;
- Annex 3: Table summarising the regulatory position of pension scheme trustees and service providers;
- Annex 4: Table summarising the regulatory position of employers and affinity groups; and
- Annex 5: Table summarising the regulatory position concerning financial promotions by trustees, employers and affinity groups.

10.2 General issues

Q2. I propose to provide services to a pension scheme - in what circumstances will I need to be authorised under the Act or be an exempt person?

You will need to be an *authorised* or *exempt person* if you will:

- be carrying on *regulated activities*;
- be doing so by way of business; and
- be doing so in the *United Kingdom*.

Q3. How will I know if my proposed activities are regulated?

Regulated activities are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the *Regulated Activities Order*"). They include:

- *dealing* (broadly, entering into a transaction as principal or agent to *buy* or *sell* certain investments);
- *arranging* (broadly, bringing about an investment transaction between other parties or making arrangements to assist other *persons* to enter into such transactions);
- *managing investments* (broadly, discretionary management of assets that include or may include certain investments);
- *assisting in the administration and performance of a contract of insurance* (broadly, notifying and providing evidence in support of or negotiating claims on behalf of policyholders);
- *safeguarding and administering investments*, being assets that include or may include certain investments (otherwise known as custody services);
- *advising on investments* (broadly, advising an investor on the merits of his *buying* or *selling* certain particular investments);
- *advising on conversion or transfer of pension benefits* (broadly advising a *member of a pension scheme* on converting, transferring or paying out *safeguarded benefits* in a pension scheme);
- *establishing, operating or winding up a stakeholder pension scheme*;
- *establishing, operating or winding up a personal pension scheme*.

Q4. What kind of investments do these regulated activities relate to?

Securities, such as shares, debt securities, warrants, unit trusts, contractual schemes or rights under a personal pension scheme or a stakeholder pension scheme and *contractually based investments* such as options, futures and cash-settled instruments (contracts for differences) or long-term insurance policies with an investment element (such as unit-linked insurance or annuities). Some *regulated activities*, such as *arranging* and *advising on investments*, also relate to all *contracts of insurance*.

The activity of *advising on conversion or transfer of pension benefits* relates exclusively to rights or interests under a pension scheme which provides *safeguarded benefits*.

Q5. What exclusions are available?

There are various exclusions - some relate to a single activity and others relate to several. Further guidance on exclusions is given in the remaining questions.

Q6. How do I know if I am carrying on activities by way of business?

Whether a particular *person* will be carrying on a *regulated activity* by way of business (and so needs *authorisation* or exemption) will invariably depend on that person's individual circumstances. A number of factors need to be taken into account in determining whether the by-way-of-business test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears compared to other activities carried on by the same person which are not regulated; and
- the nature of the particular regulated activity that is carried on.

Corporate pension scheme trustees and other persons who provide professional services to pension schemes are likely to be carrying on their activities by way of business. Unpaid individuals who act as trustees are not likely to be. Neither are in-house trustee companies set up by an employer to operate its *occupational pension scheme* ("OPS") or the employer if it acts as the trustee itself. In this respect, however, article 4 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 ("the *Business Order*") amends this test for trustees and other persons who manage the assets of an OPS. The effect of the amendment is that a trustee will need to be authorised if he is managing the investments of an OPS, whether or not he would normally be regarded as doing so by way of business. This is unless certain conditions are met (as explained in questions 7 to 22).

In addition, article 3(4) of the *Business Order* provides that any person who carries on an *insurance distribution activity* by way of business must be remunerated for doing so. Guidance on the application of the by way of business' test to insurance distribution activities is in Chapter 5.4 of PERG.

10.3 Pension Scheme Trustees

Q7. I am a trustee of an occupational pension scheme ("OPS") - will I need to be authorised if I also manage the investments held under my scheme?

Only if you are involved in the day-to-day management of the assets and your scheme is not a *small self-administered scheme*.

Occupational pension scheme trustees are subject to special treatment when they manage investments held under their scheme. This means that they may need to be *authorised* even though they are not carrying on their managing activities by way of business in the normal sense (they may be unpaid individuals for example).

That aside, and broadly speaking, you will not need to be *authorised* if:

- you delegate day-to-day decision-making about *securities* or *contractually based investments* to an *authorised, exempt* or *overseas person* (typically a fund manager); or
- the only day-to-day decisions you take relate to pooled investment products and are only taken after you have obtained and considered advice from a regulated person; or
- your scheme is fully insured and you do not take or need to delegate any day-to-day decisions; or
- your scheme is a small self-administered scheme.

Q8. What decisions can I make, as a trustee of an OPS (other than a small-self administered scheme), if I am not authorised?

You can make:

(1) strategic decisions, such as decisions:

- about the adoption or revision of a statement of investment principles as required by relevant pensions legislation; or
- about the formulation of a general asset allocation policy; or
- about prescribing the method and frequency for rebalancing asset classes, and the permitted ranges of divergence, following the setting of the general asset allocation policy; or
- about the proportion of the assets that should constitute investments of particular kinds; or
- affecting the balance between income and growth; or
- about the appointment of fund managers; or
- as to which pooled investment products to make available for members to choose from under a money purchase scheme;

(2) decisions that are needed to be taken in exceptional circumstances, such as:

- in a take-over situation; or
- where the person managing the scheme's assets has a conflict of interest; or

- where the decision is sensitive (such as one relating to investments in the same market sector as the employer or in the employer's own securities); or
- where the decision raises sensitive policy considerations (such as investments in certain territories or markets or in ethical or green areas); or
- where the trustees are required to make decisions:
 - about investments acquired purely as a result of a demutualisation by an insurer or building society in which the scheme holds investments or deposits; or
 - following a change in fund managers which results in the scheme holding investments which the new fund manager is unable or unwilling to take on;

(3) day-to-day decisions about investment in pooled investment products, namely:

- *collective investment schemes* such as unit trusts, contractual schemes, limited partnerships, hedge funds or open-ended investment companies;
- shares or debt securities issued by an investment company such as an investment trust or a venture capital trust;
- contracts of insurance such as annuities or unit-linked investment policies;

(This is subject to the decisions being made only after you have taken and considered advice from an *authorised, exempt or overseas person* or an *exempt professional firm* (that is, a firm of solicitors, accountants or actuaries who can carry on incidental *regulated activities* without *authorisation*).);

and

(4) decisions of any kind about investing in assets that are not *securities* or *contractually based investments* - such as real property, cash or precious metals.

Q9. As an unauthorised OPS trustee, what decisions am I unable to make?

You will be unable to make most day-to-day decisions. Generally speaking, these will be:

- decisions to *buy, sell* or hold particular *securities* or *contractually based investments* such as a fund manager would be expected to make in his everyday management of a client's portfolio (other than day-to-day decisions about investment in pooled investment vehicles taken after obtaining advice as per Q8(3)); or
- decisions made as a result of regular or frequent interventions outside scheduled review meetings in the decision-making of external fund managers; or
- recommendations made to fund managers, on a regular basis, with a force amounting to direction relating to individual *securities* or *contractually based investments*.

Q10. As an OPS trustee, will I be making day-to-day decisions by implementing strategic decisions on a regular basis?

No. For example, you will not be making day-to-day decisions merely because the application of the method for rebalancing asset classes and permitted ranges of divergence result in mechanical changes being made regularly to the asset allocation policy. This is because the decisions are made at the time the method and frequency are set and not when those decisions result in a change to the policy.

Similarly, there may be occasions when you may determine that, in the absence of instructions from a member, his contributions will automatically be placed in a particular fund. Provided this follows a pre-determined

procedure that is rigidly applied and not subject to frequent alteration, it may be regarded as the routine application of a strategic decision and not as a day-to-day decision in its own right.

Q11. As an OPS trustee, I need, from time to time, to sell investments to raise cash to meet obligations to scheme members. Is this likely to mean that I am making day-to-day decisions?

No, unless you are making regular decisions as to which particular investments to dispose of to release the necessary cash. This would not include situations where, in realising assets, you are merely applying pre-agreed strategic policy decisions with no element of discretion. In that situation, the decision is made at the time that the policy is set and is strategic.

Q12. Does the fact that, as an OPS trustee, I only infrequently make decisions about investments mean that the decisions I do make will not be regarded as day-to-day decisions?

No. The mere fact that a decision may be taken only infrequently does not, of itself, prevent that decision being a day-to-day decision. It is the nature of the decision that is important, not its frequency. For example, if you were responsible for the investment of scheme assets in a portfolio of Government stocks and debt securities, the fact that you might only occasionally need to make decisions about buying new, or selling existing, investments would not prevent those decisions being day-to-day decisions. Similarly, the fact that you may be the trustee of a small scheme where decisions about the investment of scheme assets arise only infrequently does not, of itself, prevent those decisions being day-to-day decisions.

Q13. As an OPS trustee, will I be making day-to-day decisions if I decide on the purchase of annuities to be held under the scheme?

Not in most circumstances. Typically, you may choose to select what you consider to be the most suitable annuity provider on each occasion that a decision has to be made. If this is the case, provided that you are not purchasing annuities on a frequent basis, it is unlikely that the decisions you make would be day-to-day decisions (on the basis that you are making strategic decisions about which provider to use rather than decisions about investment of the scheme assets). Less typically, your choice of annuity provider might be determined at the outset so that, each time an annuity has to be purchased, that chosen provider is used. If this occurs, you may be regarded as having made a strategic decision with regard to the most appropriate provider and then as carrying out that strategic decision on each occasion that an annuity is purchased.

But, even if your decision to purchase an annuity is a day-to-day decision, you can still make it. This is provided you meet the conditions for making decisions that involve taking and considering advice about investment in pooled investment vehicles (see Q8(3)).

Q14. As an OPS trustee, if I make decisions about the purchase of annuities on the winding-up of the scheme, am I making day-to-day decisions?

No. Decisions taken about annuities in such exceptional circumstances would not be regarded as day-to-day decisions. This also applies to decisions about annuities taken in the context of ensuring provision of benefits for a member's ex-spouse.

Q15. As an OPS trustee, I make investments on the instructions of members of the scheme. Does this mean that I have to be authorised as I have effectively delegated day-to-day decision-making to persons who are not authorised, exempt or overseas persons? What about the member - is he then managing the assets of an OPS so as to need authorisation?

No, on both points. You will not be regarded as *managing investments* (so that issues about delegation of day-to-day decision-making do not arise) provided the investment is to be purchased solely for the benefit of the member and you, in practice, invariably seek to match the scheme's obligations to the member by purchasing those investments. This includes where the member instructs you to purchase a particular annuity. But the position may be different should you choose not to match the obligations that the scheme incurs through the members' instructions by purchasing the relevant investments. If you then make decisions about what alternative investments to make, you are likely to be *managing investments* and the decisions you make may be day-to-day decisions.

The member would be regarded as managing assets that belong beneficially to him rather than assets that belong to another. So, he would not be regarded as *managing investments* either.

Q16. Am I going to be managing investments by exercising voting rights conferred by investments that I hold as trustee under my OPS? If so, will this be viewed as my taking a day-to-day decision?

No, you will not be *managing investments* unless the exercise of the rights would result in your *buying, selling, subscribing for or underwriting securities or contractually based investments*. This will not usually be the case. For example, voting to support a take-over offer to be made by a company in which the scheme holds shares would not involve *managing investments* as it would not result in your acquiring or disposing of investments. Neither would voting on the re-appointment of company directors or auditors or on whether a company in whom the scheme holds shares should make a rights issue (although deciding to subscribe to the rights issue when it is made would amount to managing investments).

Deciding to accept an offer to buy company shares held by you under the scheme, in the context of a proposed take-over of that company, would involve *managing investments*. But the decision you make would be viewed as strategic and not a day-to-day decision.

Q17. When may a decision I make as an OPS trustee that results in my investing in a pooled investment vehicle other than an annuity be regarded as a strategic decision?

This will arise where the decision:

- represents the initial decision to invest the scheme wholly or to a substantial amount, and on an ongoing basis, in a particular vehicle such as a life policy, unit trust scheme or contractual scheme (on the basis that an initial decision of this kind is of such importance to the scheme that it may be regarded as strategic); or
- may be seen to be a decision to appoint a discretionary fund manager.

Q18. When will a decision that I make as an OPS trustee be regarded as one to appoint a discretionary fund manager?

This will be the case when the decision:

- seeks to implement a strategic decision to invest part of the scheme assets in a particular area or asset class (such as venture capital or emerging markets);
- is based principally on the suitability of appointing the fund manager to manage that part of the scheme assets; and
- to use a pooled investment vehicle rather than a segregated portfolio is secondary to the decision to appoint the fund manager.

Where the circumstances surrounding the appointment of a fund manager suggest that the decision is day-to-day, you may still be able to make that decision. This is provided you meet the conditions for making decisions that involve taking and considering advice about investment in pooled investment vehicles (see Q8(3)).

Q19. As an unauthorised OPS trustee, I have made a decision to invest in an investment vehicle which allows me to switch between various sub-funds. Can I make decisions about switching between those sub-funds?

Yes. However, taking decisions of this kind other than to implement strategic decisions on asset allocation is likely to involve taking day-to-day decisions. So, you would need to meet the conditions for making decisions that involve taking and considering advice about investment in pooled investment vehicles (see Q8(3)).

Q20. I understand that, as an unauthorised trustee of a small self-administered scheme (a "SSAS") I can make day-to-day investment decisions. What types of scheme qualify as a SSAS?

There are two kinds of scheme that qualify as a SSAS. These are:

- (1) an "insured SSAS" - that is an OPS:
 - that has no more than 50 members; and
 - where:
 - the contributions made by or for each member are used in the acquisition of a contract of insurance or an annuity on the life of that member;
 - the only decision to be made is the selection of the relevant contract; and
 - each member has been given the opportunity to make that choice himself, whether or not he chooses to do so; and
- (2) a "12 relevant member SSAS" - that is an OPS:
 - with no more than 12 relevant members (broadly speaking, 'relevant members' are existing or former employees for whom contributions are being or have been made and for whom benefits under the scheme are or may become payable);
 - that is established under an irrevocable trust;
 - where all the relevant members are trustees of the scheme (except those who are unfit to act or incapable of acting as trustee); and
 - where all day-to-day decisions relating to the management of the assets of the scheme which are *securities* or *contractually based investments* (other than decisions that satisfy the conditions involving taking and considering advice about investment in pooled investment vehicles - see Q8(3)) are required to be taken by:
 - all or a majority of the relevant members who are trustees; or
 - an *authorised person* or *exempt person*, in each case acting either alone or jointly with all or a majority of the relevant members.

Q21. My 12 relevant member SSAS requires that all day-to-day decisions are taken by the trustee beneficiaries. The SSAS has an independent trustee who is not a beneficiary or an authorised or exempt person. If the

independent trustee takes a day-to-day decision in breach of the scheme's requirement, what effect does that have on him and on the relevant members?

The independent trustee's actions will not cause the trustee beneficiaries any regulatory difficulties, even though he has acted in breach of the requirements of the SSAS. This is because it is the existence of the requirement about day-to-day decision-making that is important and not whether it may be breached. The independent trustee may, as a result of having taken the decision, be regarded as managing the SSAS's investments. But whether or not this would be the case will depend on the particular circumstances in which the decision came to be made.

Q22. I am a trustee of a 12 relevant member SSAS but not a relevant member. My role requires me to monitor investments made by the scheme - won't I be drawn into making day-to-day decisions?

No. You should be able to perform your role in monitoring and, where necessary, objecting to particular transactions without needing authorisation. Merely operating a blocking vote where a certain proposed investment would, for whatever reason, be prohibited, would not be regarded as taking part in the decision to make, or to refrain from making, that investment. If you merely express a view as to whether or not a certain proposed investment would be permitted you would not, thereby, be making a decision to buy the investment. However, to reduce the risk of being drawn into making day-to-day decisions, you may wish to make a point of not participating in a vote except where the investment could not, in your view, be made without breaching the relevant requirements.

Q23. My company acts as the corporate trustee for a self-invested personal pension scheme ("SIPP"). Will it need to be authorised?

No, provided it is not establishing, operating or winding up the scheme and is able to satisfy various exclusions that apply to other regulated activities. Guidance on the regulated activities of establishing, operating and winding up a personal pension scheme is in Q24 to Q28 and in ■ PERG 12 (Q3 to Q5).

So, your company's position will depend on a combination of the activities that it carries on and the availability of certain exclusions. These exclusions may also apply to trustees of pension schemes other than SIPPs, including trustees of stakeholder pension schemes, with the exception of that for *managing investments* (which will not apply to a trustee of an OPS).

- (1) Your company is likely to be *dealing in investments as principal* in entering into investment transactions on behalf of the trust. However, in general terms, it would avoid this if either:
- it is a bare trustee acting on the instructions of the member or his agent and it does not hold itself out as someone who provides a dealing service (see article 66(1) of the *Regulated Activities Order*); or
 - it does not hold itself out to the public as someone who carries on business as a market maker or dealer in *securities* and, if it buys or sells *contractually based investments*, it only does so with or through a regulated person (see articles 15 and 16 of the *Regulated Activities Order*).

But you will not be *dealing in investments as agent* merely because you commit co-trustees to a transaction by entering into it on behalf of the scheme.

- (2) Your company should not be *arranging* because this activity does not apply where a person arranges transactions to which he is to be a party (see articles 25 and 26 of the Regulated Activities Order).
- (3) Your company is likely to be *managing investments* if it has discretionary control over the assets held under the trust. But it will not be managing investments if:
 - it is acting solely on instructions from the members or from a fund manager or other agent appointed to instruct it on their behalf; or
 - it is not holding itself out as an investment manager and is not remunerated for managing investments in addition to what it is paid for acting as trustee (see article 66(3) of the Regulated Activities Order).
- (4) As trustee, your company is likely to be responsible for *safeguarding and administering investments* held as scheme assets. If it makes use of a specialist custodian it will be *arranging safeguarding and administration of assets*. These are potentially regulated activities. But they will not be if:
 - your company is not holding itself out as a custodian and is not remunerated for providing custody services in addition to what it is paid for acting as trustee (see article 66(4) of the Regulated Activities Order); or
 - (as respects arranging for another person to provide custody services) it delegates custody to a suitably *authorised or exempt person* (see article 66(4A) of the Regulated Activities Order).
- (5) Your company will not be *advising on investments* unless it advises a prospective member on the merits of his *buying or selling* interests in *securities or relevant investments* to be held under the trust. If it gives advice to its co-trustees about trust investments or to existing members about their interests under the trust, its advice will be excluded provided it is not remunerated for giving the advice in addition to what it is paid for acting as trustee (see article 66(6) of the Regulated Activities Order).
- (6) There are no exclusions from the regulated activities of *establishing, operating or winding up a stakeholder pension scheme* or *establishing, operating or winding up a personal pension scheme*. Guidance to help you determine whether or not your company will be carrying on any of these activities is in Q24 to Q28 and in ■ PERG 12 (Q3 to Q5).

Q24. My company acts as corporate trustee for both trust-based stakeholder and personal pension schemes. Does it need to be authorised?

This depends on the responsibilities that your company assumes as trustee. *Establishing, operating or winding up a stakeholder pension scheme* or a *personal pension scheme* are regulated activities in their own right. These are functions that may often be carried out by the trustees of a trust-based scheme other than where the trustees are mere bare trustees. This is apart from establishing a scheme which is a function that may often be carried out by a third party such as a product provider. See Q25 to Q28 and ■ PERG 12 (Q3 to Q5) for further guidance on these activities.

Q25. What does establishing a stakeholder or personal pension scheme involve?

The establisher of a stakeholder or personal pension scheme is the *person* responsible for putting in place the arrangements founding the scheme. With a trust-based scheme, this will usually be the person who executes the trust as provider. In a scheme established by deed poll, it will usually be the person who enters into the deed poll. There will usually only be one person who establishes the scheme. Any professional firms that he may employ to act as his agent (such as solicitors) would not be establishing the scheme. The establisher may also be the operator but need not be. An employer will not

be establishing a stakeholder pension scheme purely as a result of his having designated such a scheme to meet the statutory requirement to do so.

Q26. What does operating a stakeholder or personal pension scheme involve?

The 'operator' is the *person* responsible to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In trust-based schemes, the trustees may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person to be responsible to the members for carrying out all of the operator's functions as scheme administrator or as trustee, or both as the case may be.

Q27. What is my position as the operator of a stakeholder or personal pension scheme if I delegate day-to-day functions such as administration of the scheme or management of the scheme assets to another person?

A *person* who accepts responsibility, and remains responsible, for carrying on a *regulated activity* is carrying on that activity even though he may delegate or outsource the day-to-day carrying out of the functions to another person. So, if the operator of a scheme delegates some or all of his functions to another person, he will still be the regulated operator of the scheme. At the same time, none of the people to whom he delegates his activities will become an operator of the scheme. However, they may be carrying on other regulated activities in performing their delegated or outsourced tasks (such as *arranging or managing investments*), in which case they will be subject to regulation for those activities.

Q28. What does winding-up a stakeholder or personal pension scheme involve?

The *person* who winds-up such a pension scheme will be the person who is responsible for putting in place the arrangements for bringing the scheme to an end in a way that complies with the relevant provisions of the instrument that established the scheme and any relevant rules under pensions or tax legislation. This will, more often than not, be the operator of the scheme.

Q29. I am one of several trustees of a pension scheme. Sometimes I arrange an investment transaction on behalf of all the trustees but another trustee actually signs the purchase agreement and becomes the registered owner of the trust asset - does this mean that I could be regarded as arranging deals in investments on behalf of my fellow trustee?

No. You will not be *arranging* in these circumstances. This is because the interest that you acquire as trustee in the investment means that you will be regarded as being a party to the transaction. Arrangements made by a person in relation to transactions of which he is to be a party as principal or agent are excluded from *arranging*.

Q30. [Deleted]

10.4 Pension scheme service providers other than trustees

Q31. I provide administration services to pension schemes. Will I require authorisation or exemption?

Yes, if your services include any of the following activities and you cannot make use of an exclusion.

- (1) Receiving instructions from the trustees or members about the *buying or selling* of trust investments (being *securities or relevant investments*) and then instructing a broker or product provider to effect the transaction. This is because you are likely to be *arranging*. This will include arranging for investments such as units in a unit trust scheme or in a life policy managed fund to be realised or surrendered to raise cash.
- (2) Entering into investment transactions concerning *securities or relevant investments* on behalf of the trustees. This is because you will be *dealing in investments as agent*.
- (3) *Assisting in the administration and performance of contracts of insurance*. This will only be likely to apply if you handle claims under policies held by the scheme on behalf of the trustees or other policyholders. For example, if you were making a claim for benefits payable on the death of a member under the 'death in service' benefits provided by a pension scheme. To be carrying on this regulated activity you must be assisting the trustees in both the administration and performance. Whilst dealing with claims on the death of a scheme member is likely to involve assisting in the administration of the contract of insurance, it will only involve assisting in the performance if you assist the trustees, as policyholders, to satisfy a contractual obligation that they have under it. This will typically include assisting the trustees to notify the claim in the manner specified in the policy. Detailed guidance on this regulated activity is available in Chapter 5.7 of PERG.
- (4) Arranging the appointment of a custodian on behalf of the trustees. This is because you will be *arranging safeguarding and administration of assets*. But you will not be doing so simply because you instruct a fund manager to buy investments which the fund manager will then safeguard and administer in accordance with pre-existing arrangements.
- (5) Arranging for persons to join or to leave a *stakeholder pension scheme* or a *personal pension scheme* or to exercise certain rights under such a scheme. This is because the rights themselves will be a form of investment and so you will be *arranging*. This is explained in more detail in ■ PERG 12 (Q15 to Q20).
- (6) Acting as the scheme administrator (as defined in section 270(1) of the Finance Act 2004) for a stakeholder pension scheme or a personal pension scheme. This is because you are likely to be operating the scheme (see Q26).

- (7) Advising the trustees on the merits of buying or selling particular securities or relevant investments or advising a member on the merits of joining or leaving, or of exercising certain rights under, a stakeholder pension scheme or a personal pension scheme. This is because you will be *advising on investments* (see Q38 and Q39).
- (8) Advising a *member of a pension scheme* or their *survivor* on the merits of requiring a trustee or manager of a pension scheme to convert, transfer or cash out *safeguarded benefits* could amount to *advising on conversion or transfer of pension benefits* (see ■ PERG 2.7.16GG).

Services that typically will not involve any regulated activities include:

- maintaining records;
- liaising with tax authorities;
- arranging actuarial advice;
- paying over contributions to a product provider or fund manager for investment in line with pre-agreed instructions; and
- paying out benefits.

Q32. What are the exclusions that might apply to me as a pensions administration service provider?

One or more of the following exclusions might be available to you depending on the nature and scope of the services you provide:

- *dealing in investments as agent* and *arranging with or through an authorised person* (articles 22 and 29 of the *Regulated Activities Order*);
- *dealing in investments as agent, arranging and advising on investments* as a necessary part of providing other non-regulated services (article 67 of the *Regulated Activities Order*); and
- services provided to a member of your *group* (article 69 of the *Regulated Activities Order*).

But none of these exclusions will apply to you if, in carrying on the relevant *regulated activity*, you are an *investment firm* and do not benefit from any of the exemptions under *MiFID* (see Chapter 13 of *PERG*, including Q42).

Q33. How would the exclusions for dealing or arranging with or through an authorised person in articles 22 and 29 apply to me as a pensions administration service provider?

The exclusions will apply to you if:

- you are an *unauthorised person*;
- you are *dealing in investments as agent* or *arranging* on behalf of the pension scheme trustee or member (your 'client');
- the transaction into which you are entering or which you are arranging is either with an authorised product provider such as a unit trust manager or is effected by an authorised intermediary such as a stockbroker;
- you do not advise your client on the merits of his entering into the transaction;
- you are not paid by anyone other than your client; and
- the transaction does not involve *contracts of insurance*.

So, the exclusions can apply to a transaction involving any investment other than rights under a contract of insurance. Given that many pension schemes invest wholly or partly in contracts of insurance, there may be limited occasions where articles 22 or 29 will exclude all dealing or arranging activity of this kind.

The requirement that you do not receive any payment other than from your client does not prevent you receiving payment from the *authorised person* but you must then treat the sums paid to you as belonging to your client. There is nothing to prevent you then using the sums to offset payments due

to you from your client for services rendered to him. This is provided that you have your client's agreement to do so.

Q34. When will regulated activities form a necessary part of my pension administration services so that I can use the exclusion in article 67?

Broadly speaking, a regulated activity will form a necessary part of your pension administration service if you could not reasonably expect to be able to provide your non-regulated administration services to the scheme trustee or member without conducting the regulated activity. This may apply where you are simply arranging for the payment of regular contributions that the broker or product provider will apply in line with standing instructions. This would, for example, apply to you if you were to be providing payroll services.

There are further conditions that must be met for the exclusion to apply:

- you must not be remunerated for the *regulated activity* separately from the remuneration you get from providing pension administration services; and
- you must not be a person who is required to be regulated by the *IDD*.

So, the exclusion cannot apply to you if you are providing a service that involves assisting in the conclusion or the administration and performance of *contracts of insurance*. But it may apply where you are providing other services relating to contracts of insurance (for example, arranging post-conclusion transactions such as surrenders or switches) or to other investments such as shares, unit trusts or contractual schemes.

Q35. I provide pension administration services to a corporate pension scheme trustee who is a member of the same group as me. Does this mean that the exclusion for services provided to other group members in article 69 will apply to me?

Yes, provided the services:

- may properly be regarded as being provided solely to the trustee (as will be the case where the trustee has delegated or outsourced the carrying out of regulated activities to you but remains responsible to the members for the performance of those activities) and not to the members; and
- do not relate to *contracts of insurance*.

If the services do relate to *contracts of insurance*, you are still unlikely to need authorisation because you will only be carrying out *insurance distribution activities* by way of business if you are remunerated for providing services to third parties. Members of your *group* are not considered to be third parties.

Q36. As an administration service provider, I have authority over the pension scheme trustees' bank account. Does this mean I have to be authorised?

No. Holding or controlling money belonging to a client is not, of itself, a regulated activity. It is only if you are holding or controlling the money in connection with performing a *regulated activity* that you will need to be *authorised*. This may arise, for example, if you are arranging investment transactions on behalf of the trustees and have authority to settle the transaction using funds in the trustees' bank account.

Q37. The trustees authorise me, as administration service provider, to determine how much money should be transferred for investment each

month to ensure that the scheme has enough cash available to meet its obligations. Does this have regulatory implications for me?

No, unless it results in your concluding that there is a need to realise funds and instructing a broker or product provider to liquidate investments to do so. Should that happen, you are likely to be *dealing in investments as agent* or *arranging* subject to the possible availability of an exclusion such as that in article 29 of the *Regulated Activities Order* (see Q33). If you are able to exercise delegated powers to determine, on the trustees' behalf, which particular investments should be sold or surrendered, you are likely to be *managing investments* and need to be an *authorised or exempt person*.

Q38. My services to the pension trustees include advising them on investments and investment strategy. Is this likely to be regulated advice and mean that I must be authorised or exempt?

Yes, if the advice:

- relates to a particular *security or relevant investment* such as the ABC unit trust scheme or the XYZ unit-linked insurance policy - advice on investment strategy or the choice of fund managers or brokers is not regulated advice;
- is advice and not simply information - so, there must be a recommendation to *buy, sell* or hold on to the particular investments;
- relates to the merits (that is the pros or cons) of buying or selling the particular investment; and
- is given to a *person* who is acting as an investor or who would enter into transactions as agent for the investor - so, advice to trustees about scheme investments will be given to them in their capacity as investors.

Q39. I give advice to the members of a pension scheme. Is this likely to be regulated advice and mean that I must be authorised or exempt?

It is likely to be regulated advice under article 53(1) of the *Regulated Activities Order* if the advice concerns a *personal pension scheme* but probably not if it concerns an OPS that is not a *stakeholder pension scheme*. In respect of the activity of advising on investments, the same factors apply to advice given to a member as apply to advice given to trustees (see Q38). But a particular factor will be whether the member is himself *buying or selling a security or relevant investment* (a "regulated investment").

It is usually the case that, where regulated investments are held under trust, the person for whose benefit the investments are held will acquire a beneficial interest in the investments. Such interests are regulated investments in their own right under article 89 of the *Regulated Activities Order*. In addition to advice that may fall under article 53(1) of the *Regulated Activities Order*, giving advice to *members of a pension scheme* could amount to *advising on conversion or transfer of pension benefits* where the advice relates to rights or interests under a pension scheme which provides *safeguarded benefits* (see ■ PERG 2.7.16GG). This is the case regardless of how the rights or interests are held (see ■ PERG 12.6). Where an OPS that is not a *stakeholder pension scheme* is concerned, however, the interests obtained by members are specifically excluded from being regulated investments (see article 89(2) of the *Regulated Activities Order*). This means that a member of a money purchase OPS does not acquire a regulated investment simply through having a beneficial interest in investments held under the trust for the purpose of providing his benefits. Similarly, an

interest in investments that result from a member having made additional voluntary contributions and which are held under the trust for his benefit will not be a regulated investment. So, advice to the member on the merits of his making additional voluntary contributions under his OPS will not be regulated advice.

The position with *stakeholder pension schemes* and *personal pension schemes* (including free-standing additional voluntary contributions schemes) is different. The rights under such a scheme (whether it is trust-based or contractual) are a specific type of regulated investment. So, advice on the merits of joining or leaving, or of exercising certain rights under, such a scheme will be regulated advice. This is the case with a stakeholder pension scheme even if the scheme is also an OPS. More detailed guidance on the meaning of rights under a personal pension scheme and the circumstances in which advice about such rights is regulated is in ■ PERG 12 (Q15 to Q20). That guidance will apply equally to rights under a stakeholder pension scheme.

Q40. I provide administration services to the providers of pension products such as insurers, unit trust managers, contractual scheme managers or banks. Is my position any different to that of a person who provides administration services to pension scheme trustees?

Potentially, yes. This is because:

- you are unlikely to be *assisting in the administration and performance of a contract of insurance* because of the exclusion in article 39B of the *Regulated Activities Order* for persons who manage claims on behalf of a regulated insurer; and
- although you are likely to be carrying on *dealing or arranging* activities if you handle such things as arranging new policies or units, additional payments, surrenders, switches or assignments, some of the exclusions may not apply to you, for example:
 - the exclusions in articles 22 and 29 of the *Regulated Activities Order* (see Q33) will not apply because you will be remunerated by the authorised person rather than by the trustee; and
 - the exclusion in article 69 of the *Regulated Activities Order* (see Q35) will not apply because, as a group company of the insurer, you will not be providing services solely to it but also providing services directly to the trustees on behalf of the insurer.

Q41. Does the fact that I provide administration services to the providers of pension products such as insurers on an outsourced basis and act in their name affect my position?

No. The need for *authorisation* or exemption depends on the nature of the activities that you carry on. The mere fact that you may carry on the services under your authorised client's name does not, of itself, remove the need for you to be authorised or exempt in your own right if the services you perform involve *regulated activities*.



10.4A The application of requirements which implemented EU directives

Q41A. Are pension scheme trustees and administration service providers likely to be subject to authorisation under the UK provisions which implemented the Markets in Financial Instruments Directive?

This is possible, but in many instances it is likely that pension scheme trustees and service providers will either not be providing an investment service for the purposes, or otherwise be exempt under the exemptions which were set out in article 2.1 of the *Markets in Financial Instruments Directive* but have been onshored in Part 1 of Schedule 3 to the *Regulated Activities Order*. The following table expands on this in broad terms.

Detailed guidance on the scope of the UK provisions which implemented the *MiFID* is in ■ PERG 13.

In the table below, references to relevant paragraphs of Article 2.1 of *MiFID* should be read as the equivalent exemptions which have been onshored in Part 1 of Schedule 3 to the *Regulated Activities Order*, or, in respect of Article 3 of *MiFID*, which can now be found in regulation 8 of the *MiFI Regulations*.

Activity	Potential MiFID investment activity or service?	Potential application of MiFID or of a MiFID article 2.1 exemption?
Dealing in scheme assets as trustee	Execution of orders on behalf of clients	MiFID will not apply provided the trustees are either not acting by way of business or otherwise are not holding themselves out as persons who provide a dealing service to third parties. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis In any event, the trustee should be ex

<p>Issuing rights under a stakeholder or personal pension scheme to members</p>	<p>None - the rights are not MiFID financial instruments</p>	<p>empt under article 2.1(i) as manager or depositary (or both) of a pension fund MiFID does not apply</p>
<p>Pension scheme service provider:</p> <p>a. dealing in scheme assets as agent for the trustees</p> <p>b. arranging deals in scheme assets as agent for the trustees</p> <p>c. arranging for persons to join the scheme or to switch or dispose of, or to acquire further, rights under the scheme</p>	<p>a. Execution of orders on behalf of clients</p> <p>b. Receiving and transmitting orders</p> <p>c. None - the rights are not MiFID financial instruments and neither are any rights to or interests in financial instruments that the scheme member may acquire under the scheme</p>	<p>MiFID will potentially apply where the investments are MiFID financial instruments (such as shares, debt securities or units)</p> <p>However, many pension schemes will be employee participation schemes, the administration of which is exempt under article 2.1(f)</p> <p>Where the service provider is providing services exclusively for the benefit of a corporate trustee who is a member of its group, the exemption in article 2.1(b) should apply. And article 2.1(g) will provide for the exclusions in 2.1(b) and 2.1(f) to be combined where the service provider is both administering an employee participation scheme and providing services to a trustee who is a group member</p>
		<p>Where the activity is receiving and transmitting orders and the service provider is authorised, the optional intermediaries exemption in article 3 of MiFID may apply</p> <p>If the service provider is acting as the operator of a stakeholder or personal pension scheme (for example, as the scheme administrator), he should be exempt under article 2.1(i) as manager of a pension fund</p>

Managing the assets of the scheme	Investment management	<p>MiFID will not apply to trustees provided they are either not acting by way of business or otherwise are not holding themselves out as, or additionally remunerated for, providing investment management services. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis</p> <p>In any event, trustees should be exempt under article 2.1(i) as manager or depositary (or both) of a pension fund</p> <p>If a service provider is acting as the operator of a stakeholder or personal pension scheme, he should also be exempt under article 2.1(i) as manager of a pension fund</p> <p>But a service provider who is merely managing the assets of a pension fund without being the manager or depositary of the scheme will not be exempt under article 2.1(i). The manager and depositary are those persons charged with responsibility for managing the fund or safeguarding its assets and not persons to whom such functions may be delegated or outsourced</p>
Safeguarding and administering the scheme assets	None	Safekeeping and administration of investments is a MiFID ancillary service
Establishing, operating or winding up a stakeholder or personal pension scheme	None	MiFID does not apply
a. Pension scheme trustee advising fellow	Investment advice	MiFID will potentially apply where the advice

trustees or members or prospective members

b. Pension scheme service provider advising trustees or members or prospective members

concerns MiFID financial instruments (such as shares, debt securities or units) and so may apply to advice given to the trustees about scheme assets. However, beneficial interests in financial instruments held under the trusts of a pension scheme will not themselves be financial instruments under MiFID. And rights under a personal pension or stakeholder pension scheme are also not financial instruments. So, advice given to scheme members or prospective members should not be investment advice under MiFID

MiFID will not apply to trustees who are advising their fellow trustees for the purposes of the trust provided they are not additionally remunerated for providing investment advisory services

Also, trustees will be exempt under article 2.1(i) in respect of anything they do in the capacity of manager or depositary of a pension fund (including advising their fellow trustees)

If a service provider is acting as the operator of a stakeholder or personal pension scheme, he should also be exempt under article 2.1(i) as manager of a pension fund if he gives advice to the trustees

Where the service provider is providing advice to a corporate trustee who is a member of its group, the exemption in article 2.1(b) may apply (and

may be combined with the exemption for administration of an employee participation scheme under article 2.1(g) where relevant)

Q41B. [deleted]

Q41C. As a professional trustee of a pension scheme, am I affected by the implementation of the *IDD* ?

No. A pension scheme trustee may perform tasks on behalf of the other trustees (such as signing proposal forms or giving dealing instructions to insurers or brokers or notifying claims on the death of a scheme member). But that trustee will not be providing an insurance distribution service to them. This is because, under the policy, the trustee will share equal rights and equal responsibility with his co-trustees and so may be regarded as acting solely in the capacity of policyholder rather than intermediary. Also, the pension scheme trustee will not be providing an insurance distribution

service on behalf of the members as the members will not be policyholders.

Q41D. As a pension scheme administration service provider, am I affected by the implementation of the *IDD*?

You may be. Detailed guidance about the potential effect of the *IDD* on the normal activities of administration service providers is in Q31 to Q41 and the table in ■ PERG 10 Annex 3.



10.5 Employers and affinity groups (such as trade unions)

Q42. Will I, as an employer, ever need to be regulated for providing pension benefits to my staff?

No, unless you are carrying on a *regulated activity* and, if so, satisfy the by-way-of-business test (see Q44).

Q43. When am I, as an employer, likely to be carrying on a regulated activity?

You are unlikely to be carrying on a *regulated activity* in the case of an OPS (other than one that is also a *stakeholder pension scheme*) unless you provide services that involve *regulated activity* to the trustees (such as giving them advice or arranging trust transactions). Any service that you might provide to your employees concerning their rights under the OPS will not be a regulated activity unless you are *advising on conversion or transfer of pension benefits*. But if you provide your staff with the opportunity to participate in a *personal pension scheme* or a *stakeholder pension scheme*, you are likely to be *arranging*. You may also be *advising on investments* if you provide your employees with advice on the merits of their joining the scheme (see Q39).

In respect of any pension scheme that provides *safeguarded benefits*, you may be *advising on conversion or transfer of pension benefits* where as part of your services to employees you provide advice on the merits of requiring a trustee or manager of a pension scheme to convert, transfer or cash out *safeguarded benefits* (see ■ PERG 12.6).

Q44. As an employer, I may offer my staff a stakeholder pension scheme or a personal pension scheme. If I do so, will I satisfy the 'by way of business' test?

Most probably not. To need *authorisation* you would need to be carrying on the *arranging* activity on commercial lines. This means that you would need to be expecting to obtain some form of commercial benefit from providing your staff, or a third party such as the intermediary who sets up the scheme for you, with services. This also applies if you were to be advising your employees on the merits of joining the scheme. However, giving advice also brings into play the restriction on making *financial promotions* (see Q47 to Q50).

As an employer, you are likely to be obtaining a commercial benefit from providing a pension scheme for your staff if you receive a direct benefit such as a commission or introduction fee. Or the commercial benefit may be indirect, for example, a reduction in premiums payable on another product such as key man or buildings insurance as an alternative to a direct fee.

But you would not gain a commercial benefit purely because:

- you negotiate special terms for your employees or for your own contributions or for both; or
- you hope to acquire or retain a more satisfied or happier or efficient workforce; or
- you recover the actual costs of arranging for your staff to be able to participate in the scheme.

In addition, if your scheme is an insurance-based scheme, such as a *group personal pension scheme*, your activity will potentially involve *insurance distribution activity*. If so, to satisfy the by-way-of-business test, you would also need to be remunerated.

The vast majority of employers or affinity groups do not set out to make a regular profit from arranging pension benefits for their staff or members and so will not satisfy the 'by way of business' test and will not need to be an *authorised or exempt person*.

Q45. As an employer, administration services that involve regulated activities are provided to my OPS in-house by my staff. Does this mean that I or my staff will need to be authorised or exempt?

No, on the basis that neither you nor they are likely to satisfy the by-way-of-business test. This is unless you are providing the services on a commercial basis (see Q44). This would arise if you provide the service in return for a reward that goes beyond the mere recovery of the costs you incur in doing so.

Q46. As an employer, I have designated a stakeholder pension scheme for my employees in accordance with the statutory requirement to do so. Does this mean that I am carrying on the regulated activity of establishing a stakeholder pension scheme?

No. The scheme has already been established by another person and you are merely choosing it as the stakeholder pension scheme which is to be offered by you to your employees.

Q47. As an employer, are there restrictions on my providing staff with details of pension schemes?

Yes, but in most circumstances you should be able to make use of an exemption.

If you make an invitation or inducement to your staff to join a *personal pension scheme* or a nominated *stakeholder pension scheme*, you are likely to be making a *financial promotion*. This is prohibited under section 21 of the *Act* unless:

- you are an *authorised person* ; or
- its contents are *approved* by an *authorised person* with the necessary *approver permission* or within an *approver permission exemption* ; or
- it falls within a relevant exemption.

It should be noted that the prohibition applies to financial promotions made in the course of business. It is our view that employers who promote their chosen pension schemes to their employees will be doing so in the course of business.

There are no restrictions on your promoting a non-stakeholder OPS to your employees. This is because neither rights under an OPS nor interests in any

investments held under it (such as interests in additional voluntary contributions schemes) are treated as regulated investments.

Q48. What are the exemptions that are available to employers?

Where an employer is obliged by law to offer its employees a *stakeholder pension scheme*, any *financial promotion* made for that purpose will be exempt under article 29 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 ("the *Financial Promotion Order*").

There is also a specific exemption for employers who make financial promotions to their staff in article 72 of the *Financial Promotion Order*. This applies, broadly speaking, where:

- the promotion is about a *group personal pension scheme* or a *stakeholder pension scheme*;
- the employer contributes to the pension scheme and discloses details of its contribution to the employee;
- the employer does not obtain any direct commercial benefit from promoting the scheme to its employees; and
- the employer informs the employee in any written promotion of his right to seek independent financial advice from a regulated person.

Q48A. What are the exemptions that are available to contracted service providers that make financial promotions to employees?

There is a specific exemption for contracted service providers (or *persons* acting on their behalf) that make financial promotions to employees in article 72A of the *Financial Promotion Order*. This applies in circumstances broadly similar to those set out in Q48. Further details of the exemption are set out in PERG 8.14.40AAG.

Q49. Are there any other exemptions available to employers or any that apply to affinity groups?

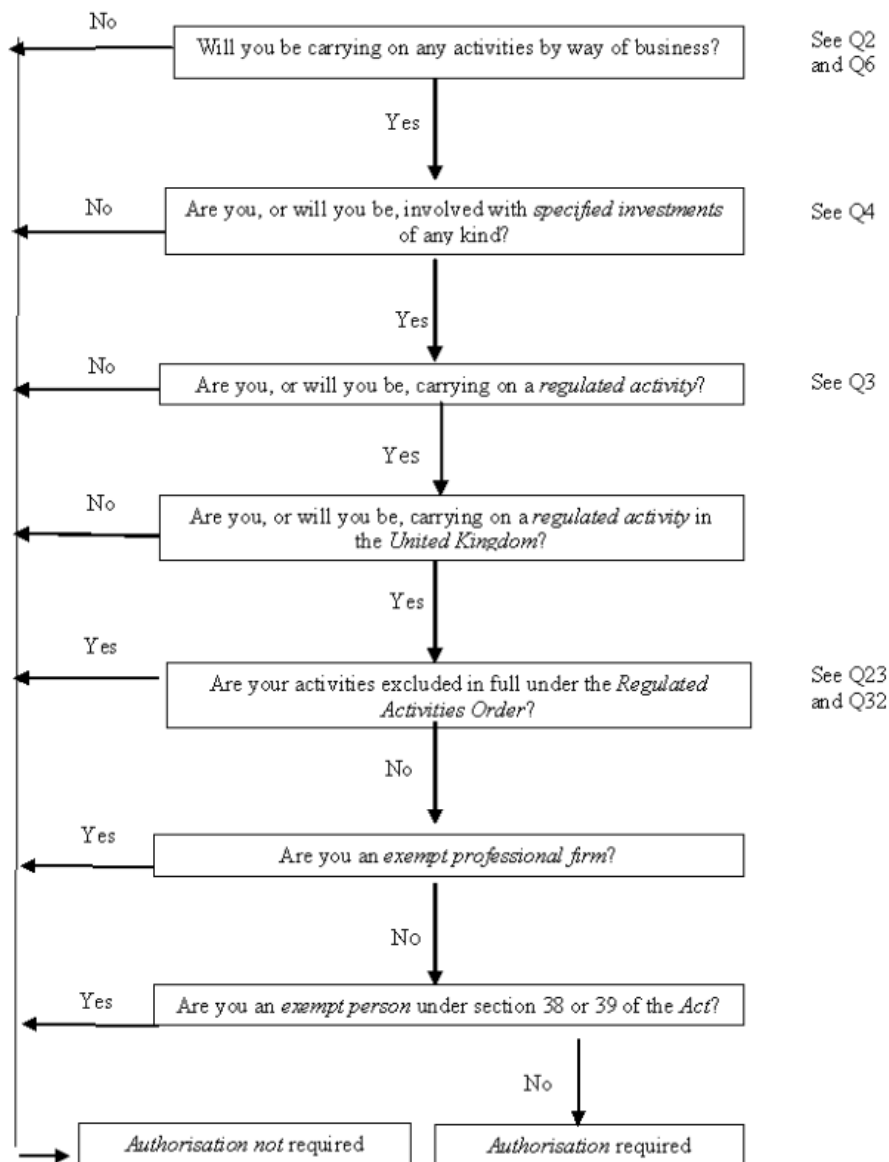
There are a few exemptions that may be relevant. For example:

- follow-up promotions, such as may be made after the employer has made a promotion under article 72 of the *Financial Promotion Order* - see article 14 of the *Financial Promotion Order*; and
- one-off promotions (that is, promotions that take account of the personal circumstances of the recipient) - see articles 28 and 28A of the *Financial Promotion Order*.

Q50. Can I find out more about the financial promotion restriction?

Yes. Chapter 8 of PERG has detailed *guidance* about the scope of the financial promotion restriction and the exemptions that are available.

Flow chart showing the steps to be considered in deciding whether authorisation is needed.



Flow chart showing the additional steps to be considered by trustees of occupational pension schemes and other persons in deciding whether authorisation is needed for managing the assets of such a scheme

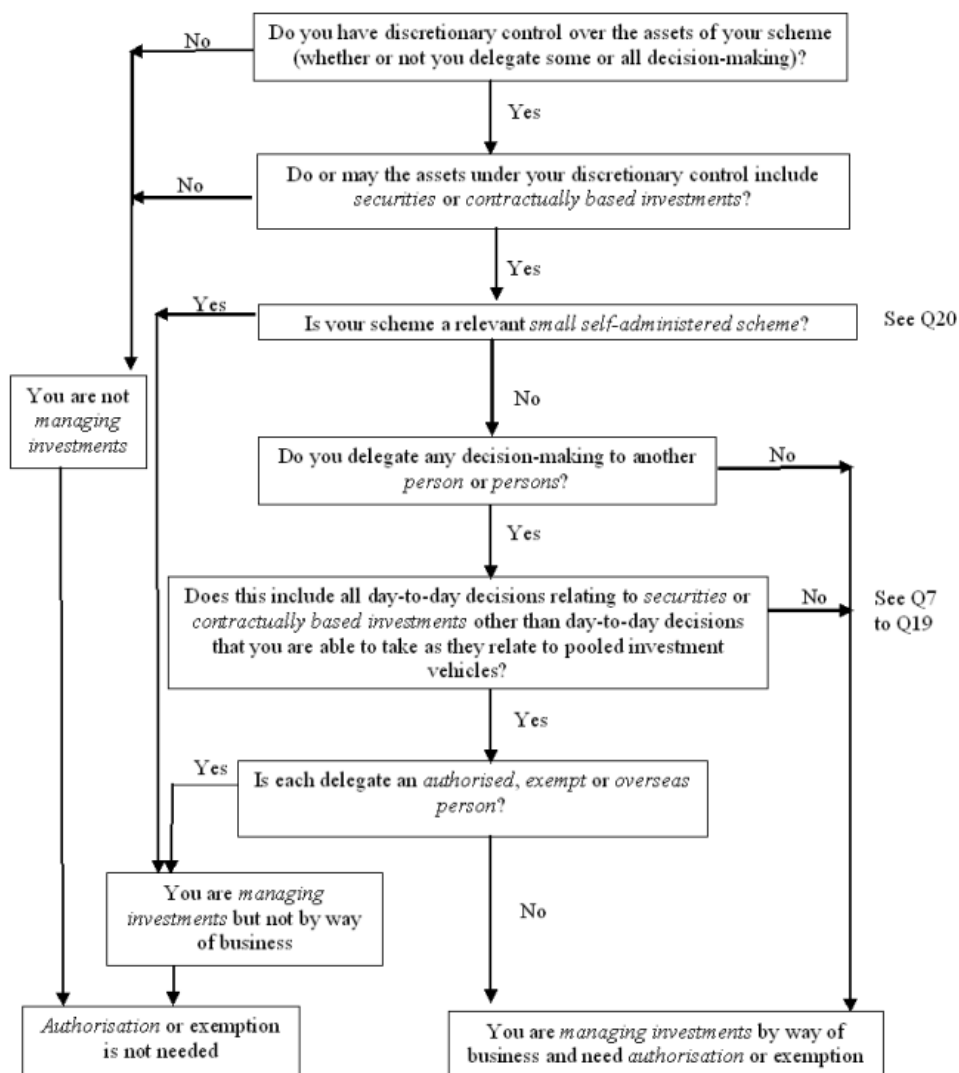


Table summarising regulatory position of pension scheme trustees and service providers

Potential regulated activity	When will such regulated activities be carried on?
<i>Dealing in investments as principal</i> (article 14 of the <i>Regulated Activities Order</i>)	Pension scheme trustees will be entering into investment transactions as principal but should be able to rely on the exclusions in articles 15, 16 or 66(1) of the Regulated Activities Order (see Q23(1)).
<i>Dealing in investments as agent</i> (article 21 of the Regulated Activities Order)	<p>Service providers who enter into investment transactions under delegated authority from pension scheme trustees or members are likely to be dealing in investments as agent (see Q31(2)).</p> <p>Pension scheme trustees are not dealing in investments as agent simply because their actions result in co-trustees acquiring or disposing of interests in trust assets. This is because they will be acting as principals (see Q23(1)).</p> <p>Article 22 of the Regulated Activities Order excludes from its scope, subject to certain conditions, an <i>unauthorised person</i> who deals in investments as agent with or through an <i>authorised person</i>. This exclusion is disapplied where the arrangements relate to a contract of insurance (such as a unit-linked policy, an annuity, term assurance or any general insurance contract). Service providers may be able to make limited use of this exclusion (see Q33).</p> <p>Article 67 of the Regulated Activities Order provides an exclusion for persons whose profession or business does not otherwise consist of regulated activities and who deal in investments as agent as a necessary part of their profession or business without being separately remunerated for doing so. This exclusion does not apply, in broad terms, where a person is carrying on <i>insurance distribution</i> or <i>reinsurance distribution</i>. Service providers may be able to make limited use of this exclusion - for instance, where providing payroll services (see Q34).</p> <p>Article 69 of the Regulated Activities Order excludes persons who are dealing in investments other than contracts of insurance as agent for other members of their <i>group</i>. However, service providers who are carrying on <i>insurance distribution activities</i> solely for, and are remunerated solely by, another group member will not satisfy the by-way-of-business test (see Q35).</p>
<i>Arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments</i> (article 25 of the Regulated Activities Order)	<p>Service providers who arrange transactions involving <i>securities</i> or <i>relevant investments</i> for pension scheme trustees or members are likely to be carrying on one or both of the <i>arranging</i> activities (see Q31(1)).</p> <p>Pension scheme trustees are not arranging simply because their actions result in co-trustees acquiring or disposing of interests in trust assets. This is because they will be acting as principal (see Q29).</p>

Potential regulated activity	When will such regulated activities be carried on?
<p><i>Managing investments</i> (article 37 of the Regulated Activities Order)</p>	<p>Service providers should be able to make good use of the exclusion in article 29 of the Regulated Activities Order for arranging deals with or through an <i>authorised person</i>. However, this exclusion does not apply where the arrangements relate to a contract of insurance (such as a unit-linked policy, an annuity, term assurance or any general insurance contract). This may affect the position of service providers where they are involved with such things as:</p> <ol style="list-style-type: none"> (1) arranging trust investments for the trustees; (2) arranging for employees to participate in a personal pension scheme; or (3) arranging for employees to participate in a <i>stakeholder pension scheme</i>. <p>Where such activities relate to a contract of insurance, the service provider is likely to need to be an authorised or exempt person provided he satisfies the by-way-of-business test (see Q33).</p> <p>Article 67 of the Regulated Activities Order provides an exclusion for persons whose profession or business does not otherwise consist of regulated activities and who are arranging as a necessary part of their profession or business without being separately remunerated for doing so. This exclusion does not apply, in broad terms, where a <i>person</i> is carrying on <i>insurance distribution</i> or <i>reinsurance distribution</i>. Service providers may be able to make limited use of this exclusion - for instance, where providing payroll services (see Q34).</p> <p>Article 69 of the Regulated Activities Order provides an exclusion for persons who are arranging on behalf of other members of their <i>group</i>. This exclusion does not apply where the transaction involves a contract of insurance.</p> <p>However, service providers who are carrying on <i>insurance distribution activities</i> solely for, and are remunerated solely by, another group member will not satisfy the by-way-of-business test (see Q35).</p> <p>Trustees of occupational pension schemes (whether or not they would otherwise be regarded as acting by way of business) will need authorisation or exemption for managing investments unless:</p> <ul style="list-style-type: none"> • the scheme is a small self-administered scheme that meets certain requirements; or • they do not need to take any day-to-day decisions about investing the scheme's assets; or • they delegate the taking of all day-to-day decisions to an authorised, exempt or overseas person; or • the only day-to-day decisions that they take relate to pooled investment vehicles and they obtain and consider advice from an expert (see Q7 to Q22). <p>The flow chart in Annex B sets out the steps that an OPS trustee will need to go through to determine whether he will need authorisation or exemption for managing investments. This also applies to any other person who may be managing the assets of an OPS.</p>

Potential regulated activity	When will such regulated activities be carried on?
<p><i>Assisting in the administration and performance of a contract of insurance</i> (article 39A of the Regulated Activities Order)</p>	<p>A personal pension scheme trustee will not need authorisation if he is unpaid. Other trustees who manage the investments of a personal pension scheme will not be managing investments provided they do not:</p> <ul style="list-style-type: none"> • hold themselves out as providing a service of managing investments; or • receive additional remuneration for managing investments (see Q23(3)). <p>Pension scheme trustees will not be regarded as carrying on this activity simply because they make claims on behalf of their co-trustees as well as on their own behalf. This is where the trustees are acting jointly and share the same rights and obligations as policyholders (see Q30).</p> <p>Service providers are likely to carry on this activity if they notify a claim under the 'death in service' benefits under a scheme in conjunction with handling the claim on behalf of the pension scheme trustees. This is because such services involve assisting in both administration and performance. But they will not be carrying on this activity provided they do not assist the trustees to perform any contractual obligation that they may have under the relevant policy. For example, the trustees may notify the claim themselves in accordance with the policy leaving the service provider to deal with administration only. Redeeming units under a unit-linked contract of insurance with a view to funding benefits or assigning benefits for any reason will not involve making a claim or otherwise assisting in performance (see Q31(3)).</p> <p>The exclusion in article 67 of the Regulated Activities Order extends to persons whose profession or business does not otherwise consist of carrying on a regulated activity and who are assisting in the administration and performance of a contract of insurance as a necessary part of their profession or business without being separately remunerated for doing so. The exclusion only applies where a person is not required to be regulated by the Insurance Mediation Directive. This means, in effect, that service providers will only be able to use the exclusion in connection with assisting in the administration and performance of a contract of insurance if they are merely providing information (see Q34).</p> <p>Where a person is assisting in the administration and performance of a contract of insurance solely for, and is remunerated solely by, another <i>group</i> member, that person will not satisfy the 'by-way-of-business' test because they are not carrying on <i>insurance distribution activities</i></p> <p>for a third party and so does not require to be authorised or exempt (see Q35).</p>
<p><i>Safeguarding and administering investments or arranging safeguarding and administration of assets</i> (article 40 of the Regulated Activities Order).</p>	<p>Some pension scheme trustees will not be carrying on this activity by way of business. For example, individuals who act as unpaid trustees of an occupational pension scheme (see Q6).</p> <p>Other trustees will not be carrying on this activity provided they do not:</p> <ul style="list-style-type: none"> • hold themselves out as providing a service of safeguarding and administering investments or arranging safeguarding and administration of investments; or

Potential regulated activity	When will such regulated activities be carried on?
<p><i>Establishing, operating or winding up a stakeholder pension scheme or establishing, operating or winding up a personal pension scheme</i> (article 52 of the Regulated Activities Order)</p>	<ul style="list-style-type: none"> • receive additional remuneration for safeguarding and administering investments or arranging safeguarding and administration of investments. <p>In addition, trustees will not be arranging safeguarding and administration of investments where they arrange for this to be done by a regulated person or a person acting on his behalf (see Q23(4)).</p> <p>Service providers would be arranging safeguarding and administration of investments if they arrange for the appointment of a custodian on behalf of the trustees. But they will not be arranging for another person to safeguard and administer simply by virtue of instructing a fund manager to buy investments which the fund manager will then safeguard and administer in accordance with pre-existing arrangements (see Q31(4)).</p> <p>The trustee of a trust-based stakeholder or personal pension scheme may be its operator. This is where the trustee is not merely a bare trustee and is responsible under the instruments establishing the scheme for complying with the management and administration requirements in respect of the assets and income of, and the benefits payable under, the scheme as imposed under relevant pensions and tax legislation. Persons who are not scheme trustees are only likely to be carrying on these activities if they are the scheme administrator (see Q26).</p>
<p><i>Advising on investments (except P2P agreements)</i> (article 53(1) of the Regulated Activities Order)</p>	<p>Trustees of pension schemes will not be advising on investments provided the advice is given only:</p> <ul style="list-style-type: none"> • to a fellow trustee for the purposes of the trust; or • to a member about their interest in the trust fund, <p>and provided that the trustee:</p> <ul style="list-style-type: none"> • does not receive additional remuneration for advising on investments; and • is not required to be regulated under the <i>IDD</i> (which should not be the case either because the trustee does not provide mediation services to his co-trustees or because the trustee is not remunerated specifically for giving advice) (see Q23(5) and Q30). <p>Service providers would be advising on investments if they provide advice to the trustees on the merits of the trust making particular investments (see Q39 and Q40).</p> <p>Article 67 of the <i>Regulated Activities Order</i> provides an exclusion for persons whose profession or business does not otherwise consist of regulated activities and who are advising on investments as a necessary part of their profession or business without being separately remunerated for doing so. This exclusion does not apply, in broad terms, where a person is carrying on <i>insurance distribution</i> or <i>reinsurance distribution</i>. Service providers may be able to make limited use of this exclusion - for instance, where providing actuarial advice to the trustees of an occupational pension scheme (see Q34).</p>

Table summarising regulatory position of employers and affinity groups.

Activity carried on by employer or affinity group	Potential implications in terms of regulated activities and the need for authorisation
<p>Establishing or setting up an <i>occupational pension scheme</i> or a <i>group personal pension scheme</i> or a <i>stakeholder pension scheme</i>.</p>	<p>Establishing an occupational pension scheme is not a regulated activity. Setting up a group personal pension scheme is likely to involve <i>arranging</i> (see Q43).</p> <p>Establishing a stakeholder pension scheme is a regulated activity in its own right. But an employer who is designating a stakeholder pension scheme as required by law is not, as a result of that fact alone, establishing the scheme (see Q46).</p> <p>In any event, the employer or affinity group will only need to be authorised or exempt if they are carrying on regulated activity by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p>
<p>Acting as trustee of a trust-based stakeholder pension scheme.</p>	<p>This is likely to be a regulated activity as the trustee is likely to be operating the stakeholder pension scheme. But the employer or affinity group will only need to be authorised or exempt if, as trustee, they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p>
<p>Arranging for employees to participate in an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme.</p>	<p>Arranging for employees to participate in an occupational pension scheme (other than one that is also a stakeholder pension scheme) is not a regulated activity as the employees are not acquiring investments. Arranging for employees to participate in any form of personal pension scheme or in a stakeholder pension scheme is likely to involve <i>arranging</i>. But the employer or affinity group will only need to be authorised or exempt if they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p>
<p>Advising employees on the merits of participating in an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme, including advising employees against joining a personal pension scheme or advising them to transfer from a personal pension scheme.</p>	<p>Advice on the merits of participating in an occupational pension scheme (other than one that is also a stakeholder pension scheme) is not a regulated activity as the employees are not acquiring investments. Advice on the merits of participating in a particular group personal pension scheme or stakeholder pension scheme will be a regulated activity because the rights that a person would acquire by becoming a member of the scheme are a form of investment (see Q39). Advice against joining or to transfer from a particular personal pension scheme will be a regulated activity for the same reasons. If the advice relates to personal pension schemes generally but not one in particular it will not be a regulated activity (see Q39 and Q40).</p> <p>But the employer or affinity group will only need to be authorised or exempt if they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p>
<p>Advising employees in their capacity of members of a pension scheme or advising their <i>survivor</i> on the merits of requiring a trustee</p>	<p>This is likely to amount to <i>advising on conversion or transfer of pension benefits</i> but only where it is carried on by way of business, the guidance in Q6, Q44 and Q45 is applicable.</p>

Activity carried on by employer or affinity group	Potential implications in terms of regulated activities and the need for authorisation
<p>or manager of a pension scheme to convert, transfer or cash out safeguarded benefits.</p> <p>Assisting in the administration of an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme.</p> <p>Providing in-house administration services to the trustee of the employer's OPS and safekeeping services for documents of title such as bearer certificates.</p>	<p>Any of these could involve regulated activity (see Q31). But the employer or affinity group will only need to be authorised or exempt if they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p> <p>This may amount to <i>safeguarding and administering investments</i> if the employer undertakes both activities.</p> <p>But the employer or affinity group will only need to be authorised or exempt if they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p>

Table summarising regulatory position concerning financial promotions by trustees, employers and affinity groups.

Person communicating	Subject or purpose of communication	Need for approval or exemption available
Employer, affinity group or trustee	To provide information on any aspect or type of pension arrangements without seeking to persuade the recipient to take a particular course of action.	Approval or exemption not needed. Mere information will not be a <i>financial promotion</i> .
Employer, affinity group or trustee	To persuade employees or members to join an <i>occupational pension scheme</i> which is not a <i>stakeholder pension scheme</i> .	Approval or exemption not needed as interests arising under the trusts of an occupational pension scheme which is not a stakeholder pension scheme are not investments and so the communication will not be a financial promotion (see Q47).
Employer, affinity group or trustee	To persuade employees or members to join a stakeholder pension scheme or a <i>group personal pension scheme</i> .	<p>Approval or exemption needed as rights under a stakeholder pension scheme and rights under a group personal pension scheme are themselves investments.</p> <p>Promotions about stakeholder pension schemes will be exempt where employers are making them in order to meet their statutory obligation to provide a stakeholder pension scheme for their employees.</p> <p>Employers and contracted service providers may be able to use the specific exemptions for promotions made to employees if the conditions in the exemptions are satisfied (see Q48 and Q48A).</p> <p>Individuals who act as unpaid trustees will not be making promotions in the course of business, so approval or exemption will not be required.</p> <p>Affinity groups may or may not be promoting in the course of business depending primarily on whether they are carrying on their main activities as a business.</p>
Employer or affinity group	To persuade employees or members to make free-standing additional voluntary contributions (FSAVCs) or to take out any other type of <i>personal pension scheme</i> (other than a stakeholder pension scheme or a group personal pension scheme).	Approval or exemption will be needed as rights under FSAVCs and other personal pension schemes are themselves investments.

Person communicating	Subject or purpose of communication	Need for approval or exemption available
Employer, affinity group or trustee	To persuade employees or members to take out additional voluntary contributions (AVCs) or an annuity to be held under an occupational pension scheme which is not a stakeholder pension scheme.	Approval or exemption not needed as interests in AVCs or annuities arising under the trusts of an occupational pension scheme which is not a stakeholder pension scheme are not investments and so the communication will not be a financial promotion (see Q47).
Employer, affinity group or trustee	To persuade employees or members not to join, or not to leave the occupational pension scheme to join, a stakeholder pension scheme or a group personal pension scheme or not to switch funds by reference to which their benefits are calculated.	Approval or exemption not needed as persuading persons not to acquire, or not to dispose of, investments is not a financial promotion.
Employer, affinity group or trustee	To persuade members of a pension scheme to switch funds by reference to which their benefits are calculated.	<p>Approval or exemption not needed when the scheme is an occupational pension scheme which is not a stakeholder pension scheme as the rights being switched are not investments and so the communication will not be a financial promotion (see Q47).</p> <p>Where the switching rights occur under a stakeholder pension scheme or a group personal pension scheme, approval or exemption will be needed as the rights are investments.</p> <p>Employers and contracted service providers may be able to use the specific exemptions for promotions made to employees where the promotion relates to switching rights under a group personal pension scheme or a stakeholder pension scheme and the other conditions in the exemptions are satisfied (see Q48 and Q48A).</p> <p>Trustees will be exempt as they are making the promotion to a member and it relates to the management or distribution of the trust fund.</p>
Trustee	To persuade co-trustees to enter into an investment transaction.	Trustees will be exempt as they are making the promotion to a fellow trustee and it is made for the purposes of the trust fund.

Chapter 11

Guidance on property investment clubs and land investment schemes

11.1 Background

Q1. What is the purpose of these questions and answers ("Q&As") and who should be reading them?

These Q&As are principally aimed at those involved in the running of property investment clubs or schemes involving the sale of plots of land with arrangements for obtaining planning permission in respect of them or for the disposal of the land as a whole. They are intended to help such persons understand whether they will be carrying on a *regulated activity* and need to be an *authorised person* or *exempt person* under section 19 of the Financial Services and Markets Act 2000. The Q&As may also be of assistance to investors in such schemes concerned about whether the scheme they are investing in should be run by an authorised or exempt person.

The Q&As that follow are set out in two sections:

- Guidance on property investment clubs (■ PERG 11.2)
- Guidance on land investment schemes (■ PERG 11.3)



11.2 Guidance on property investment clubs

Q2. What are property investment clubs?

In general, property investment clubs, (sometimes also known as buy-to-let schemes, buy-to-let syndicates or property investment syndicates) are schemes allowing members of the public to invest in property and which possess some or all of the following characteristics:

- a pooling of resources to allow investment in, or collective management of, real property;
- much or all of the property purchased being financed by money borrowed by the members of the scheme (a typical split being 15% equity and 85% debt), with the borrowing often being arranged by the property investment club itself for members;
- the offer of educational training on the property market;
- other help given to members by the property investment club, including help with the purchase, and the sale, of the property (sometimes involving forward purchase contracts);
- the properties concerned are often newly, or not yet, built; and
- discounts are often offered, or are purported to be offered, on the price of the property (usually from the developer in recognition of a bulk purchase by club members).

Q3. Does the FCA regulate property investment clubs?

The FCA regulates the operation (or management) and promotion of property investment clubs if, in substance, they amount to *collective investment schemes* or *AIFs*.

If a scheme, in substance, is a collective investment scheme, it cannot escape the need for regulation by being dressed up as something else.

Q4. What is a collective investment scheme and will my property investment club be one?

Broadly speaking, a collective investment scheme is any arrangement:

- the purpose or effect of which is to enable those taking part (either by owning the property, or part of it, or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property;
- where persons taking part do not have day-to-day control over the management of the property; and
- where either the contributions and profits or income are pooled, or the property is managed as a whole by or on behalf of the operator of the scheme, or both.

Whether your property investment club is a collective investment scheme or not will depend on its individual structure and the facts surrounding it. If your club meets each of the above conditions and is not exempt, then its operation and promotion should come under FCA regulation. This is regardless of whether that was intended by the person operating or promoting the club.

Q4A. What is an AIF and will my property investment club be one?

■ PERG 16.1 and ■ PERG 16.2 provide *guidance* on what constitutes an *AIF*; you should consult this *guidance* to determine whether the management and *marketing* of a property investment club will be regulated by the *FCA* as an *AIF*. You should be aware that a property investment club may be both a *collective investment scheme* and an *AIF*, and may be an *AIF* even if it does not amount to a *collective investment scheme*. The remainder of this section does not address whether or not a property investment club may be an *AIF* or the consequences if it is an *AIF*.

Q5. Can a body corporate be used rather than a collective investment scheme?

Yes, if all your rights in a scheme derive from ownership of securities issued by a body corporate, the scheme will not be a collective investment scheme. This is unless the body corporate is an *open-ended investment company* or a limited liability partnership. ■ PERG 9 has guidance on the meaning of open-ended investment company.

Q6. What is the purpose of the 'day-to-day control' test and the nature of day-to-day control?

The purpose of the 'day-to-day control' test is to try to draw an important distinction about the nature of the investment that each investor is making. If the substance is that each investor is investing in a property whose management will be under his control, the arrangements should not be regarded as a collective investment scheme. On the other hand, if the substance is that each investor is getting rights under a scheme that provides for someone else to manage the property, the arrangements would be regarded as a collective investment scheme.

Day-to-day control is not defined and so must be given its ordinary meaning. In our view, this means you have the power, from day-to-day, to decide how the property is managed. You can delegate actual management so long as you still have day-to-day control over it.

Q7. The participants in my property investment club do not get involved in every single management decision, but appoint agents to take decisions for them in accordance with criteria agreed between them. Have the participants lost day-to-day control?

We do not consider that day-to-day control means that each participant would themselves need to be involved in each and every decision taken, so long as they retain day-to-day control over the management. For example, delegating rent collection, cleaning and management services in relation to a property, by appointing agents to carry out these tasks would not necessarily mean that the participants lose day-to-day control, so long as the participants retain day-to-day control over the management of the agency contracts.

Q8. Must each participant individually have day-to-day control for my property investment club not to be a collective investment scheme?

Yes, though this does not prevent two or more individuals having day-to-day control together. (This may happen, for example, where business partners buy several flats in a block and manage them jointly.) But the more distant any individual participant is from controlling the management of the property himself, the less likely it is that the individual participants can be said to have control which is 'day-to-day'.

Q9. I run a property investment club where the participants have a right to be consulted on management decisions or at least give directions. Do they have day-to-day control?

Not by virtue of those rights alone. Simply having the right to be consulted or give directions is not enough to give a participant day-to-day control.

Also, if all management decisions are taken by the operator (or a person appointed by him) using generic mandates (for example, a power of attorney) from participants, then it is unlikely to be the case that the participants have day-to-day control. It is more likely in this case that the scheme is effectively one where management is devolved entirely to the operator, with participants only retaining a notional control over the decision-making of the operator - in essence amounting to a right to be consulted or give directions, rather than day-to-day control.

Q10. I have promoted or set up a property investment club such that the documents that each participant signs explicitly say that they have day-to-day control over the management of the property - does that mean it is not a collective investment scheme?

No. In our view, regardless of what rights or powers the documentation purports to give its participants, it is important to look at what happens in fact. It is the substance rather than the form that counts. So, if the participants are stated to have day-to-day control, simply as an attempt to avoid the property investment club amounting to a collective investment scheme, but they do not, in fact, have such day-to-day control, then the club may still amount to a collective investment scheme. In that case, its operation and promotion would be regulated by the FCA.

Q11. I run a property investment club where all of the major participants have day-to-day control over the management of the property but, by choice, one or two of the smaller participants do not. Does this mean that the club could still be a collective investment scheme?

Yes, if the other elements are present. In order for the arrangements not to be a collective investment scheme, all individual participants, regardless of their contribution or stated preferences, must have day-to-day control. So, if one participant does not have day-to-day control then the whole scheme could amount to a collective investment scheme.

Q12. I run a scheme where each person owns individual properties or parts of properties in the property investment club. Each person owns property either directly, or indirectly (for example, through a limited company or a limited liability partnership of which he is the owner or through a limited partnership). Is this scheme likely to be a collective investment scheme?

No, unless the properties belonging to each person, company, limited liability partnership or limited partnership are managed as a whole by or on behalf of the operator of the scheme. So, the mere fact that the operator is managing a number of properties and achieves economies of scale in his management charges or in things such as insurance cover would not mean that the properties are being managed as a whole. Neither would the fact that the operator may be able to offer reductions in sale price because of bulk discounts negotiated with developers. This is provided the operator is managing each property on an individual basis.

As an example, if a managing agent manages a block of flats on the basis that the only profit or income each individual flat owner obtains is what arises from the management of his property, there is no management as a whole. However, if the managing agent managed the flats in such a way that each individual flat owner received an income from total lettings, regardless of whether that person's flat was let or not, the properties are managed as a whole and the arrangements are likely to be a collective investment scheme.

Q13. Does it make a difference if people participate through a corporate vehicle?

No. But it should be noted that a limited liability partnership or limited partnership, through which a person indirectly owns the property concerned, may amount to a collective investment scheme itself. This is if the partnership has more than one investor participant and subject to the considerations set out in this guidance.

Q14. I run a property investment club where the participants own their own individual properties which are rented out but the rental income is pooled and I decide on which property should be rented at any time and to whom. Is this likely to be a collective investment scheme?

Yes. This is because:

- the property in respect of which the arrangements are made is the property belonging to each of the participants;
- you are managing that property as a whole; and
- the participants do not have day-to-day control over the management of that property.

Q15. If my property investment club is not a collective investment scheme because participants acquire shares in a body corporate, does that mean that I do not need to be authorised?

Not necessarily. Depending on the circumstances, you may be involved in making arrangements for the participants to buy, sell or subscribe for their shares which is itself a regulated activity and may only be carried on by an authorised or exempt person.

Q16. Does the FCA regulate the mortgages that are used to finance property investment clubs?

No. The FCA only regulates the provision of mortgages on property where the borrower intends to use at least 40% of it as a dwelling for him or a close relative. This is typically not the case with properties purchased through property investment clubs.

Q17. What are the consequences of a property investment club being regulated by the FCA?

If a property investment club were considered to be a collective investment scheme, and therefore its operation and promotion regulated by the FCA, then any person operating the scheme in the *United Kingdom* or advising investors on the merits of participating or arranging for them to do so, must be an authorised or exempt person. If such a person was not authorised or exempt, he would be liable to commit a criminal offence. It is only the activities of such persons that would be regulated by the FCA. The property investment club itself would not be regulated by the FCA as a product in the way that authorised unit trusts, authorised contractual schemes or authorised open-ended investment companies (which are collective investment schemes) are. Also, agreements entered into by an unauthorised person in the course of their operating, advising on or arranging for persons to participate in a collective investment scheme are potentially unenforceable against the other party and the other party may be entitled to compensation from the unauthorised person.

Q18. Are there restrictions on the promotion of my property investment club?

Yes, if it is a collective investment scheme or involves investors acquiring securities issued by a body corporate - otherwise not. If your property investment club is a collective investment scheme, you would not be able to promote it to the general public and, unless exempt, any promotional material would need to comply with FCA rules. ■ PERG 8 has guidance about the restrictions on all kinds of *financial promotion*.

Q19. [deleted]



11.3 Guidance on land investment schemes involving planning permission arrangements

Q20. I run a business arranging for the sale of individual plots of development land to investors who are also required to use my services in obtaining planning permission for or disposing of the land as a whole (or both). Might I need to be authorised?

Yes, this is likely to be the case. This will be because the role you have in obtaining planning permission or in negotiating and effecting the sale of the land (or both) may mean that you are operating a collective investment scheme (see Q4). The purpose or effect of the arrangements would appear to be to enable investors, as owners of parts of the land, to receive profits arising from your services in obtaining planning permission or arranging disposal in respect of the land as a whole. If the planning or disposal process is such that individual investors do not have day-to-day control over it, the arrangements are likely to amount to a collective investment scheme, and to operate it you would need to be authorised or exempt. The restrictions on financial promotions referred to in Q18 would also need to be considered.

Q21. I run a business which arranges for individual plots of land to be sold to potential investors and, whilst I refer to the possibility of obtaining planning permission as a way of increasing the value of the land, I don't, nor does anyone connected to me, have a role in pursuing any such permission nor any other control over the land as a whole. Do I need to be authorised?

No. If all of the participants have control over the obtaining of planning permission relevant to their individual plots of land the arrangements will not be a collective investment scheme. Arranging for investment in plots of land by itself is not a regulated activity as plots of land are not of themselves *specified investments*.

Chapter 12

Guidance for persons running or advising on personal pension schemes

12.1 Background

Q1. What is the purpose of these questions and answers ('Q&As') and who should be reading them?

These Q&As are aimed at, and should be read by, *persons* involved in the running of a *personal pension scheme* and those who give advice about or provide services to such schemes. They are intended to help such persons understand whether they will be carrying on a *regulated activity* and need *authorisation* or exemption under section 19 of the Financial Services and Markets Act 2000 following the changes to pension legislation that took effect on 6 April 2007 and on 6 April 2015. The Q&As complement the general *guidance* on regulated activities which is in Chapter 2 of our Perimeter Guidance manual ('PERG') and the general guidance about pensions-related activities which is in Chapter 10 of PERG.

The Q&As are set out under five sections:

- *establishing, operating or winding up a personal pension scheme* (■ PERG 12.2);
- *rights under a personal pension scheme* (■ PERG 12.3);
- *the application of EU Directives* (■ PERG 12.4); and
- *financial promotion issues* (■ PERG 12.5); and
- *advising on conversion or transfer of pension benefits* (■ PERG 12.6).

12.2 Establishing, operating or winding up a personal pension scheme

Q2. What is a personal pension scheme for the purposes of this regulated activity?

The term is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) as any scheme other than an *occupational pension scheme* (OPS) or a *stakeholder pension scheme* that is to provide benefits for people:

- (1) on retirement; or
- (2) on reaching a particular age; or
- (3) on termination of service in an employment.

Although the definition does not expressly say so, it is, in the FCA's view, clear from the context in which the term is applied, that such a scheme will be one the sole or principal purpose of which is to provide benefits to members of the scheme upon their reaching a pensionable age. This will typically include pension schemes that are intended to be registered with The Pensions Regulator and to be eligible for tax relief relating to pension schemes. It will also include other types of pension schemes such as qualifying recognised overseas pension schemes (QROPSs) that are not occupational pension schemes.

This will include *self-invested personal pension schemes* ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers, contractual scheme managers or deposit takers (including free-standing voluntary contribution schemes).

To determine whether a pension scheme is a personal pension scheme it is first necessary to determine whether it is an OPS. An OPS is defined in the Regulated Activities Order by reference to an OPS as defined in section 1 of the Pensions Schemes Act 1993 but without including paragraph (b) of that section. This means that a pension scheme is an OPS if, broadly speaking, it is a pension scheme:

- that is established:
 - for the purpose of providing benefits to, or in respect of, people with service in employments of a description; or
 - for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

by persons who are, or who include, employees of that kind or their employers, or persons representing the interests of either, at the time the scheme is established; or

- that is prescribed or is of a prescribed description (such as a scheme that is prescribed under the Pension Schemes (Categories) Regulations 2005 (SI 2005/2401)).

The effect of omitting paragraph (b) from the Pensions Schemes Act definition of an OPS is that a pension scheme that would otherwise be an OPS but for the fact that its main administration takes place in another *EEA State* will be an OPS for the purposes of the Regulated Activities Order and this guidance.

Q3. What is involved in establishing a personal pension scheme?

The establisher of a *personal pension scheme* is the *person* responsible for putting in place the arrangements founding the scheme. With a trust-based scheme, this will usually be the person who executes the trust as provider. In a scheme established by deed poll, it will be the person who enters into the deed poll. There will usually only be one person who establishes the scheme. Any professional firms that they may employ to act as their agent (such as solicitors) would not be establishing the scheme. The establisher may also be the operator but need not be. An employer will not be establishing a personal pension scheme (such as a *group personal pension scheme*) purely as a result of them having chosen such a scheme to offer to their employees.

The activity of establishing a personal pension scheme ceases once the scheme is established. This means that persons who have established schemes prior to 6 April 2007 will not require authorisation for establishing a personal pension scheme unless they intend to establish a new scheme after that date.

Q4. What is involved in operating a personal pension scheme?

The 'operator' is the *person* responsible to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In trust-based schemes, the trustees may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person to be responsible to the members for carrying out all the operator's functions as scheme administrator or as trustee, or both as the case may be. But a person to whom activities may be outsourced by the operator will not, thereby, become an operator of the scheme (see further guidance in Q6).

The fact that a member of a SIPP has the right to direct which investments are to be held for his benefit does not mean that he is to be regarded as operating the scheme as a result of exercising that right.

Q5. What is involved in winding up a personal pension scheme?

The *person* who winds-up a *personal pension scheme* will be the person who is responsible for putting in place the arrangements for bringing the scheme

to an end in a way that complies with the relevant provisions of the instrument that established the scheme and any relevant rules under pensions or tax legislation. This will, more often than not, be the operator of the scheme.

Q6. What is my position as an operator of a personal pension scheme if I delegate day-to-day functions such as administration of the scheme or the management or custody of the scheme assets to another person?

As explained in Q4, the operator of a *personal pension scheme* is the person who is responsible to the members of the scheme for ensuring that the scheme is operated in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. Provided he remains responsible to the members for such matters, he will remain the operator even though he may delegate or out-source the day-to-day carrying out of his functions as operator to another person. That other person will not become an operator of the scheme purely as a result of carrying out such functions on behalf of the operator. However, he may be carrying on other regulated activities in performing his delegated or out-sourced tasks (such as *arranging or managing investments*) in which case he will be subject to regulation for those activities.

Chapter 10.4 of PERG has general guidance about the circumstances in which persons who administer pension schemes on behalf of the operator or trustees may be carrying on a regulated activity including an *insurance distribution activity*.

Q7. As the operator of a personal pension scheme, is my position affected by whether the underlying property of the scheme is comprised of physical assets such as commercial property rather than investments such as shares or life policies?

No. It is the establishment, operation and winding up of the scheme that is regulated under the new activity - regardless of the type of assets the scheme will hold.

Q8. Will I need to be authorised for managing the assets of a personal pension scheme which is invested solely in physical assets such as commercial property on behalf of the operator?

No. Such assets will not become *designated investments*. However, the operator of the scheme will remain responsible for the management and administration of the assets as these are part of the regulated activity of operating the scheme.

Q9. Will I satisfy the 'by-way-of-business' test that is necessary for authorisation to be required?

The application of the by-way-of-business test to any particular *person* will always depend on that person's individual circumstances. A number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular *regulated activity* that is carried on.

In very broad terms, it is likely that any corporate body (including corporate trustees) that operates a *personal pension scheme* would be carrying on that activity by way of business. Chapter 10.5 of PERG has specific guidance about the limited circumstances in which employers may be likely to satisfy the by-way-of-business test when advising on or arranging pension benefits for their employees.

Q10. Can there be more than one person who operates a personal pension scheme?

Yes. For example, the *person* establishing a scheme may appoint a trustee and an administrator to operate the scheme jointly (see Q4). In this case, both the trustee and the administrator will need to be *authorised*. Or there could be two or more trustees who are jointly responsible for operating the scheme, in which case each will need to be *authorised* if they are doing so by way of business.

Q11. I am a trustee operating a self-invested personal pension scheme ('SIPP'). Can I rely on the various exclusions available to trustees for other regulated activities such as dealing in investments, managing investments and safeguarding and administering investments?

Yes, provided you are able to satisfy the conditions applicable to the exclusions. No changes were made to any of the exclusions as a result of the changes in regulatory scope that took effect on 6 April 2007. Guidance on the exclusions is given in Chapter 10 (Q23) of PERG.

Q12. Do the same principles apply to establishing, operating or winding up a stakeholder pension scheme?

Yes. In principle, the answers given to other questions apply equally to *stakeholder pension schemes*. Establishing, operating and winding up a stakeholder pension scheme are already regulated activities. Guidance on these activities is given in Chapter 10 (Q24 to Q28) of PERG.

Q13. Does the regulated activity of establishing, operating or winding-up a personal pension scheme have any effect on occupational pension schemes?

No. But the establishment, operation and winding up of *occupational pension schemes* that are *stakeholder pension schemes* are regulated activities in their own right.

Q14. I intend to operate a personal pension scheme under which members will acquire benefits derived from the management of a pool of assets. Will the scheme become a collective investment scheme or an AIF?

No. *Personal pension schemes* (along with *stakeholder pension schemes*) are specifically exempted from being *collective investment schemes*. In the FCA's view a *personal pension scheme* also does not amount to an *AIF* (see ■ PERG 16.2 question 2.32). However, where a *personal pension scheme* invests in a pooled investment vehicle of some kind, that vehicle may itself be a *collective investment scheme* or an *AIF* unless another exemption applies to it.

12.3 Rights under a personal pension scheme

Q15. I am a financial intermediary dealing with pensions. Am I affected by the fact that rights under a personal pension scheme are a specified investment?

Yes. The *specified investment* of rights under a *personal pension scheme* is a *security*. This means that the following regulated activities apply in relation to such rights:

- *dealing*;
- *arranging*;
- *managing investments*;
- *safeguarding and administering investments*; and
- *advising on investments*.

In addition, rights or interests under a pension scheme which provides *safeguarded benefits* is a specified investment in respect of *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6).

Q16. What are the rights under a personal pension scheme that are specified investments and securities?

These are all the rights that membership of the scheme confers on a member. This may vary (for example, where the scheme is a SIPP) but is likely to include some or all of the following rights:

- to make payments to the scheme;
- to withdraw sums from the scheme in certain circumstances;
- to transfer value to another pension scheme;
- to receive benefits arising from the capital value of or income derived from particular assets or from the performance of a unitised fund;
- to place certain types of property (for example, commercial property) in the scheme;
- to instruct the operator which assets to buy or sell for the purposes of the scheme;
- to instruct the operator to switch funds from one managed or unitised fund to another;
- to appoint a *person* to manage the assets or to give instructions to the operator about which assets to buy or sell on behalf of the member; and
- to instruct the operator to borrow money to purchase assets (for example, to take out a mortgage on a commercial property).

Q17. Regulated activities such as dealing and arranging deals in, and advising on, investments relate to transactions involving the buying or selling of certain specified investments including securities. When will rights under a personal pension scheme be bought or sold so as to trigger these regulated activities?

The terms 'bought' and 'sold' are given a wide meaning and include any acquisition or disposal for valuable consideration. The term disposal is also given a wide meaning and, in relation to an investment comprising rights under a contract, includes surrendering, assigning or converting such rights. Taking these facts into account, the circumstances in which rights under a *personal pension scheme* may be bought or sold include:

- when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights);
- when the member makes regular or occasional additional payments to the scheme (since he has bought further rights being rights to an increased entitlement to benefits);
- when income withdrawals are made or benefits are transferred to another scheme or benefits are released to permit the purchase of an annuity (since the rights giving entitlement to benefits represented by the sums moved out of the scheme are surrendered and so sold);
- where the member or his agent instructs the operator to buy assets of any kind either from existing cash holdings or from the proceeds of selling existing assets (since, in switching the assets, the member is converting his rights from an entitlement to benefits from the performance of certain assets to an entitlement to benefits from the performance of other assets - the former rights are sold and the latter are bought); and

[*Editor's note:* The Court of Appeal (in the case of *Russell David Edward Adams v Options UK Personal Pensions LLP* (formerly *Options SIPP UK LLP* and *Carey Pensions UK LLP*) and the FCA (as intervenor) ([2020] EWHC 1229 (Ch)) held to be incorrect the view in the preceding paragraph that rights under a pension scheme are being sold and bought if assets held within the scheme are disposed of in order to reinvest in another asset to be held within the scheme. The FCA is considering what changes to PERG are needed to reflect this decision.]

- where the member exercises his right to switch between managed or unitised funds (since, in switching funds, the member is converting his rights from an entitlement to benefits from the performance of one fund to an entitlement to benefits from the performance of another fund - again, the former rights are sold and the latter are bought).

The operator of a personal pension scheme will also be selling rights when he grants rights to a member.

Q18. The members of the personal pension scheme that I operate acquire rights to or interests in specified investments such as units or life policies. Such rights or interests are usually specified investments in their own right and arranging or advising on them is a regulated activity. Does the fact that rights under the personal pension scheme are themselves a specified investment affect this?

In certain circumstances this may be the case, but, in practice, the effect will be largely academic. Where the rights or interests would form part of the rights under a *personal pension scheme*, they will fall under that category of specified investment and will not be a specified investment in their own right. But where, for example, advice is being given on the merits of acquiring rights to or interests in specified investments for the purpose of their being held under a personal pension scheme but not any one particular scheme, the rights or interests will remain specified investments in their own right. This is because there are no rights under a personal pension scheme at that stage.

This will only affect the rights that the member obtains. It does not alter the nature of any asset that is held by or on behalf of the operator for the purpose of providing benefits to the scheme member. So, any person who arranges for the scheme operator (or trustee as the case may be) to acquire assets is likely to be carrying on the regulated activity of *arranging* where those assets are *securities* or *relevant investments* but not where they involve other property such as real estate. This contrasts with a person who is arranging for scheme members to acquire rights under the scheme which will be a regulated activity regardless of the nature of the underlying property.

Q19. For advice to be regulated, it needs to relate to the merits of buying or selling a particular investment. When do rights under a personal pension scheme become 'particular' rights and so particular investments?

It is the rights under a *personal pension scheme* that must be a particular investment. This means that the rights must arise under a particular personal pension scheme. So, provided the rights on which advice is given relate to rights conferred, or to be conferred, by a particular scheme, they will be particular rights and advice on the merits of buying or selling them is likely to be regulated. This is the case, whatever the nature of the rights or of the underlying assets or prospective underlying assets. Conversely, if there is no particular personal pension scheme, there cannot be any particular rights.

As for advice to a prospective member on the merits of buying particular assets at a stage where there are no particular rights under a personal pension scheme, such advice is likely to be regulated where the assets are *securities* or *relevant investments* (as being advice on the merits of buying rights to or interests in those investments). But such advice will not be regulated where the assets are not investments of that kind (such as commercial property).

A person may be asked to advise a client on the merits of his acquiring a commercial property for holding it under a SIPP in circumstances where the client has an existing SIPP of which the adviser may or may not be aware. Provided the adviser has not been asked to, and it is reasonable for him to believe that he would not be expected to, advise his client on the merits of his holding the property under the particular SIPP, the advice may remain generic as respects rights under a personal pension scheme and so would not be subject to regulation.

In addition, it should be noted that advising a client P in their capacity as *member of a pension scheme* who has *subsisting rights* in respect of any *safeguarded benefits* on the merits of P requiring the trustee or manager of the pension scheme to:

- (a) convert any of the *safeguarded benefits* into different benefits that are flexible benefits under the scheme; or
- (b) make a transfer payment in respect of any of the *safeguarded benefits* with a view to acquiring a right or entitlement to flexible benefits for P under another pension scheme; or
- (c) pay a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the *safeguarded benefits*;

is a regulated activity on its own and would require the person carrying it out to be authorised for *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6).

Q20. Can you provide examples of when the regulated activities of advising on and arranging deals in investments are likely to arise in typical situations involving rights under a personal pension scheme?

Yes. The following table indicates whether certain typical scenarios are likely to involve regulated advising or arranging activities.

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
his joining a <i>personal pension scheme</i> (PPS) either generally or of a particular kind (such as a <i>self-invested personal pension scheme</i> (SIPP))	No - this would be generic advice	N/A
his joining a particular PPS that is already established	Yes - the rights are particular rights as the PPS already exists and offers specific rights	Yes - rights are being bought
establishing a PPS (typically a SIPP) intended solely for the prospective member's benefit	Yes - because the advice will concern establishing a particular scheme which will offer the investor particular rights (such as the right to make payments and direct investment)	Yes - rights are being bought
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, physical property of a particular description (such as commercial property) or particular physical property	No - there are no particular rights under a PPS at that stage, so the advice is generic as respects the acquiring of such rights	No
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, <i>securities or relevant investments</i> of a particular description or particular investments of that kind	Yes, where the advice relates to acquiring particular investments of that kind - whilst the rights under the PPS may remain generic, the advice relates to acquiring rights to or interests in particular securities or relevant investments. Those rights or interests are themselves a particular investment No, where the advice only relates to acquir	Yes - rights to or interests in specified investments are being bought

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
acquiring a particular property for the purpose of holding it in a particular SIPP but where the advice to be given is limited to the tax or legal consequences of doing so	<p>ing a particular type of investment - both the rights under the PPS and the investment remain generic</p> <p>No. Although the advice relates to the merits of buying particular rights, provided the advice may reasonably be regarded as a necessary part of the service of providing tax or legal advice it should be excluded from the scope of regulation (see Q21)</p>	<p>No, provided the arranging is undertaken as a necessary part of providing tax or legal services. This may be more likely to arise in practice where, for example, a legal adviser goes on to arrange the conveyancing of the property as a necessary part of legal services. There may be limited circumstances in which it would be necessary for a tax adviser to go on to arrange for the client to acquire the rights under the PPS having given tax advice on the merits of doing so.</p>
making additional payments into a particular PPS, either for investment in line with pre-existing arrangements or in accordance with instructions to be given to the operator, or of not making such additional payments	<p>Yes - the advice relates to the merits of acquiring further particular rights</p>	<p>Yes - rights are to be bought</p>
appointing a fund manager to manage the PPS assets on behalf of the member(s) or changing an existing fund manager	<p>No - the advice is about the merits of exercising rights but not for the purpose of buying or selling particular investments - and no rights are being bought or sold</p>	<p>No, where the assets do not include <i>securities</i> or <i>relevant investments</i></p> <p>Possibly, where the assets do include investments of that kind (because the arrangements are made with a view to the fund manager buying and selling, and possibly safeguarding and administering, investments)</p>
changing the investment objectives with which the fund man-	<p>No - the advice is about the merits of exercising rights but not</p>	<p>No</p>

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
<p>ager appointed to manage the PPS assets on behalf of the member(s) is instructed to comply</p>	<p>for the purpose of buying or selling particular specified investments - and no rights are being bought or sold</p>	
<p>placing particular assets or assets of a particular description, into a particular PPS, or of instructing the operator to purchase such assets, either:</p> <ul style="list-style-type: none"> • by means of funds to be made available by selling existing assets or of existing cash holdings within the PPS; or • from new funds to be provided by the member 	<p>Yes - the advice relates to either:</p> <ul style="list-style-type: none"> • disposing of particular rights and acquiring new particular rights; or • acquiring new particular rights 	<p>Yes - rights are being bought or sold or both</p>
<p>instructing the operator to dispose of particular assets or assets of a particular description, to raise funds for purchasing other assets of any kind or to form a cash holding</p>	<p>Yes - the advice relates to disposing of particular rights as well as acquiring new particular rights</p>	<p>Yes - rights are being bought and sold</p>
<p>instructing the operator to realise an investment in a managed or unitised fund and re-invest the sums in another such fund</p>	<p>Yes - the advice relates to disposing of particular rights and acquiring new particular rights</p>	<p>Yes - rights are being bought and sold</p>
<p>withdrawing cash sums (income withdrawal)</p>	<p>Yes - the advice relates to disposing of particular rights</p>	<p>Yes - rights are being sold</p>
<p>transferring existing assets of any kind or their cash value to another PPS</p>	<p>Yes - the advice relates to disposing of particular rights</p> <p>There may also be regulated advice on the merits of acquiring rights under the new PPS</p>	<p>Yes - rights are being sold and rights in the new PPS are being bought</p>
<p>instructing the operator/trustee to obtain a mortgage to purchase a particular commercial</p>	<p>Yes - the advice relates to acquiring new rights under the PPS in the form of the borrowed</p>	<p>Yes - rights are being bought</p> <p>Arranging for a personal pension scheme</p>

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
property to be held under the PPS	<p>money or the property to be acquired with it</p> <p>But the advice given to the member on the mortgage itself is not regulated as the mortgage would not be a <i>regulated mortgage contract</i> (because, under tax rules, a member of a PPS cannot hold property under the scheme if he intends to make personal use of it).</p>	<p>trustee to take out a mortgage will not be regulated as it will not be a <i>regulated mortgage contract</i></p>
<p>[Editor's Note: The answers to some of the scenarios in this table may be affected by the Adams decision noted in the answer to Q.17]</p>		

Q21. What exclusions may be available for advising on investments in connection with acquiring or disposing of rights under a personal pension scheme?

The usual exclusions for *advising on investments* and *advising on conversion or transfer of pension benefits* will potentially be available. In particular, article 67 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*):

- may permit firms such as solicitors or licensed conveyancers to advise on the implications of transferring title to real property to the operator of a particular *personal pension scheme*;
- may permit tax advisers or solicitors to advise their clients on the tax or legal consequences of holding property of any description, or of acquiring or exercising rights, under a particular personal pension scheme; and
- may permit firms such as surveyors or estate agents to advise on the merits of acquiring commercial property which is intended to be held under a particular personal pension scheme.

This is, in each case, so long as it may reasonably be regarded as necessary for them to provide the advice in order to provide their professional services and they are not remunerated for *advising on investments* separately from any remuneration they receive for providing their professional services.

If the rights relate to a contract of insurance, the adviser can still make use of the exclusion so long as A is not carrying on an activity that requires him to be regulated under the *IDD*. And that is only likely to be the case if the advice relates to the merits of A's client directly acquiring rights under a contract of insurance (for example, because the client is also a trustee of the scheme). Advice about acquiring a beneficial interest in a contract of insurance held under trust will not be subject to regulation under the Directive.

Q22. What exclusions may be available for arranging deals in investments in connection with acquiring or disposing of rights under a personal pension scheme?

The usual exclusions for *arranging* will potentially be available. The following exclusions may be particularly relevant.

Article 29 of the *Regulated Activities Order* will apply where the arranging is done with or through an *authorised person* and, broadly speaking, the arranger:

- is an *unauthorised person*;
- does not advise on the merits of the member or prospective member entering into the transaction; and
- is not rewarded other than by their client (the member).

This exclusion should mean that many firms providing professional services to members of the scheme (such as estate agents, surveyors, property developers and experts on valuing or appraising the particular type of asset that is to be acquired for the personal pension scheme) would be able to arrange for the property to be held under the scheme without needing *authorisation* or exemption. This is because the operator of the scheme will be an *authorised person* and the firm is likely to be paid by its client and not by the scheme operator.

Article 29 does not apply where the arrangements relate to a contract of insurance. But this will only affect the availability of the exclusion as it applies to personal pension schemes where either:

- the member is himself directly acquiring rights under the contract of insurance (for example, because the member is also a trustee of the scheme); or
- the rights which the member is acquiring (or disposing of) relate directly to rights under a contract of insurance that is or is to be held by or on behalf of the operator for the purpose of providing benefits to that member.

Article 33 of the *Regulated Activities Order* will allow *persons* such as estate agents, surveyors or property developers (whether or not they are *authorised*) to refer clients to an *authorised* or *exempt person* for independent advice on the merits of their placing a commercial property in a particular personal pension scheme. Article 33 may also apply where a person arranges for an independent fund manager to be appointed to manage the assets of a personal pension scheme or for members or potential members to obtain independent advice in relation to their rights under the scheme. As with article 29, the article 33 exclusion does not apply where the introductions relate to a contract of insurance.

Article 67 of the *Regulated Activities Order* may permit firms such as solicitors and licensed conveyancers to arrange for the title to property to be transferred to the operator of the personal pension scheme. The exclusion could also apply to firms such as surveyors or estate agents arranging the transfer of title to commercial property. This is so long as it is necessary for them to arrange the transaction in order to provide their professional services and they are not separately remunerated for doing it.

Q23. I am an exempt professional firm. Will I be able to advise on, and arrange deals in, rights under personal pension schemes without needing FCA authorisation?

Rights under a personal pension scheme will be securities. This means that, subject to your being able to satisfy the general requirements of Part XX of the FSMA:

- you will be limited in your ability to give advice without authorisation; but

- you will be able to arrange deals in such rights without authorisation.

The limitation on your being able to give advice, as an exempt professional firm, to a member of a personal pension scheme will be, in broad terms, that:

- the advice must not consist of a recommendation to acquire or dispose of rights (unless it endorses a corresponding recommendation that has been given to the member by a suitably authorised or exempt person); and
- if, in addition, the advice relates to a contract of insurance, you must be a firm that is included in the Financial Services Register of Exempt Professional Firms.

12.4 The application of requirements which implemented EU directives

Do the changes in the scope of regulated activities concerning pension schemes that took effect on 6 April 2007 have any implications for pension scheme trustees or service providers under the UK provisions which implemented the Investment Services Directive or the UK provisions which implemented the Markets in Financial Instruments Directive or the Insurance Distribution Directive?

In general terms, if a pension scheme trustee or service provider did not need to be authorised under the *Investment Services Directive* prior to 6 April 2007 he should not need to be authorised for carrying on the same activities after that date. This is because rights under a personal pension scheme are not a financial instrument under that Directive and establishing, operating or winding up a personal pension scheme is not an investment service under the Directive. This is also the case under the Markets in Financial Instruments Directive which replaced the Investment Services Directive in late 2007. Guidance on the scope of *MIFID* as implemented into UK law can be found in ■ PERG 13.

Similarly, a pension scheme trustee or service provider who was not subject to regulation under the *Insurance Mediation Directive* prior to 6 April 2007 will not become subject to regulation purely as result of the changes in regulatory scope that took effect on 6 April 2007. Detailed guidance on the application of that Directive (as replaced by the Insurance Distribution Directive) to pension scheme trustees and service providers is in Chapters 10.4 and 10.4A of PERG.



12.5 Financial promotion issues

Q25. Will the financial promotion restriction in section 21 of the Financial Services and Markets Act 2000 apply to promotions that invite or induce persons to become members of a personal pension scheme?

Yes, because they will be inviting or inducing persons to buy an investment in the form of the rights under the scheme that they would acquire by becoming a member.

Q26. Will the financial promotion restriction apply to a promotion of commercial property that is held out as being suitable for holding under a SIPP (but not any particular SIPP)?

Yes, if the promotion is an inducement to acquire the right to receive benefits derived from the performance of that property when it is held under a *personal pension scheme*. However, provided the promotion does not identify any particular scheme or scheme provider or person who can arrange or advise on the placing of the property into the scheme, the promotion should be exempt as a generic promotion under article 17 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the *Financial Promotion Order*).

Q27. Will any of the other exemptions in the Financial Promotion Order apply to promotions of a personal pension scheme?

Yes. All the usual exemptions that apply to the promotion of *securities* generally will apply. This includes the exemption for promotions made by an employer to their employees about a *group personal pension scheme* to which they are to contribute (article 72 of the *Financial Promotion Order*).

Q28. Can I find out more about the financial promotion restriction?

Yes. Chapter 8 of PERG has detailed guidance about the scope of the financial promotion restriction and the exemptions that are available.

12.6 Advising on conversion or transfer of pension benefits

12.6

Q29.What is the background to this *regulated activity*?

The effect of the Pension Schemes Act 2015 is that trustees or managers must ensure that a *member of a pension scheme* or a *survivor* has taken appropriate independent advice before converting or transferring pension benefits, where the conversion or transfer is of *safeguarded benefits* to *flexible benefits*.

The *Regulated Activities Order* was amended so that the appropriate independent advice to be sought by a *member of a pension scheme* or a *survivor* is regulated.

Q30.Does this mean that there is an overlap between “advising on conversion or transfer of pension benefits” and “advising on investments”?

Yes, there is an overlap between both activities. Under the *Regulated Activities Order* rights under a *stakeholder pension scheme* and under a personal pension scheme fall within the definition of *security*. This means that advising on any of these investments would fall under *advising on investments*.

Where a *pension scheme* provides *safeguarded benefits* then a person who is *advising on investments* may also be *advising on conversion or transfer of pension benefits* at the same time.

In practice, we expect that a person *advising on conversion or transfer of pension benefits* will also carry on *advising on investments*.

Q31.What is the difference between both advising activities?

The regulated activity of *advising on conversion or transfer of pension benefits* applies to any *pension scheme* that has *safeguarded benefits*. This means it includes advising on transfers between *occupational pension schemes* where the transfer payment is in respect of *safeguarded benefits* with a view to acquiring a right or entitlement to *flexible benefits*.

In the context of pension schemes, *advising on investments* in respect of rights under a *personal pension scheme* or a *stakeholder pension scheme* is limited to these types of schemes and would not include occupational pension schemes.

Q32.Does a person who advises on the conversion or transfer of flexible benefits need to seek authorisation?

When the conversion or transfer of *flexible benefits* involves advising on the merits of *buying, selling, subscribing for rights in a personal pension scheme*

or in a *stakeholder pension scheme* or exercising any of these rights, either as the ceding scheme or the receiving scheme or both, then that would amount to *advising on investments* and authorisation is required. This is because the *regulated activity of advising on investments* applies in relation to rights under a *personal pension scheme* or rights under a *stakeholder pension scheme*.

When the conversion or transfer of *flexible benefits* involves *occupational pension schemes* only and is not in respect of *safeguarded benefits*, then no regulated activity is being carried on.

For example, advice on the switching of *flexible benefits* between *defined contribution occupational pension schemes*. Similarly, advice on an *uncrystallised funds pension lump sum* payment out of a *defined contribution occupational pension scheme* is not regulated.

Q33. Does a *guaranteed annuity rate (GAR)* mean that a pension policy has a *safeguarded benefit*?

In our opinion, a pension policy with a GAR has a *safeguarded benefit* and a person advising on it may be *advising on conversion or transfer of pension benefits*.

Q34. Can advising on conversion or transfer of pension benefits be carried on in respect of any other *specified investments*?

No, the only *specified investment* relevant for *advising on conversion or transfer of pension benefits* is rights or interests under a pension scheme which provides *safeguarded benefits*.

It should be noted that rights or interests under a pension scheme which provides *safeguarded benefits* is a *specified investment* exclusively in respect of *advising on conversion or transfer of pension benefits* and not any other *regulated activity*.

Q35. When does a *firm* advise on conversion or transfer of pension benefits when it provides triage services?

The table in ■ PERG 12 Annex 1G includes examples of when a *firm* is and is not *advising on conversion or transfer of pension benefits* when it has an initial "triage" conversation with a potential customer. The purpose of triage is to give the customer sufficient information about *safeguarded benefits* and *flexible benefits* to enable them to make a decision about whether to take *advice on conversion or transfer of pension benefits*.

Examples of what is and is not advising on conversion or transfer of pension benefits

Example	Is this advising on conversion or transfer of pension benefits?
<p><i>Firm A</i> has a triage conversation with customers. It gives them factual information about <i>safe-guarded benefits</i> and <i>flexible benefits</i> and describes the requirement to take <i>advice on conversion or transfer of pension benefits</i> and the cost of transfer. In addition the <i>firm</i> explains the features of pension schemes with <i>flexible benefits</i> and pension schemes with <i>safeguarded benefits</i> that make them more or less suitable for general groups of people. The <i>firm</i> also explains the cash equivalent transfer value.</p>	
<p>(1) During the triage conversation the customer's circumstances are covered. Based on these specific circumstances, the <i>firm</i> tells the customer that they should not take advice.</p>	<p>Yes. This is advice because it is effectively advice to stay in the occupational pension scheme and advice not to transfer.</p>
<p>(2) Same circumstances as example (1) but the <i>firm</i> tells the customer that they would be unlikely to recommend a transfer if the customer took advice.</p>	<p>Yes. This is likely to be an implicit recommendation not to transfer.</p>
<p>(3) After giving the factual information set out at the start of this table and taking into account the customer's specific circumstances, the <i>firm</i> tells the customer it will not provide them with <i>advice on conversion or transfer of pension benefits</i>.</p>	<p>The <i>firm</i> will not give regulated advice in these circumstances if it tells the customer that it will not give them advice. The <i>FCA</i> thinks that <i>firms</i> should be able to turn down business they do not want to carry out without this being interpreted as <i>advising on conversion or transfer of pension benefits</i>. Refusing to do business with someone is not consistent with having an advisory relationship with them. (A similar issue arises under the <i>regulated activity</i> of <i>advising on investments</i> - see example F(12) at PERG 8 Annex 1G.)</p>
<p>(4) After giving the factual information set out at the start of the table, the <i>firm</i> signposts sources of information on them, including an option to take advice. The <i>firm</i> leaves it to the customer to decide whether or not to take advice.</p>	<p>No. The general context of the information provided and the neutral way in which it is presented should not involve advice. A <i>firm</i> may give advice if it provides an opinion on whether the customer should go on to take advice or if it uses language which may be perceived as influencing a customer's decision to take advice.</p>
<p>(5) After giving the factual information set out at the start of the table, the <i>firm</i> provides the customer with the transfer value comparator (TVC) prepared in accordance with COBS 19.1.3AR.</p>	<p>A <i>firm</i> does not necessarily give advice by bringing obviously relevant facts to the attention of a customer who wants to transfer, even if those facts show that a transfer would be a poor decision. Yes. This is likely to be advice as the TVC is prepared using personal information and is objectively likely to influence the customer's decision to transfer or remain in the scheme. Occupational schemes and employers providing the TVC to scheme members should consider</p>

Example	Is this advising on conversion or transfer of pension benefits?
<p>(6) Before or during the course of the triage conversation with customers, the <i>firm</i> uses a form of pre-purchase questioning (such as decision trees and RAG-rated questionnaires) as set out in PERG 8.30A.</p> <p>The <i>firm</i> leaves it to the customer to decide whether or not to take advice.</p>	<p>whether they are providing the TVC by way of business (PERG 2.3) and require authorisation.</p> <p>Yes. This is likely to be advice as the pre-purchasing questioning process accumulates personalised information tailored to individual customers, which is presented in such a way that is objectively likely to influence the customer's decision to transfer or convert their <i>safeguarded benefits</i>.</p>

Chapter 13

Guidance on the scope of the UK provisions which implemented MiFID

13.1 Introduction

13.1

The purpose of this chapter is to help UK firms consider:

- whether they fall within the scope of the *UK* provisions which implemented Markets in Financial Instruments Directive 2014/65/EU ('MiFID') and therefore are subject to the requirements derived from it, and
- how their existing *permissions* correspond to related MiFID derived concepts;

This chapter is mostly aimed at questions that are relevant to someone who wants to know whether they need to be authorised under the *Act*. This means that this chapter does not cover those types of persons for whom MiFID or MIFIR requirements are applied outside the authorisation regime under the *Act*, such as:

- a *data reporting service provider*;
- those subject to position limit requirements in derivatives markets;
- those subject to an obligation to trade in derivatives on a regulated market, OTF or MTF;
- persons with a proprietary interest in benchmarks who are obliged to provide access to certain information; or
- central counterparties subject to the requirements about non-discriminatory access for financial instruments.

Background

MiFID replaced the Markets in Financial Instruments Directive 2004/39/EC (MiFID 1), which in turn replaced the Investment Services Directive (ISD).

MiFID onshoring in UK legislation and the FCA Handbook

The *United Kingdom's* onshoring of the directive takes the form of a combination of legislation made by HM Treasury, in the form of a number of statutory instruments, and rules contained in the FCA Handbook and the PRA Rulebook. "Onshoring", for these purposes, refers to the process by which law deriving from EU legislation at IP completion day is retained or adapted, post IP completion day.

The Treasury legislation is set out in the following statutory instruments as amended by the Exit Regulations, in particular:

- Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 ('MiFI regulations'), SI 2017/701;

● Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2017 2001 ('RAO Amendment Order'), SI 2017/488 2001/544.

The FCA Handbook complements the Treasury legislation, referred to above.

Transitional onshoring provisions

The effect of section 3 of the European Union (Withdrawal) Act 2018 is that "direct EU legislation" became part of UK law, as at IP completion day (and is known as "retained EU law" in accordance with section 6 of the same legislation). As such, MiFIR and all directly applicable regulations made under MiFID and MiFIR including the MiFID Org Regulation (Commission Delegated Regulation 2017/565), the MiFIR Delegated Regulation (Commission Delegated Regulation 2017/567) and technical standards became part of UK law, as at IP completion day.

Each of these pieces of legislation is subject to the power in section 8 of the European Union (Withdrawal) Act 2018 to deal with deficiencies arising out of the *United Kingdom's* withdrawal from the EU. The Treasury has exercised this power in the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (the 'Exit Regulations') to amend each of the following:

- MiFIR
- MiFID Org Regulation
- MiFIR Delegated Regulation
- Data Reporting Services Regulations
- The Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017

A reference to any of the above in the remaining text of this chapter is to the legislation as amended by the Exit Regulations.

MiFID scope

The scope aspects of MiFID are primarily addressed through the *Regulated Activities Order* ('RAO') and ■ PERG 2 focuses on the scope of *regulated activities* under the RAO and includes materials on the effect that the UK provision which implemented MiFID has had on the RAO. This chapter focuses more on the underlying MiFID investment services and activities, as well as the exemptions.

Where a firm's regular occupation or business is providing one or more *investment services* to third parties or performing investment activities in relation to MiFID financial instruments on a professional basis, it is a firm to which UK provisions which implemented MiFID applies unless it is exempt.

Broadly, the exemptions from MiFID are likely to be relevant to insurers, group treasurers, professional firms to which Part XX of the *Act* applies, many *authorised professional firms*, professional investors who invest only for themselves, pension schemes, depositaries and operators of collective investment schemes or other collective investment undertakings (such as investment trusts), journalists, and commodity producers and traders. The exemptions are subject to conditions and limitations described in more detail below (see ■ PERG 13.5).

The Treasury's implementation of the article 3 MiFID exemption, onshored in regulation 8 of the *MiFI Regulations*, is likely to be relevant to many financial advisers (see Q50) including some corporate finance advisers. It may

also be relevant to some venture capital firms. The Treasury legislation enables firms falling within the scope of the exemption to elect to be subject to the requirements derived from of MiFID (see Q52).

In each case, it will be for firms and individuals to consider their own circumstances and consider whether they fall within the relevant exemptions. A firm which takes the benefit of one or more of the exemptions in article 2 or 3 MiFID, onshored in Part 1 of Schedule 3 to the Regulated Activities Order and *Regulation 8 of the MiFI Regulations*, may nevertheless require authorisation under the Act (see ■ PERG 2).

In addition to *investment firms*, the UK provisions which implemented *MiFID* are also relevant to *credit institutions* providing investment services or performing investment activities (see Q5), to *AIFMs* to which the UK provisions which implemented article 6.4 of *AIFMD* applies (in other words, *AIFM investment firms*) and to *UCITS management companies* to which the UK provisions which implemented article 6.4 of the *UCITS Directive* applies (in other words, *UCITS investment firms*).

This guidance is concerned with the scope of the UK provisions which implemented MiFID and does not address the question of whether an investment firm that falls within the scope of the UK provisions which implemented MiFID is providing a MiFID investment service as opposed to an investment activity.

CRD IV [deleted].

How does this document work?

This document is made up of Q and As divided into the following sections:

- General (■ PERG 13.2);
- Investment services and activities (■ PERG 13.3);
- Financial instruments (■ PERG 13.4);
- Exemptions from MiFID derived provisions (■ PERG 13.5); and
- Flow charts, tables and lists (■ PERG 13 Annex 1 and ■ PERG 13 Annex 2.)

We have also included guidance in the form of flow charts to help firms decide whether the *UK* provisions which implemented MiFID apply to them as well as permission maps indicating which regulated activities and *specified investments* correspond to MiFID investment services, activities and MiFID financial instruments (see ■ PERG 13 Annex 1 and ■ PERG 13 Annex 2.)

Article and recital references are to MiFID (Level 1 measures) unless otherwise stated. References to categories of MiFID investment services and activities and MiFID financial instruments adopt the structure of Annex 1 MiFID: for example, A1 refers to "reception and transmission of orders in relation to one or more financial instruments" and C1 relates to "transferable securities".

While these provisions have been "onshored", we have, unless otherwise stated, retained the references in this chapter, and its annexes, to the provisions in MiFID and other relevant directives such as CRD, UCITS directive and AIFMD for ease of reference. As a result, where the context requires, any references to a directive, its articles or recitals, which could be read as having continuing effect, should be read as a reference to 'the *UK* provisions which implemented' that directive or the relevant article. In addition, any reference which adopts the structure of Annex 1 of MiFID, for example by referring to A1 or C1, should be read as a reference to the relevant corresponding paragraph as onshored in Schedule 2 of the *Regulated Activities Order*.

13.2 General

13.2

Q1. Why does it matter whether or not we fall within the scope of MiFID?

Depending on whether or not you fall within the scope of MiFID, you may be subject to:

- domestic legislation implementing MiFID (for example, FCA rules);
- “direct EU legislation”, which became part of *UK* law as at IP completion day in accordance with section 3 of the European Union (Withdrawal) Act 2018, and is known as “retained EU law” in accordance with section 6 of the same legislation. (such as, *MiFIR* and all directly applicable regulations made under it or under MiFID); and
- other FCA *rules* or legislation whose scope is drawn by reference to MiFID (for example, the Prudential sourcebook for MiFID investment firms (*MIFIDPRU*)).

Q2. Is there anything else we should be reading?

The Q and As complement, and should be read in conjunction with, the relevant legislation and the general guidance on regulated activities, which is in chapter 2 of our Perimeter Guidance manual ('PERG').

Q3. How much can we rely on these Q and As?

The answers given in these Q and As represent the FCA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of MiFID affect the regulatory position of any particular person will depend on his individual circumstances. If you have doubts about your position after reading these Q and As, you may wish to seek legal advice. The Q and As are not a substitute for reading the relevant the *UK* provisions which implemented MiFID.

Moreover, MiFID has been subject to guidance and communications by the European Commission, the European Securities and Markets Authority ('ESMA') and the European Banking Authority ('EBA'), we have now issued guidance on how this will be treated after IP completion day.

[**Note:** link to the relevant guidance is to be inserted].

Q4. We provide investment services to our clients - does MiFID apply to us?

Yes if you are:

- an “investment firm” and the exemptions in MiFID do not apply to you; or
- a “tied agent” as defined by MiFID.

If you are a non-UK firm, for example the UK branch of a US firm, MiFID does not apply to you. However, if MiFID would have applied to you if you had been incorporated or formed in the *United Kingdom*, you will be a *third country investment firm* under the FCA's rules. As a result, certain MiFID based requirements will apply to you.

See the flow charts in Annex 1 for further information and ■ PERG 13.5 for guidance relating to exemptions. See Q7 and 8 for guidance on whether you are an investment firm and Q11 for guidance relating to tied agents.

Q5. We are a credit institution. How does MiFID apply to us?

If you are an credit institution, article 1.3 MiFID provides that selected MiFID provisions apply to you, including organisational and conduct of business requirements, when you are providing investment services to your clients or performing investment activities. In our view, MiFID will apply when you are providing ancillary services in conjunction with investment services. Where you provide ancillary services on a standalone basis, MiFID will not apply in relation to those services. Article 1.3 MiFID is reflected in paragraph (2) of the *Handbook* definition of “MiFID investment firm”.

In addition, article 1.4 MiFID provides that various MiFID provisions apply when selling or advising clients about structured deposits (see Q34B). Article 1.4 MiFID is reflected in paragraph (2) of the *FCA Handbook* definition of “MiFID investment firm”.

Q6. We are a UCITS management company that, in addition to managing unit trusts, contractual schemes and investment companies, provides portfolio management services to third parties. How does MiFID apply to us?

If you are the *management company* of a *UCITS scheme* with a permission to manage investments including MiFID financial instruments pursuant to article 6.3 of the *UCITS Directive*, certain MiFID provisions apply to you when you provide investment services to third parties (see article 6.4 *UCITS Directive*). These include initial capital endowment, organisational and conduct of business requirements. You are a *UCITS investment firm* for the purposes of the *Handbook*. Article 6.4 of the *UCITS Directive* is reflected in paragraph (3) of the *Handbook* definition of “MiFID investment firm”.

Q6A. We are an AIFM that, in addition to managing AIFs, provides portfolio management services to third parties. How does MiFID apply to us?

If you are the *AIFM* of an *AIF* with a *Part 4A permission* to manage investments including *MiFID financial instruments* pursuant to article 6.4 of *AIFMD*, certain *MiFID* provisions apply to you when you provide *investment services* to third parties (see article 6.6 of *AIFMD*). These include initial capital endowment, organisational and conduct of business requirements. You are an *AIFM investment firm* for the purposes of the *Handbook*. Article 6.6 of *AIFMD* is reflected in paragraph (3) of the *Handbook* definition of “*MiFID investment firm*”.

Q7. We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?

If your regular occupation or business includes the provision of investment services in relation to MiFID financial instruments to others on a professional basis, you are an investment firm and require *authorisation* unless you benefit from an exemption or are a tied agent (see Q11).

Where you are a firm with more than one business, you can still be an investment firm. What amounts to a “professional basis” depends on the individual circumstances and in our view relevant factors will include the existence or otherwise of a commercial element and the scale of the relevant activity.

Q8. We do not provide investment services to others but we do buy and sell financial instruments (for example, shares and derivatives) on a regular basis. Are we an investment firm for the purposes of MiFID?

Yes, if you are trading in MiFID financial instruments for your own account as a regular occupation or business on a “professional basis”. You can be an investment firm even if you are not providing investment services to others; this arises from the fact that you are also an investment firm under MiFID where you perform investment activities on a professional basis.

Even if you are an investment firm you may still be able to rely on one or more exemptions in article 2 MiFID, in which case MiFID will not apply (see ■ PERG 13.5 and in particular article 2.1(d) (see Q40 to Q41)) and 2.1(j) (see Q44 to Q45).

Q9. We are a credit institution that does not provide investment services to customers but we do have a treasury function. Are we subject to MiFID?

Not necessarily. Although you may be dealing on own account in relation to MiFID financial instruments, you may be able to rely upon the exemption in article 2.1(d) MiFID (see Q40). In our view, credit institutions can rely on exemptions in article 2 where they meet the conditions of the exemptions.

Q10. Is there any change to the “by way of business” test in domestic legislation?

There is no change to article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities By Way of Business) Order 2001 as part of MiFID implementation by the Treasury, so the domestic test for whether you are carrying on 'regulated activities by way of business' and require *authorisation* remains unchanged.

Q11. How will we know whether we are a tied agent (article 4.1(29))?

A tied agent under MiFID is a similar concept to an *appointed representative* under the Act. A tied agent does not require *authorisation* for the purposes of MiFID, just as an *appointed representative* does not require *authorisation* under the Act. In our view, you will only be a tied agent if your principal is an investment firm (including a credit institution) to which MiFID applies. So, if you act for a principal that is subject to an exemption in article 2 of MiFID, you are not a tied agent for the purposes of MiFID although you may be an *appointed representative* for domestic purposes. You will still not require *authorisation* under MiFID, either because you are not performing

investment services and activities or, if you are, because you fall within an exemption in article 2 of MiFID.

MiFID says that firms exempt under article 3 should be subject to requirements which are at least analogous to the MiFID regime for tied agents of investment firms. This has been implemented in the UK through the *appointed representative* regime. If you are an *appointed representative* of a principal who is exempt under article 3 you will also be exempt under MiFID. Q48 to Q53 deal with the article 3 exemption.

Assuming your principal is an investment firm to which MiFID applies, if you are registered as an *appointed representative* on the *Financial Services Register* and carry on the activities of *arranging (bringing about) deals in investments* or *advising on investments*, in either case in relation to MiFID financial instruments, you are likely to be a tied agent for the purposes of article 4.1(29).

It is not possible for a tied agent to provide *investment services* on behalf of more than one investment firm to which MiFID applies.

Further material on *appointed representatives* and tied agents is contained in chapter 12 of our Supervision Manual ('SUP').

13.3 Investment Services and Activities

Introduction

13.3

Q12. Where do we find a list of MiFID services and activities?

The list in Section A of Annex 1 of MiFID has been onshored in Part 3 of Schedule 2 to the Regulated Activities Order. There are nine investment services and activities in Part 3 (A1 to A9 have now been onshored in paragraph 1 to paragraph 9). However, as explained in ■ PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this chapter. Article 4 MiFID defines some of them in more detail:

- investment advice (article 4.1(4) MiFID);
- execution of orders on behalf of clients (article 4.1(5) MiFID);
- dealing on own account (article 4.1(6) MiFID); and
- portfolio management (article 4.1(8) MiFID).

A further provision relating to investment advice is contained in article 9 of the *MiFID Org Regulation*.

As explained in ■ PERG 13.1, this chapter only covers the MiFID activities dealt with through the authorisation regime under the Act. The other activities covered by MiFID and MiFIR are not dealt with in section A of Annex 1, as onshored in Part 3 of Schedule 2 of the *Regulated Activities Order*.

Q12A. We carry out the activity of bidding in emissions auctions. Is this a MiFID service or activity? [deleted]

Reception and transmission

Q13. When might we be receiving and transmitting orders in relation to one or more financial instruments? (A1 and recital 44)?

Under the general definition of this service, you only provide the service if you are both receiving and transmitting orders. For example, this would be the case if you transmit subscription or redemption orders received from a client to the operator of a collective investment undertaking or transmit buy or sell orders to agency brokers.

This service though is also extended to include arrangements that bring together two or more investors, thereby bringing about a transaction between those investors. This meaning may be relevant, for example, to corporate finance firms. It could include, in our view, negotiating terms for the acquisition or disposal of investments on behalf of a corporate client with a potential buyer or seller, for example as part of a merger or acquisition. You may be providing this service even though, having brought

the investors together, the actual offer or acceptance is not communicated through you.

The extended meaning of the service only applies if the firm brings together two or more investors. A person issuing new securities, including a collective investment undertaking, should not be considered to be an 'investor' for the purpose of this extended meaning. However, an issuer may be an investor for the purpose of the general definition of the service. Accordingly whilst an arrangement whereby a person, on behalf of a client, receives and transmits an order to an issuer will, in our view, amount to reception and transmission, one in which it simply brings together an issuer with a potential source of funding for investment in a company, will not.

If you are party to a transaction as agent for your client or commit your client to it, you may be doing more than receiving and transmitting orders and will need to consider whether you are providing the investment service of executing orders on behalf of clients.

Q14. We are introducers who merely put clients in touch with other investment firms - are we receiving and transmitting orders?

No. If all you do is introduce others to investment firms so that they can provide investment services to those clients, this in itself does not bring about a transaction and so will not amount to receiving and transmitting orders. But if you are a person who does more than merely introduce, for example an introducing broker, you are likely to be receiving orders on behalf of your clients and transmitting these to clearing firms and therefore may fall within the scope of MiFID.

Executing orders

Q15. When might we be executing orders on behalf of clients (A2, article 4.1(5) and recital 45)?

When you are acting to conclude agreements to buy or sell one or more MiFID financial instruments on behalf of clients. You will be providing this investment service if you participate in the execution of an order on behalf of a client, as opposed simply to arranging the relevant deal. In our view, you can execute orders on behalf of clients either when dealing in investments as agent (by entering into an agreement in the name of your client or in your own name, but on behalf of your client) or, in some cases, by dealing in investments as principal (for example by back-to-back or riskless principal trading).

This activity includes the issue of their own *financial instruments* by an *investment firm* or a credit institution.

Q15A. Is every issue of financial instruments a MiFID investment service?

No. Although the answer to Q15 says that executing client orders includes issuing your own *financial instruments*, not every issue of *financial instruments* amounts to the MiFID investment service of execution of orders on behalf of clients. This is explained in more detail in the rest of this answer.

One difficult question is whether the extension of the executing orders service only applies to firms that are already *investment firms* because of other services and activities they provide or whether this part of the

definition is also relevant to someone who is deciding whether they are an *investment firm* in the first place.

In the FCA's view, this part of the definition is not limited to someone that is already an *investment firm* because of its other activities and services. This is because the risks at which recital 45 of MiFID says this part of the definition is aimed apply whether or not the issuer is already an investment firm for another reason. For example, there is no reason why a *firm* that issues its own complicated securities to the retail market should not need authorisation if a *firm* that distributes ones issued by another *firm* requires authorisation.

On the other hand, it cannot be the case that raising capital by issuing its own capital causes an ordinary commercial company to become an *investment firm*. The reasons why this should not be the case include the following:

- If you do not issue *financial instruments* on a professional basis and do not otherwise execute orders on behalf of clients, you will generally not need permission or authorisation to do this. See Q8 for more information.
- The investor may not be your *client*. For example, an ordinary commercial company issuing debt securities to financial investors is unlikely to be providing a service; it is more likely to be receiving one.
- Recital 45 of MiFID confirms that the definition is intended to catch issuers when distributing their own *financial instruments*. Thus if you get another investment firm or credit institution to distribute your *financial instruments*, you will not be executing client orders.

Dealing on own account

Q16. What is dealing on own account (A3, article 4.1(6)) and recital 24)?

Dealing on own account is trading against proprietary capital resulting in the conclusion of transactions in one or more MiFID financial instruments.

Dealing on own account involves position-taking which includes proprietary trading and positions arising from market-making. It can also include positions arising from client servicing, for example where a firm acts as a *systematic internaliser* or executes an order by taking a market or 'unmatched principal' position on its books.

Dealing on own account may be relevant to firms with a *dealing in investments as principal* permission in relation to MiFID financial instruments, but only where they trade financial instruments on a regular basis for their own account, as part of their MiFID business. We do not think that this activity is likely to be relevant in cases where a person acquires a long term stake in a company for strategic purposes or for most venture capital or private equity activity. Where a person invests in a venture capital fund with a view to selling its interests in the medium to long term only, in our view he is not dealing on own account for the purposes of MiFID.

If a firm executes client orders by standing between clients on a matched principal basis (back-to-back trading), it is both dealing on own account and executing orders on behalf of clients.

Portfolio management

Q17. What is portfolio management under MiFID (A4 and article 4.1(8))?

Portfolio management is managing portfolios in accordance with mandates given by *clients* on a discretionary client-by-client basis where such portfolios include one or more *MiFID financial instruments*. If there is only a single *financial instrument* in a portfolio, you may be carrying on portfolio management even if the rest of the portfolio consists of other types of assets, such as real estate. Portfolio management includes acting as a third party manager of the assets of a *fund*, where discretion has been delegated to the manager by the *operator* or manager of the *fund*. In the case of management of a collective investment undertaking, however, an exemption may be available to the operator (see Q43). The advisory agent who keeps clients' portfolios under review and provides advice to enable the client to make investment decisions (but does not exercise discretion to take investment decisions himself) is not carrying on portfolio management but may be providing other investment services such as investment advice under MiFID.

Investment advice

Q18. What is investment advice under MiFID (A5 and article 4.1(4))?

Investment advice means providing personal recommendations to a client, either at his request or on your own initiative, in respect of one or more transactions relating to MiFID financial instruments.

Q19. What is a 'personal recommendation' for the purposes of MiFID (article 9 of the MiFID Org Regulation)?

A personal recommendation is a recommendation that meets the following conditions:

- it is given to a person in his capacity as an investor, or potential investor, or as agent for either; and
- it is presented as suitable for him or based on a consideration of his personal circumstances; and
- it constitutes a recommendation to him to do one or more of the following:

- buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; or

- exercise, or not to exercise, any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

This is similar to the UK regulated activity of *advising on investments* but is narrower in scope insofar as it requires the recommendation to be of a personal nature. A personal recommendation does not include advice given to an issuer to issue securities, as the latter is not an "investor" for the purposes of MiFID or article 53 of the RAO.

As explained in ■ PERG 8.24.1AG, there are circumstances in which the UK regulated activity is also based on giving personal recommendations. ■ PERG 8.30B (Personal recommendations) gives *guidance* on the definition in the context of the UK regulated activity. In the FCA's view that *guidance* is also relevant to the meaning of 'personal recommendation' under MiFID.

Q20. Can you give us some other practical examples of what are not personal recommendations under MiFID?

A recommendation is not a personal recommendation if it is issued exclusively to the public (article 9 of the *MiFID Org Regulation*) Advice about financial instruments in a newspaper, journal, magazine, publication, internet communication addressed to the public in general or in a radio or television broadcast should not amount to a personal recommendation. However, use of the internet does not automatically mean that a communication is not a personal recommendation on the grounds that it is made to the public. Therefore, for instance, while advice through a generally accessible website is unlikely to be a personal recommendation, an email communication provided to a specific person, or to several persons, may amount to investment advice.

Merely providing information to clients should not itself normally amount to investment advice. Practical examples include:

- advising clients on how to fill in an application form;
- disseminating company news or announcements;
- merely explaining the risks and benefits of a particular financial instrument; and
- producing league tables showing the performance of financial instruments against published benchmarks.

However, you should bear in mind that, where a person provides only selective information to a client, for example, when comparing one MiFID financial instrument against another, or when a client has indicated those benefits that he seeks in a product, this could, depending on the circumstances, amount to an implied recommendation and hence investment advice for the purposes of MiFID.

If you provide an investment research service to your clients or otherwise provide recommendations intended for the public generally, this is not MiFID investment advice (A5) although it may be an ancillary service (B5) for the purposes of MiFID and may also amount to the regulated activity of *advising on investments* for which you are likely to require *authorisation*.

Q21. Is generic advice investment advice for the purposes of MiFID (recitals 15 to 17 to the MiFID Org Regulation)?

No. Investment advice is limited to advice on particular MiFID financial instruments, for example "I recommend that you buy XYZ Company shares". If you only provide generic advice on MiFID financial instruments and do not provide advice on particular MiFID financial instruments, you are not a firm to which MiFID applies and do not require *authorisation*.

If you are an investment firm to which MiFID applies, however, the generic advice that you provide may be subject to MiFID-based requirements. For example, if you recommend to a client that it should invest in equities rather than bonds and this advice is not in fact suitable, you are likely, depending on the circumstances of the case, to contravene MiFID requirements to:

- act honestly, fairly and professionally in accordance with the best interests of your clients; and
- provide information to clients that is fair, clear and not misleading.

Acts carried out by an investment firm that are preparatory to the provision of a MiFID investment service or activity are an integral part of that service or activity. This would include the provision of generic advice. Therefore if a person provides generic advice to a client or a potential client prior to or in the course of the provision of investment advice or any other MiFID investment service or activity, that generic advice is part of that MiFID investment service or activity.

Providing a general recommendation about a transaction in a financial instrument or a type of financial instrument is an ancillary service within Section B(5) of Annex I of MiFID.

Underwriting and firm commitment placing

Q22. What is underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis (A6)?

A6 comprises two elements:

- the 'underwriting of financial instruments'; and/or
- the 'placing of financial instruments on a firm commitment basis'.

Underwriting is a commitment to take up financial instruments where others do not acquire them. In our view, placing is the service of finding investors for securities on behalf of a seller and may involve a commitment to take up those securities where others do not acquire them. We associate underwriting and placing of financial instruments with situations where a company or other business vehicle wishes to raise capital for commercial purposes, and in particular with primary market activity.

In our view, the 'firm commitment' aspect of the placing service relates to the person arranging the placing, as opposed to the person who has agreed to purchase any instruments as part of the placing. Accordingly, placing on a firm commitment basis occurs where a firm undertakes to arrange the placing of MiFID financial instruments and to purchase some or all the instruments that it may not succeed in placing with third parties. In other words, the placing element of A6 requires the same person to arrange the placing and provide a firm commitment that some or all of the instruments will be purchased.

Where a person distributes units in a UCITS fund to investors, in our view this does not amount to placing although it is likely to involve the reception and transmission of orders.

Placing without a firm commitment

Q23. When might placing of financial instruments without a firm commitment basis arise (A7)?

Where the person arranging the placing does not undertake to purchase those MiFID financial instruments he fails to place with third parties.

Operating a multilateral trading facility

Q24. What is a multilateral trading facility (A8, article 4.1(22) and recital 7 of MiFIR)?

A multilateral trading facility involves a multilateral trading system (for example, a trading platform) operated either by an investment firm or by a market operator which brings together multiple buyers and sellers of

financial instruments (for more on multilateral systems, see the answer to Q24B).

A multilateral trading facility does not include bilateral systems where an investment firm enters into every trade on own account (as opposed to acting as a riskless counterparty interposed between the buyer and the seller).

For there to be an MTF, the buying and selling of MiFID financial instruments in these systems must be governed by non-discretionary rules in a way that results in contracts. As the rules must be non-discretionary, once orders and quotes are received within the system an MTF operator must have no discretion in determining how they interact. The MTF operator instead must establish rules governing how the system operates and the characteristics of the quotes and orders (for example, their price and time of receipt in the system) that determine the resulting trades. An MTF may be contrasted with an OTF (see Q24A for OTFs) in this regard, because the operator of an OTF is required to carry out order execution on a discretionary basis.

Operating an organised trading facility

Q24A. What is an organised trading facility (A9, article 4.1(23) and recitals 8 and 9 of MiFIR)?

An OTF is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in certain products are able to interact in the system in a way that results in a contract (for more on multilateral systems, see the answer to Q24B).

Only bonds, *structured finance products*, emission allowances and derivatives may be traded. Equity instruments may not be traded on an OTF.

Order execution must be carried out on an OTF on a discretionary basis. By contrast with the operation of an MTF or regulated market, the operator of the OTF must exercise discretion in either of, or both:

- placing/retracting client orders; or
- matching client orders.

In exercising its discretion, the operator must comply with the requirement under article 18 of MiFID to establish objective criteria for the efficient execution of orders, and must also comply with the best execution requirements under article 27 of MiFID.

Multilateral system

Q24B. Where can I find more information about what a multilateral system is (article 4.1(19))?

[deleted]

Q24C. What is a multilateral system?

A *multilateral system* is a system or facility in which multiple third-party buying and selling trading interests in *financial instruments* are able to interact in the system (see article 2(1)(11) UK MiFIR).

A *multilateral system*, for these purposes, comprises each of the following main elements:

- it has the characteristics of a trading system or facility;
- it comprises multiple third-party buying and selling trading interests;
- it allows trading interests to interact in the system; and

- those trading interests are in financial instruments.

We provide guidance on each of these elements below.

Characteristics of a system or facility

A *multilateral system* has the characteristics of a trading system or facility. Recital 7 UK MiFIR clarifies that a trading system or facility includes markets composed of a set of rules and a trading platform, as well as those only functioning on the basis of a set of rules. The rules relate to how multiple third-party trading interests in *financial instruments* are able to interact in the system (see below). The rules could be reflected in contracts and/or operating procedures. As such, a system is technology neutral for these purposes, as shown by the different types of trading systems referred to in Annex I to *MiFID RTS 1*, and Annex I to *MiFID RTS 2*. For guidance on voice broking, please refer to Q24D below.

General purpose communications systems would not as such amount to trading systems or facilities. This means that the following services in and of themselves would not amount to operating a *multilateral system*:

- acting as an internet services provider;
- providing a telephone network;
- providing a website; or
- providing chatroom facilities.

Even if the provider of the general purpose communication system is not operating a *multilateral system*, a person using that system to operate a trading system or facility will operate a *multilateral system* if the other elements of the definition of a *multilateral system* are met.

If a system has features specifically designed to enable the interaction of trading interests in *financial instruments*, this would indicate that it is a trading system or facility. More generally, we will consider the role of the operator and its monitoring of the use of the system. Operating the platform requires more than simply providing technology or software. Our assessment of whether there is a trading system or facility will also take into consideration a wider range of factors, including for example:

- its target users and the actual use of a system by its users;
- any relevant restrictions on how the system may be used and their practical effect;
- whether the system is designed to enable trading of any kind amongst users; and
- the determinants of the remuneration of the operator and the extent to which these are linked to the interaction of trading interests in financial instruments in the system.

Accordingly, whilst general communications systems, for example, are used for the purposes of trading *financial instruments*, they will not amount to a *multilateral system* unless they were ever operated by a person for these purposes and then subject to these criteria.

It is possible for a firm to operate more than one piece of technology which, when taken together, have the characteristics of a trading system or facility.

There are multiple third-party buying and selling trading interests

There needs to be multiple third-party buying and selling trading interests for a system to be a *multilateral system*. Recital 7 UK MiFIR clarifies that the

expression 'buying and selling trading interests' is to be understood in a broad sense and includes orders, quotes and indications of interest.

The inclusion of the words 'third-party' in this expression makes it clear that the trading interests in question are not the trading interests of the system operator.

The fact that when any two persons negotiate within the system they do so between themselves does not make the system bilateral rather than multilateral. Instead, what matters is whether the system, at the point of entry, enables one person to interact potentially with multiple others (other than the operator). This is the service a person receives as a user of the system.

Trading interests are able to interact in the system

Multiple third-party trading interests must also be able to interact in the system for it to be a *multilateral system*. A *multilateral system* involves the bringing together of third-party trading interests (see also recital 7 UK MiFIR).

Interaction takes the form of an exchange of information relevant to essential terms of a transaction in *financial instruments* (being price, quantity or subject matter).

Accordingly, in our view, a system which enables this information to be inputted and then responded to in the system would allow trading interests to interact in the system.

Interaction between trading interests can arise in a system because the system:

- matches trading interests within its system; or
- allows users to respond within the system to other users' trading interests, including by communicating in relation to, negotiating or accepting essential terms of a transaction.

Interaction between trading interests in the system does not require a contract to be entered into for the sale/purchase of *financial instruments* (i.e. execution of a transaction to take place) within the system if it is with a view to the parties agreeing the terms of a trade.

As clarified by recital 8 UK MiFIR, any system that merely receives, pools, aggregates and broadcasts trading interests should not be considered a *multilateral system*. This means that a bulletin board should not be considered a trading venue because there is no interaction between trading interests within its system. Similarly, a system which simply notifies the parties of general expressions of interest in relation to *financial instruments* does not amount to an interaction of trading interests in the system. For further guidance on bulletin boards, please refer to Q24H to Q24L below. In addition, neither the service of portfolio compression, which reduces non-market risks in derivative portfolios without changing the market risk, nor post-trade confirmation services, constitute a *multilateral system* by themselves.

Financial instruments

The interaction of multiple third-party buying and selling trading interests in the system must be in *financial instruments* for the system to be a *multilateral system*. A *financial instrument* is an instrument specified in Part 1 of Schedule 2 to the *Regulated Activities Order*. Please refer to ■ PERG 13.4 for further guidance on *financial instruments*.

Trading venue perimeter – specific cases

Q24D. Does voice broking involve the operation of a multilateral system?

Voice broking may but need not comprise the operation of a *multilateral system*.

Merely arranging or executing client orders over the telephone does not constitute a *multilateral system*, although it may amount to other investment services such as reception and transmission or execution of orders on behalf of clients.

A trading system or facility could, however, take the form of a voice trading system (as referred to in Annex I *MiFID RTS 2*) or a hybrid system (as referred to in Annex I *MiFID RTS 1* and Annex I *MiFID RTS 2*). For example, a firm that operates a platform where trading interests of clients are broadcast to other users and then engages in voice broking to enable negotiation between these parties would operate a trading system or facility, unless Q24F applies. Voice broking may also be part of a *multilateral system* when operating in conjunction with other modes of execution such as electronic order books operated by that broker.

Q24E. Does a firm that undertakes portfolio management operate a multilateral system by operating an internal matching system to execute trading interests relating to the portfolio of one of its clients against trading interests relating to the portfolio of another of its clients?

No. A firm engaged in *portfolio management*, in whatever capacity, must exercise discretion in relation to the *financial instruments* it manages. We do not consider that such a firm operates a *multilateral system* when, in the exercise of this discretion, it executes trading interests relating to the portfolio of one of its *clients* (which may be a fund) against the trading interests relating to the portfolio of another of its *clients* in an internal matching system. We also do not consider that it is the purpose of ■ COLL 6.9.9R and ■ FUND 1.4.3R to prevent a *UCITS management company* or an *external AIFM* that is a *full-scope UK AIFM* from doing this in these circumstances. This is because in these circumstances the portfolio manager is the only user of the system and hence, there is no interaction of multiple third-party trading interests in the system.

Q24F. Does a firm using or operating a system to execute trades on behalf of clients operate a multilateral system?

No, if a firm uses or operates a system for the purpose only of executing these trades on a trading venue consistent with the intentions of the parties to the underlying transactions to trade on a trading venue, in accordance with the venue's rules. For example, when arranging a large-in-scale or negotiated trade in accordance with the rules of the venue, in our view these arrangements do not amount to the operation of a *multilateral system* – in accordance with Q24C – in the case of UK MiFIR or otherwise. For guidance on execution of orders on behalf of clients, see ■ PERG 13 Q15.

Q24G. Would a crowdfunding platform be regarded as a multilateral system?

In our view, a crowdfunding platform does not amount to a *multilateral system* when the business funding interests of an issuer of *shares*, *debentures* or *alternative debentures*, as expressed in an offer made by that issuer, on the one hand, are matched with the interests of investors on the other.

A bulletin board provided to assist investors is not itself a *multilateral system* where the trading interests would not be able to interact within the system. By contrast, a crowdfunding platform in which multiple third-party buying

and selling trading interests of investors in *financial instruments* are able to interact within a system (for example, in a secondary market) would be a *multilateral system*.

Bulletin boards

Q24H. What is a bulletin board?

There is no definition of a bulletin board. Recital 8 UK MiFIR, however, refers to 'facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests' or 'other entities aggregating or pooling potential buying or selling interests' and implies that such bulletin boards or entities should not be considered a *multilateral system*.

Q24I. Is a bulletin board a multilateral system?

No. The reason is that, whilst trading interests (including information relevant to essential terms of a transaction in *financial instruments* (being price, quantity or subject matter)) can be posted on a bulletin board, trading interests are not able to interact in such a system. In light of Q24C (see the section on 'Trading interests are able to interact with each other') above, we would not regard a firm as operating only a bulletin board if:

- it matches trading interests within the system;
- it enables users to respond within the system to other users' trading interests, including by communicating in relation to, negotiating or accepting essential terms of a transaction; or
- users can commit to or enter into contracts for the sale/purchase of the financial instruments (i.e. execute transactions) within the system.

By contrast, as a system simply notifying users of general expressions of interest in *financial instruments* does not give rise to an interaction of trading interests in the system, a bulletin board operator can notify and introduce potential counterparties to each other without operating a *multilateral system*.

Please see Q24J to Q24L below for further guidance on bulletin boards.

Q24J. Can the operator of a bulletin board as described in Q24H assist users with exchanging contact details?

The operator of a bulletin board could (subject to data protection legislation) enable publication of contact details of users advertising buying and selling interests on its bulletin board, so that users can use these to contact each other bilaterally outside the system.

However, some users may have reservations about the publication of their contact details. In these circumstances, one possibility might be for them to agree to share contact details on a case-by-case basis. Any such request should be limited to requesting to see another user's contact details and not extend to communicating in relation to, negotiating or accepting essential terms of a transaction (being price, quantity or subject matter).

Q24K. Can an operator of a bulletin board as described in Q24H provide template documentation to assist its users with negotiating and executing transactions?

Yes, an operator of a bulletin board can make available template documentation for download by users of the bulletin board. It can also require users to use this template documentation. This will not mean that

the bulletin board is a *multilateral system*, provided that users use the template documentation to negotiate and execute transactions bilaterally outside the system. The operator should not, however, complete the template documentation in relation to the essential terms of these transactions (being price, quantity or subject matter).

Q24L. Can an operator of a bulletin board as described in Q24H provide post-trade services?

Yes, it is possible for the operator of a bulletin board to provide post-trade services, including in relation to settlement. This might include, for example, assisting with the transfer of funds or registering the transfer of *financial instruments*. The operator could be informed by users of the bulletin board that they have entered into a contract for the sale/purchase of a *financial instrument*, i.e. executed a transaction, bilaterally outside the system and then provide post-trade services in relation to that transaction to them. Providing simply these post-trade services does not require the operator to have permission for *operating a multilateral trading facility* or *operating an organised trading facility*. The operator should, however, consider whether the post-trade services provided may include any *payment services* (see ■ PERG 15.3) or *electronic money* issuance (see ■ PERG 3A).

Q25. What about ancillary services (Annex 1, section B)? Do we need to be authorised if we wish to provide these services?

Yes, but only when providing these services is a *regulated activity*, for example, if you provide custody services which fall within the *regulated activity of safeguarding and administering investments*. You are not an investment firm within the scope of MiFID, however, if you only perform ancillary services (regardless of whether these are *regulated activities* requiring *authorisation* under the Act).

Q26. We are an investment firm - can we apply for passporting rights that include ancillary services?

[deleted]

13.4 Financial instruments

Introduction

13.4

Q27. Where do we find a list of MiFID financial instruments?

The list in Section C of Annex 1 to MiFID has been onshored in Part 1 of Schedule 2 to the Regulated Activities Order. There are eleven categories of financial instruments in Section C, which have been onshored in Part 1 (C1 to C11, which have been onshored in paragraph 1 to paragraph 11). However, as explained in ■ PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this chapter. Transferable securities (C1) and money market instruments (C2) are defined in article 4. Some financial instruments are further defined in the *MiFID Org Regulation*.

Transferable securities

Q28. What are transferable securities? (C1 and article 4.1(44))?

Transferable securities refer to classes of securities negotiable on the capital markets but excluding instruments of payment. We consider that instruments are negotiable on the capital markets when they are capable of being traded on the capital markets.

Transferable securities include (to the extent they meet this test):

- shares in companies (whether listed or unlisted, admitted to trading or otherwise), comparable interests in partnerships and other entities and equivalent securities;
- bonds and other forms of securitised debt;
- depositary receipts in respect of the instruments above;
- securities giving the right to acquire or sell transferable securities (for example, warrants, options, futures and convertible bonds); and
- securitised cash-settled derivatives, including certain futures, options, swaps and other contracts for differences relating to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Examples of instruments which, in our view, do not amount to transferable securities include securities that are only capable of being sold to the issuer (as is the case with some industrial and provident society interests) and OTC derivatives concluded by a confirmation under an ISDA master agreement.

Money market instruments

Q28A. What are money market instruments (C2 and article 4.1(17) of MiFID and article 11 of the MiFID Org Regulation)?

This means those classes of instruments which are normally dealt in on the money market. Examples include treasury bills, certificates of deposit and

commercial paper. A money market instrument does not include an instrument of payment.

An instrument is only a money market instrument if it also meets the following conditions:

- it has a value that can be determined at any time;
- it does not fall into sections C4 to C10 of Annex 1 to MiFID (derivatives); and
- it has a maturity at issuance of 397 days or less.

Collective investment undertakings

Q29. What are units in collective investment undertakings (C3)?

This category of *financial instrument* includes *units* in regulated and unregulated *collective investment schemes* and units or *shares* in an *AIF* (whether or not the *AIF* is also a *collective investment scheme*). In our view, in accordance with article 1.2(a) and 2.1(o) of the *Prospectus Directive*, units or *shares* in an *AIF* include shares in closed-ended corporate schemes, such as shares in investment trust companies, and so are also units in collective investment undertakings for this purpose (as well as being transferable securities). There is *guidance* on what an *AIF* is in chapter 16 of *PERG* (Scope of the Alternative Investment Fund Managers Directive).

Derivatives: general

Q30. Which types of derivative fall within MiFID scope?

The following derivatives fall under MiFID:

- derivative instruments relating to securities, currencies, interest rates, emission allowances or certain other underlyings (see Q31A to Q31S);
- commodity derivatives (see Q32 to Q33C);
- derivative instruments for the transfer of credit risk (see Q31);
- financial contracts for differences (these are included in paragraph 9 of Section C of Annex 1 to MiFID, onshored in paragraph 10 of Part 1 of Schedule 2 of the *Regulated Activities Order*); and
- derivatives on miscellaneous underlyings (see Q34).

The scope of these derivatives does not extend to sports spread bets.

Credit derivatives

Q31. What are derivative instruments for the transfer of credit risk (C8)?

Derivative instruments that are designed for the purposes of transferring credit risk from one person to another. They include, for example, credit default products, synthetic collateralised debt obligations, total rate of return swaps, downgrade options and credit spread products

General financial and emission derivatives (C4): General

Q31A. Which types of financial derivative fall within this heading?

The C4 category of financial instruments covers:

- options;
- futures;
- swaps;
- forward rate agreements; and

- any other derivative contracts;

relating to:

- securities;
- currencies;
- interest rates or yields;
- emission allowances; or
- other derivatives instruments, financial indices or financial measures.

A derivative contract is covered whether it is settled physically or in cash.

General financial and emission derivatives (C4): Treatment of foreign exchange contracts

Q31B. Is every foreign exchange contract caught by MiFID (article 10 of the MiFID Org Regulation)?

No. There are two exclusions:

- There is an exclusion for spot contracts (see the answer to Q31C).
- There is an exclusion for a foreign exchange transaction connected to a payment transaction (see the answer to Q31G).

Technically these exclusions relate to the other “any other derivative contracts” type of C4 derivative contract listed in the answer to Q31A. However in the FCA’s view no contract that has the benefit of one of these exclusions could be a C4 future either.

These exclusions do not apply to an option or a swap on a currency, regardless of the duration of the swap or option and regardless of whether it is traded on a *trading venue* or not (recital 13 to the *MiFID Org Regulation*).

Q31C. What is the exclusion for foreign exchange spot contracts mentioned in Q31B?

A contract for the exchange of one currency against another currency is excluded if under its terms delivery is scheduled to be made within a specified number of trading days. The number of trading days depends on the type of contract. For these purposes, there are three types of contract.

The first type of contract is one for the exchange of one major currency against another major currency. The contract is exempt if under its terms delivery is scheduled to be made within two trading days.

The second type of contract is one for the exchange of a non-major currency against either another non-major currency or against a major currency. The contract is excluded if under its terms delivery is scheduled to be made within the longer of:

- two trading days; and
- the period generally accepted in the market for that currency pair as the standard delivery period.

The third type of contract is one used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking. The contract is excluded if under its terms delivery is scheduled to be made within whichever is the shorter of the following:

- the period generally accepted in the market for the settlement of that security or unit as the standard delivery period; or

- five trading days.

An example of this third category is as follows. Say that X buys a share in Country P for delivery in four days' time (the standard settlement time in Country P for share purchases). X wishes to pay for the shares (and for associated taxes and costs) in local currency. The exclusion applies if X enters into the contract for the purchase of the local currency four or fewer days before the share settlement date.

If a foreign exchange contract falls into the third category (contract for the purpose of purchase of securities) it may also fall into one of the other two categories. As a result there are potentially two maximum delivery periods. Where this is the case, the longer of the two delivery periods applies for the purpose of deciding whether the exclusion applies.

If there is an understanding between the parties to the contract that delivery of the currency is to be postponed beyond the date specified in contract, it is the longer period that is used to calculate the delivery period.

Physical settlement does not require the use of paper money. It can include electronic settlement.

This exclusion only applies if there is a direct and unconditional exchange of the currencies being bought and sold (recital (13) to the *MiFID Org Regulation*). However a contract may still benefit from the exclusion if the exchange of the currencies involves converting them through a third currency.

See the answer to Q31E for what major and non-major currency means and see the answer to Q31F for what a trading day means.

Q31D. How are contracts for multiple exchanges of currency treated under the exclusion for foreign exchange spot contracts mentioned in Q31C?

The exclusion can cover a single contract with multiple exchanges of currencies. In such a contract, each exchange of a currency should be treated separately for the purpose of the exclusion (recital 13 to the *MiFID Org Regulation*).

Q31E. What are the major currencies referred to in the answer to Q31C?

The major currencies for these purposes are the US dollar, euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Singapore dollar, Norwegian krone, Mexican peso, Croatian kuna, Bulgarian lev, Czech koruna, Danish krone, Hungarian forint, Polish zloty and Romanian leu.

All other currencies are non-major currencies for these purposes.

Q31F. What does a trading day mean in the answer to Q31C?

A day is a trading day if it is a day of normal trading in the jurisdiction of both the currencies that are exchanged.

If either of the following conditions is met:

- the exchange of the currencies involves converting them through a third currency for the purposes of liquidity; or
- the standard delivery period for the exchange of the currencies references the jurisdiction of a third currency;

a day is a trading day if it is a day of normal trading in the jurisdiction of both the currencies that are exchanged and also in the jurisdiction of that third currency.

Q31G. What is the second exclusion for foreign exchange contracts mentioned in Q31B?

A contract is excluded if:

- it is a means of payment (see the answer to Q31H for what this means);
- it must be settled physically (although non-physical settlement is permissible by reason of a default or other termination event);
- at least one of the parties is not a financial counterparty as defined in article 2(8) of *EMIR*;
- it is entered into in order to facilitate payment for identifiable goods, services or direct investment; and
- it is not traded on a *trading venue*.

The table in the answer to Q31M gives some examples of what is and is not covered by the exclusion.

Q31H. What do identifiable and means of payment as referred to in the answer to Q31G mean?

The most straightforward example (Example (1) of what this means is a contract where one of the parties to the contract:

- sells currency to the other party which that other party will use to pay for specific goods or services or to make a direct investment; or
- buys currency from the other party which the first party will use to achieve certainty about the level of payments that it is going to receive: ofor specific goods or services that it is selling; or oby way of a direct investment.

See Example (10) in Q31M (Can you give me some more examples of how the means of payment exclusion referred to in the answer to Q31G works?) for an example of the second type of foreign exchange contract in Example (1) (contract to achieve certainty about the level of payments).

The table in the answer to Q31M gives some more examples of what identifiable goods and services means.

The *MiFID Org Regulation* says that the foreign exchange contract must be a means of payment. Therefore the exclusion requires that not only should the currency contract facilitate payment for identifiable goods, services or direct investment but that it should also be a means of payment. This combined requirement does not mean that there has to be a three-party arrangement between the buyer and seller of goods or services and the foreign exchange supplier. So, for example, if a UK company (A) is buying goods from an exporter in Germany (B) and is paying in euro and A buys the euro forward from a bank (C), there is no need for C to issue some sort of instrument to B (Example (2)).

Instead this combined requirement means that the currency contract that is to be excluded should facilitate the payment in the way described in Example (1) at the start of this answer or that there should be an equivalent close connection between the currency contract and the payment transaction.

Even though there is no requirement for a formal instrument of payment, the exclusion can cover such arrangements. So in Example (2) in this answer, the exclusion may apply to an arrangement that involves bank C issuing a euro letter of credit at the request of A for the benefit of B.

Q31I. What do goods, services and direct investment mean in the answer to Q31G?

The reference to goods and services should be interpreted widely. It can cover, for example, intellectual property (such as computer software and patents) and land.

However, in the FCA's view MiFID investments are only covered by the exclusion if they constitute a direct investment.

In the FCA's view, making a direct investment means making a capital investment in an enterprise to obtain a lasting interest in that enterprise. A lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise, and an investor's significant influence on the management of the enterprise.

The requirement for the investment to be direct does not prevent the investor acquiring an investment in a wholly-owned subsidiary of a holding company by making the investment in the holding company. However this requirement does mean that the investor should acquire its investment from the enterprise or holding company itself rather than by acquiring a stake through the secondary market.

A foreign exchange contract connected to the purchase of a MiFID investment may still be covered by the exclusion for spot contracts if the payment instrument exclusion does not apply. The spot exclusion makes particular provision for purchases of transferable securities and units in a collective investment undertaking (see the answer to Q31C). The result is that the means of payment exclusion does not undermine the specific provisions of the spot contract exclusion dealing with such transactions.

Q31J. How is an agent treated under the means of payment exclusion referred to in the answer to Q31G?

This question is about a foreign exchange contract carried out through agents where:

- at least one of the principals is a non-financial counterparty (see the answer to Q31G for what a financial counterparty means);
- both the agents are financial counterparties; and
- the contract would otherwise meet the exclusion conditions.

If the agents contract with each other on a principal-to-principal basis with back-to-back contracts with their respective clients, the exclusion is not available for the contract between the two agents. It may be available for the contracts between the agent and its client.

If the arrangement is made in such a way that there is a single contract, to which the two principals are party and which is entered into on their behalf by the agents, the exclusion is available.

Q31K. How do I know whether the conditions for the means of payment exclusion described in the answer to Q31G are met?

A financial counterparty (A) selling currency to a client may want to know whether the client (B) is going to use the foreign currency in a way that meets the exclusion conditions. This may be relevant to whether MiFID conduct of business obligations apply.

A non-financial counterparty (A) may sell currency to another non-financial counterparty (B) in circumstances where the currency that A buys is not being used in a way that qualifies for the exclusion. A may therefore want to rely on B using the currency that B purchases in a way that would qualify.

In each example, the application of the exclusion depends on the use to which the other party is going to put the currency.

In these examples A may rely on B's assurances about the purpose of the currency purchase as long as it has no reason to doubt what B says. Such an assurance could be given in several ways:

- Op-
tion 1 A may ask B to explain to A what the purpose of the transaction is, leaving it to A to work out whether the exclusion applies.
- Op-
tion 2 B may tell A that the exclusion applies to the transaction in question (for instance by way of a representation in the forward contract). A should only rely on such an assurance if satisfied that B is sufficiently expert to understand what the exclusion means.
- Op-
tion 3 B may give A an assurance or representation that applies to all foreign exchange transactions that may take place between them from time to time (which might be included in a master agreement governing all forward currency contracts between them). In this case:
 - o Option 2 (B should have sufficient expertise) applies.
 - o In addition, A should be satisfied that B has procedures in place for B to consider whether the exclusion applies in particular cases. This may include for example a procedure under which B:
 - should tell A that a particular proposed transaction does not qualify for the exclusion; or
 - is obliged not to ask A to enter into a contract under that master agreement that will be outside the exclusion.

Where B is an ordinary individual consumer or a small business, A may not be able to rely on B's judgement about whether the exclusion applies. In that case A should decide whether the exclusion applies based on questions A asks B (Option 1).

Q31L. Can a flexible forward come within the means of payment exclusion described in the answer to Q31G?

A forward contract may have a flexible delivery date. For example a forward contract may:

- say that delivery can take place at any point in a two-week period rather than on a fixed date; or
- have an expiry date by which delivery has to be taken but part, or parts, of the delivery can take place before that date.

A flexible delivery date within a defined and reasonably short window can still benefit from the exclusion. If the delivery period is very long, it is doubtful whether the requirement for the contract to facilitate payment for identifiable goods, services or direct investment (see the answer to Q31G) can be met.

These examples provide for delivery of the full amount by the end of the delivery period. There might also be a contract under which the purchaser may choose not to take delivery of part. An example of this kind of foreign exchange contract is as follows:

A UK importer of goods buys from a German seller and has to pay in euro. The importer may not know exactly how much it wants to import during the next quarter but may want to fix its foreign exchange risk in advance. The foreign exchange contract allows the importer to take delivery of no more than it needs to pay the exporter. Any balance not needed to pay for imports is cancelled and is not available to the importer.

In the FCA’s view, if the contract meets the conditions of the exclusion (and in particular the need for there to be identifiable goods or services) the exclusion potentially applies.

The requirement for there to be identifiable goods or services means that the maximum amount that can be drawn down under the flexible forward contract should be a reasonable estimate of what is payable under an identified potential payment transaction or transactions. The table in the answer to Q31M gives examples of what a reasonable estimate means.

An argument against the availability of the means of payment exclusion is that a flexible forward contract is an option and that the exclusion is not available for an option. However in the FCA’s view, the approach in the answer to Q31B applies. That is, a flexible forward contract that meets all the conditions of the exclusion is not a traditional option but rather a hybrid contract that is in the “any other derivative” contract category listed in the answer to Q31A (Types of C4 derivative contracts), even in the example in which the unused balance is cancelled.

Another argument against the availability of the exclusion for a flexible forward under which the unused balance is cancelled is that it does not meet the requirement for the contract to be settled physically. In the FCA’s view this argument is not correct because this requirement is aimed at preventing net cash settlement and does not deal with the cancellation of the contract resulting in there being no need for any kind of settlement.

Q31M. Can you give me some more examples of how the means of payment exclusion referred to in the answer to Q31G works?

Examples of how the means of payment exclusion works	
Example	Explanation
(1) A customer wants to hedge its balance sheet because it has a euro exposure but reports financially in sterling.	<p>The exclusion is not available as the foreign exchange contract is not entered into in order to facilitate payment for identifiable goods or services.</p> <p>If, as is likely to be the case, the foreign exchange contract is a swap or a non-deliverable forward, that is another reason for the exclusion not being available as the exclusion does not apply to this sort of contract (see the answers to Q31B and Q31R).</p>
(2) A UK customer (X) of a UK payment institution (Y) has a sterling account with a bank (P) in the United Kingdom and a separate euro bank account with another bank (Q) in the Eurozone. X wishes to pay its supplier in euro in 3 months. X enters into a forward contract with Y and requests that the euro be sent to its euro account with Q rather than directly to the supplier. The sterling that X pays under the foreign exchange contract comes from its account with P. Q makes the payment to the supplier for X.	<p>The exclusion is potentially available as the foreign exchange transaction facilitates payment for identifiable goods, even though Y does not itself pay the suppliers.</p> <p>The exclusion can cover an arrangement in which the firm selling the foreign currency is not the firm that makes the payment on behalf of the customer buying the identifiable goods.</p>
(3) A UK importer has bought €100,000 worth of goods. The sup-	The issue here is whether the forward exchange contract relates to

Examples of how the means of payment exclusion works	
Example	Explanation
plier has not yet issued an invoice and the sum is not yet due from the importer. However the importer knows the price. It buys the euro forward.	<p>identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion is potentially available. There is no need for the invoice to have been issued or the sum yet to be due.</p>
(4) A UK importer of goods has ordered a specific quantity of an identified type of goods from the supplier. The price will be payable in euro but the euro price has not yet been fixed. The UK importer makes an estimate of the euro price and buys the euro forward.	<p>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion is potentially available.</p> <p>There is no need for the amount to be paid under the foreign exchange contract to match precisely the amount of the payment that it is facilitating. An estimate is permissible. The goods are specifically identifiable by purchase order.</p>
(5) A UK importer knows that it wants to purchase €100,000 worth of goods from an identified Eurozone supplier in the next quarter but it has not yet entered into a formal contract with the supplier. It buys the euro forward.	<p>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion is potentially available. There is no need for the contract for the supply of goods to have been entered into at the time of the currency purchase.</p> <p>The goods are specifically identifiable by type, price and supplier and by the purpose for which the importer is buying them.</p>
(6) A UK importer knows that it wants to purchase €100,000 worth of goods from a Eurozone company in the next year, but does not know from which specific supplier it is going to purchase them. It knows which goods it wishes to buy. It buys the euro forward.	<p>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion is potentially available.</p> <p>The goods are specifically identifiable by type and price and by the purpose for which the importer is buying them.</p>
(7) A UK importer of goods wishes to buy currency in order to allow it to pay for goods in the next quarter. It does not know precisely how	<p>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the se-</p>

Examples of how the means of payment exclusion works	
Example	Explanation
<p>many of the goods it will want or what their exact price will be. However it has a sufficiently good idea of the amount of goods to make it unlikely that its estimate will be seriously wrong. It knows this because it has an established practice of buying these sorts of goods.</p>	<p>cond exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion is potentially available.</p> <p>The exclusion may be available even though the precise details of the goods to be bought are not known yet.</p> <p>The goods are identifiable by reference to an established practice and need.</p>
<p>(8) A firm wishes to import goods for a project and needs foreign exchange to pay for them. It does not know precisely how many of the goods it will buy or what their exact specification or price will be. However it knows broadly what goods it needs. In this example it knows all this because the goods are needed for a specific purpose in a specific project.</p>	<p>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion is potentially available.</p> <p>The exclusion may be available even though the precise details of the goods to be bought are not known yet.</p> <p>The goods are identifiable by reference to an established project and a particular purpose within that project.</p>
<p>(9) A customer wishes to undertake a sterling/euro conversion to purchase €100,000 in three months. This amount is to cover 20 individual payments of €5,000 which will be drawn down at different times.</p> <p>This type of contract benefits the customer who obtains a better rate by setting up one contract for a larger value than could be obtained on 20 individual low value contracts.</p>	<p>The exclusion is potentially available. See the answer to Q31L (Can a flexible forward come within the means of payment exclusion described in the answer to Q31G?).</p>
<p>(10) An exporter (A) sells goods to a French importer for payment on delivery in euros. A, before the due date for payment for the goods, sells the euro for the equivalent amount in sterling. The foreign exchange contract is made at the applicable forward rate on the date of the currency contract. Settlement of the currency contract is due on the same day as payment for the goods. A is thereby protected against adverse movements in sterling against the euro.</p>	<p>The exclusion is potentially available. Recital 10 to the <i>MiFID Org Regulation</i> says that a contract to achieve certainty about the level of payments for identified goods is covered by the exclusion.</p>

Examples of how the means of payment exclusion works	
Example	Explanation
<p>(11) A UK importer (A) has bought €100,000 worth of goods from several suppliers. A has a number of purchase contracts with each supplier and each supplier has issued a number of invoices. The due dates for payment on each invoice are quite close together and so A buys €100,000 forward from one provider in a single contract.</p>	<p>The exclusion is potentially available. There is no need for there to be a single currency contract for each contract under which payment arises. Nor do the payment dates under the purchase contracts have to match exactly the settlement dates under the forward contract.</p>
<p>(12) A UK importer (A) has bought €100,000 worth of goods. A buys €100,000 forward from several currency providers.</p>	<p>The exclusion is potentially available. There is no need for A to use a single currency provider.</p>
<p>(13) A UK importer (A) has bought €100,000 worth of goods from several suppliers. A has a number of purchase contracts with each supplier and each supplier has issued a number of invoices. The due dates for some of the invoices are quite close together and so A buys €50,000 forward from one provider in a single contract to meet these payment obligations. The result is that €50,000 is allocated between a number of import contracts in differing amounts and none of the import contracts are covered in full.</p> <p>A decides to meet the other €50,000 from its own resources.</p>	<p>The exclusion is potentially available. The exclusion may apply even where the excluded currency contract is applied to a number of different payment obligations under a number of import contracts.</p> <p>The exclusion is available even if A relies on its own resources for part of the payment transaction.</p>
<p>(14) A UK importer (A) has bought €40,000 worth of goods from one supplier and €60,000 from another. The suppliers have issued invoices but payment is not yet due from A. A buys €40,000 forward to meet the payment on the first and decides to meet the €60,000 due under the other contract from its own resources.</p>	<p>The exclusion is potentially available. There is no requirement that A should cover every contract for goods to which the exclusion might apply.</p>
<p>(15) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from A. A buys €200,000 forward. A will use other €100,000 for purposes that do not meet the exclusion conditions.</p>	<p>The exclusion is not available where A uses part of the currency it buys for purposes that do not meet the conditions of the exclusion. The contract should not be treated as partly excluded and partly as a C4 currency derivative.</p> <p>If however A enters into two foreign exchange contracts, each for €100,000, the exclusion may apply to one of them. Also see example (16).</p>
<p>(16) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from the im</p>	<p>The exclusion is not available for the second contract. The first contract should be taken into account when deciding whether A may rely</p>

Examples of how the means of payment exclusion works	
Example	Explanation
porter. A buys the €100,000 forward. Later A buys another €100,000 forward.	on the exclusion for second contract. See the answer to Q31N (How do the examples in the table in the answer to Q31M apply to an exporter or importer with a large portfolio of contracts?) for an example of where the exclusion can apply in similar circumstances.
(17) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due A. A decides to meet the payment out of its own resources. Later A changes its mind and buys the €100,000 forward.	The exclusion is potentially available. The currency contract and the contract generating the payment obligation do not need to be entered into at the same time.
(18) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from A. A buys the US dollar equivalent of €100,000 forward.	The exclusion will not generally be available because the currency contract is not a means of payment facilitating the payment due from A to the supplier. This is because the payment is due in euro and so the dollar contract is not sufficiently connected to the payment transaction.
(19) A farmer's farm payment under the EU basic payment scheme will be €10,000 and will be paid in sterling. The payment will be made in three months' time. In order to fix the sterling amount they will receive, the farmer wishes to book a forward with a currency provider to sell €10,000 and buy sterling in three months' time.	The issue here is whether the forward exchange contract relates to identifiable goods and services as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?). The exclusion may not be available. This is because the payment may not be linked to any specific goods or services being sold or bought by the farmer. However it is possible that the farmer is going to use the payments under the scheme to purchase goods or stock for their farming business. If there is an identifiable payment transaction in accordance with the examples in this table the exclusion will potentially be available. If the exclusion is not available it is unlikely that the farmer will be carrying on MiFID business for the reasons described in the answer to Q7 (We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?).
(20) An overseas student is given a grant by their home country in their	The issue here is whether the forward exchange contract relates to

Examples of how the means of payment exclusion works	
Example	Explanation
<p>local currency to study at a UK university, payable in six months' time. As the fees are payable in sterling, the student wishes to book a forward with a currency provider to sell their home state currency and buy sterling in six months' time. They wish to enter into the forward contract to guarantee the amount of sterling they will receive.</p>	<p>identifiable goods and services as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</p> <p>The exclusion may be available because the grant helps the student to pay for the UK university's fees.</p> <p>The exclusion is still available if some of the grant is to meet living costs and the student has not yet decided what exactly they will need to buy (see the answer to Q31Q (holiday spending money) for more on this).</p>
<p>(21) A hedge fund manager has investors in the UK and a fund which is made up of euro denominated securities. The value of the fund to the investor will fluctuate due to the market value of the securities but it will also go up or down in accordance with the euro/sterling exchange rate. The fund manager seeks to hedge this risk by purchasing a forward contract to sell euro and buy sterling for three months in the future. The purpose of the trade is to ensure the investors will not be subject to currency volatility affecting the value of their investment.</p>	<p>The exclusion is not available because the currency transaction is not linked to any payment for specific goods, services or direct investment.</p>
<p>(22) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. However, the machinery purchase is delayed and A asks to extend the forward contract. This may involve A paying more money for the euro depending on the exchange rate at the date of the contract extension.</p>	<p>The fact that the currency forward is later amended by mutual consent to match the changed payment date for the machinery does not prevent the exclusion from applying as long as the amended version meets the exclusion conditions in the light of the changed circumstances.</p> <p>If the foreign exchange provider refuses to amend the contract the exclusion is not lost as long as the exclusion conditions were met at the time the foreign exchange contract was entered into.</p>
<p>(23) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling.</p> <p>The machinery purchase falls through but A wants to extend the contract length as they have identi</p>	<p>The answer to (22) applies. As explained in the answer to (7), the exclusion may be available for the proposed new machinery contract even though the precise details are not yet known.</p>

Examples of how the means of payment exclusion works	
Example	Explanation
<p>fied replacement machinery with a similar price.</p> <p>(24) A UK importer (A) wishes to buy some machinery from a Euro-zone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. However, the machinery purchase is delayed and the specifications are changed. The currency contract therefore no longer facilitates payment under the machinery contract. A decides to close out the existing currency contract. A also enters into a new forward contract with another currency provider that matches the revised machinery contract.</p>	<p>The exclusion is potentially available for the close out contract and also for the new currency contract.</p> <p>If A decides to meet the payment due under the revised machinery contract out of its own resources, the exclusion is still potentially available for the close out contract.</p>
<p>(25) A customer is due to receive an inheritance in euro and is advised of the amount but, owing to the need to complete probate, the funds will not be released for a number of months. The customer wishes to ensure that there is no depreciation in value of the inheritance in sterling terms and enters into a euro-sterling forward.</p>	<p>The exclusion is not available because the foreign exchange contract is not linked to any specific goods, services or direct investment.</p>
<p>(26) A UK parent company wishes to inject capital in euro into a European subsidiary in four months' time and enters into a forward contract to purchase the euro.</p>	<p>The exclusion is potentially available as the foreign exchange contract is made to facilitate a direct investment in the subsidiary.</p>
<p>(27) A customer asks a UK payment institution to make a payment to a family member living abroad. The payment is to be made in the currency of the country where the family member lives. The customer buys the foreign currency on a forward basis.</p>	<p>The exclusion is not necessarily available. The exclusion is only available if the family member is going to use the currency for a purpose that comes within the exclusion.</p>
<p>(28) A UK firm (A) has employees abroad. A pays them in local currency. A buys forward the currency with which it will pay its employees.</p>	<p>The exclusion potentially applies.</p>

Q31N. How do the examples in the table in the answer to Q31M apply to an exporter or importer with a large portfolio of contracts?

This question deals with the fact that the examples in the table in the answer to Q31M have relatively simple facts, where the purchaser of the foreign currency only has one or a few payment obligations. In many cases a seller or buyer of goods will have frequent payment transactions for which it needs foreign exchange and it may not wish to meet this need by having a separate currency contract for each import or export contract.

The exclusion can still apply in these cases. This is because, as the examples in the table in the answer to Q31M illustrate, there is some flexibility in the

amount and timing of currency contracts, the ability to estimate currency needs, the ability to close out currency contracts and the use of different currency providers.

However the requirements of the exclusion still apply, including the need to show that the currency contract is a means of payment that is entered into in order to facilitate payment for identifiable goods, services or direct investment. This means that it will be necessary to look at all the importer or exporter's incoming and outgoing payments and currency resources each time the importer or exporter enters into a new currency contract to see whether the exclusion is available for that new currency contract.

Say:

- a UK importer (A) has bought €100,000 worth of goods under a contract with a Eurozone supplier (Contract P);
- the supplier has issued an invoice but the sum is not yet due from A;
- A buys the €100,000 forward; and
- later A buys another €100,000 forward.

When A enters into the second currency contract, changes to Contract P or to A's payment profile may mean that:

- the new currency contract will better facilitate the payment obligation under Contract P and the first currency contract will facilitate another identified payment obligation; or
- the first contract no longer facilitates the payment under Contract P and A needs the new currency contract to allow it to make the payments due under Contract P.

When deciding whether the exclusion applies to the second currency contract entered into by A there is no need to treat the first currency contract as tied to the payment under Contract P just because the payment due under Contract P justified the application of the exclusion when A entered into the first currency contract. Instead it is necessary to look again at all A's incoming and outgoing payments and currency resources at the time A enters into the second currency contract (including both currency contracts).

Q310. I am a payment services provider under the Payment Services Regulations. How do the spot contract and means of payment exclusions referred to in the answers to Q31C and Q31G apply to me?

(See ■ PERG 15 (Guidance on the scope of the Payment Services Regulations 2009) for the Payment Services Regulations)

This answer only relates to a payment service provider authorised under the *Payment Services Regulations*. It does not cover, for example, banks that are subject to the conduct of business requirements of those Regulations.

The *Payment Services Regulations* allow you to provide foreign exchange services that are closely related and ancillary to your payment services. That right does not allow you to provide foreign exchange derivative services that would otherwise require authorisation under MiFID. You therefore need to consider the availability of MiFID exclusions for your foreign exchange business.

The most common sort of foreign exchange contract you are likely to carry out is where you execute a payment for your customer that involves a currency conversion. For example, you may make a payment for your customer in euros from the customer's sterling payment account to a payee's payment account. The foreign exchange part of this transaction is separate from the payment

part of the transaction (see Q12 in ■ PERG 15.2 (We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSD regulations?)).

The foreign exchange part of this example may involve a MiFID C4 derivative if it has a forward element. However in practice it is likely that such foreign exchange transactions will fall outside MiFID because the spot exclusion applies.

The following are examples of how the delivery period should be calculated for the MiFID spot exclusion. They are all based on a payment being made in one currency funded from a payment account in another currency.

- If your customer asks for the payment to be made immediately, the delivery period starts on the date of request.
- If your customer asks for the payment to be made some time after the request and the foreign exchange conversion is to be carried out at the spot rate on the transfer date, the delivery period starts on that transfer date.
- If your customer asks for the payment to be made some time after the request and the foreign exchange conversion rate is fixed on the date the customer gives you your instructions, the delivery period starts on that instruction date.
- The date on which the payment is received by the payee's payment services provider should normally be treated as the delivery date.
- If you debit your customer's payment account after receipt by the payee's payment services provider and the foreign exchange conversion rate is fixed on the debit date, the availability of the exclusion is based on the gap between the debit date and the payment to the payee's payment services provider.

If your customer wants to make a foreign currency transfer some time in the future and buys the foreign currency from you in advance at the spot rate and immediately credits it to a payment account with you, the spot exclusion should apply.

If the delivery period is too long for the spot contract exclusion to apply, the means of payment exclusion is potentially available because you are not a financial counterparty for the purposes of that exclusion.

However, the means of payment exclusion only applies if the payment by your customer meets the requirements about identifiable goods, services or direct investments described in the answer to Q31G.

Q31P. Can a non-deliverable forward come within the exclusion for spot foreign exchange contracts in the answer to Q31C or the means of payment exclusion in the answer to Q31G?

No.

A non-deliverable forward is a cash-settled foreign exchange contract relating to a thinly traded or non-convertible foreign currency against a freely traded currency. The first currency may be non-convertible for example because of exchange controls or restrictions on currency dealing. On the contracted settlement date, the profit or loss is adjusted between the two counterparties based on the difference between the contracted rate for the non-deliverable currency and the prevailing spot rate. The price for the convertible currency may be expressed in terms of a second convertible currency.

As settlement is for the difference between an exchange rate agreed before delivery and the actual spot rate at maturity, a non-deliverable forward is not

a spot contract, regardless of the settlement period (recital (12) of the *MiFID Org Regulation*), and the means of payment exclusion is also not available. See the answer to Q31R about why settlement for a difference does not come within either exclusion.

Q31Q. How is holiday spending money treated under the spot contract and means of payment exclusions referred to in the answers to Q31C and Q31G?

One way of buying holiday currency is for the holidaymaker to order currency to be collected, for example, a week after the order, to be paid for at the currency seller's spot rate on the day of collection. This contract is not a MiFID investment either because it does not fall into the category C4 type of derivative in the first place or because the spot contract exclusion described in the answer to Q31C applies.

Another way of buying holiday money is for the holidaymaker to order currency to be collected, for example, a week after the order, to be paid for at the currency seller's spot rate on the day the currency is ordered. This type of contract is potentially within the C4 type of derivative. However the means of payment exclusion is potentially available. The holiday can be treated as identifiable goods or services even though the holidaymaker may not know what restaurant they are going to eat at or what tourist attractions they are going to visit.

In either case the seller of the holiday money may agree to buy back any unused currency at a price fixed at the same time as the rate at which the holidaymaker is to buy the currency is fixed and linked to the original rate. Such an arrangement may also benefit from the means of payment exclusion. This is because the promise to buy back the currency is so closely connected to the original purchase that it can be seen as being an integral part of the same transaction.

These answers are relevant to whether the currency seller requires authorisation under MiFID. The holidaymaker will of course not require authorisation because a holiday-maker buying holiday money is not acting on a professional basis in the way described in the answer to Q7.

Q31R. How does netting affect the exclusions for foreign exchange contracts in the answers to Q31C and Q31G?

A foreign exchange contract may involve a valuation of the currencies being bought and sold for the purposes of settlement and a single payment being made.

The spot contract exclusion described in the answer to Q31C requires there to be exchange and delivery. The means of payment exclusion described in the answer to Q31G requires there to be physical settlement delivery. Therefore neither exclusion applies to a contract involving this type of netting. An instrument that provides for a single payment like this is more like a swap, which is outside the scope of the exclusions.

The fact that a foreign exchange contract provides for early termination and netting on default does not mean that the exclusions cannot apply. Similarly, the existence of force majeure provisions dealing with bona fide inability to settle physically does not prevent a contract from benefiting from the exclusions.

The parties to a foreign exchange contract may also have entered into other foreign exchange or financial contracts with each other. The result may be that the parties exchange multiple cash flows during a given day. In order to reduce operational and settlement risks they may agree to net those cash flows into one payment for each currency (payment netting). For example the parties may each have to make and receive multiple payments in sterling, euro

and US dollars on the same day. The result of payment netting is that there will only be three payments to be made on that day, one in each of the three currencies. This sort of payment netting is compatible with the exclusions.

Q315. I enter into my foreign exchange contracts on a trading venue. What exclusions or exemption can I rely on?

The spot contract exclusion described in the answer to Q31C may be available.

The means of payment exclusion described in the answer to Q31G will not be available.

If neither exclusion is available, and the contract is a C4 derivative, you may find the own account exemption described in the answer to Q40 helpful. Although that exemption is usually unavailable to those who have direct electronic access to a *trading venue*, this is not the case where the contract is for hedging purposes.

Commodity derivatives

Q32. Which types of commodity derivative fall within MiFID scope?

Broadly speaking, the following commodity derivatives fall within the scope of MiFID:

- a derivative relating to a commodity derivative, for example, an option on a commodity future (C4);
- cash-settled commodity derivatives (as explained in more detail in Q33A) (C5);
- physically settled commodity derivatives traded on certain markets or facilities (as explained in more detail in Q33B) (C6); and
- other commodity derivatives capable of physical settlement and not for commercial purposes or wholesale energy products traded on an *EU OTF* that must be physically settled (as explained in more detail in Q33C) (C7).

The definition of commodity derivative in MiFIR also includes derivatives falling into paragraph C10 of Section A of Annex 1 to MiFID, onshored in paragraph 10 of Part 1 of Schedule 2 of the *Regulated Activities Order* (see the answer to Q34 for this type of derivative).

Q33. What is a commodity for the purposes of MiFID?

“Commodity” means any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products and energy such as electricity (article 2.6 of the *MiFID Org Regulation*). The fact that energy products, such as gas or electricity, may be “delivered” by way of a notification to an energy network (such as notifications under the Network Code or the Balancing and Settlement Code) does not prevent them being “capable of being delivered” for these purposes. If a good is freely replaceable by another of a similar nature or kind for the purposes of the relevant contract (or is normally regarded as such in the market), the two goods will be fungible in nature for these purposes. Gold bars are a classic example of fungible goods. In our view, the concept of commodity does not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible.

Q33A. Can you tell me more about category C5 commodity derivatives?

This type of commodity derivative is one that must be settled in cash or one that provides for settlement in cash at the option of one of the parties. A derivative that only allows a party to opt for cash in the event of default or termination is not included.

Q33B. Can you tell me more about category C6 commodity derivatives?

This type of commodity derivative is one that:

- can be physically settled; and
- is traded on a UK regulated market, a UK MTF or a UK OTF.

The category C6 type of commodity derivative excludes a wholesale energy product traded on a UK OTF that must be physically settled. The *MiFID Org Regulation* defines physical settlement in more detail.

Article 6 of the *MiFID Org Regulation* has special definitions for what types of oil, coal and wholesale energy products are included in the C6 category of commodity derivative.

A contract that can be physically settled but which is not traded on a regulated market, MTF or OTF might still fall within the C5 or C7 category of commodity derivative even though it falls outside category C6.

Q33C. Can you tell me more about category C7 commodity derivatives (recital 5 to, and article 7 of, the MiFID Org Regulation)?

This type of commodity derivative is one that meets all the following conditions:

- It can be physically settled.
- It is not a C6 commodity derivative.
- It is not a spot contract. A spot contract means one under the terms of which delivery is scheduled to be made within the longer of the following periods:
 - o two trading days; or
 - o the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

For these purposes a contract is not a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the spot period described earlier in this answer.

- It meets one of the following criteria:
 - o it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF (an "equivalent third country trading venue"); or
 - o it is expressly stated to be traded on, or is subject to the rules of, a UK regulated market, a UK MTF, a UK OTF or an equivalent third country trading venue; or
 - o it is equivalent to a contract traded on a UK regulated market, UK MTF, UK OTF or equivalent third country trading venue. Equivalence is judged by reference to the price, the lot, the delivery date and other contractual terms such as quality of the commodity or place of delivery.
- It is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Certain contracts entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network are excluded from the C7 category of commodity derivative.

The category C7 type of commodity derivative also excludes a wholesale energy product traded on an EU OTF that must be physically settled. The *MiFID Org Regulation* defines physical settlement in more detail.

Miscellaneous derivatives (C10)

Q34. What types of derivatives fall into the C10 category?

There is a miscellaneous category of derivatives in C10, which is supplemented by articles 7 and 8 of the *MiFID Org Regulation*. These relate to:

- climatic variables;
- freight rates;
-
- inflation rates or other official economic statistics;
- telecommunications bandwidth;
- commodity storage capacity;
- transmission or transportation capacity relating to commodities, whether cable, pipeline or other means;
- an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources;
- a geological, environment or other physical variable;
- any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;
- an index or measure related to the price or volume of transactions in any asset, right, service or obligation; or
- an index or measure based on actuarial statistics.

C10 derivatives must also meet at least one of the following criteria:

- the contract is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of default or other termination event; or
- the contract is traded in a *regulated market*, an MTF, an OTF or a non-EEA trading venue that performs a similar function; or
- the contract meets the following criteria in the answer to Q33C:
 - o it is not a spot contract;
 - o it meets the requirements about trading on (or being stated to be traded on), being subject to the rules of or being equivalent to contracts traded on, certain trading venues;
 - o standardisation; and
 - o it does not fall within the exclusion about transmission grids, energy balancing mechanisms or pipeline networks.

All these criteria are explained in more detail in the answer to Q33C.

A contract of insurance or reinsurance is not a C10 commodity derivative (recital 6 to the *MiFID Org Regulation*). Neither is a contract falling under one of the other paragraphs of section C of Annex 1 to MiFID, onshored in part 1 of Schedule 2 of the *Regulated Activities Order*.

Emission allowances

Q34A. How are emission allowances treated?

They are covered in the following ways:

- Regulation 5(8) of the *UK auctioning regulations* deems as an investment service or activity the reception, transmission and submission of a bid for a financial instrument on an *auction platform* by an *investment firm* permitted to carry on these activities under the regulations.
- The *UK auctioning regulations* regulate bids for allowances in the form of two-day spot contracts or five-day futures.
- The *UK auctioning regulations* allow the following to bid:
 - aircraft operators and others referred to in (5) below;

–*MiFID investment firms* (other than *collective portfolio management investment firms*) and *UK credit institutions* and similar *third country investment firms*; and

–a person exempt under article 2(1)(j) of MiFID as onshored in Part 1 of Schedule 3 to the *RAO* (see Q44 to Q45 for more on this exemption).

- An *emission allowance* is itself a financial instrument (C11).
- An option, future, swap, forward rate agreement or any other derivative contract relating to *emission allowances* is included as a C4 derivative.

It is not always clear how all this overlapping legislation fits together but in the FCA's view, it works like this (for ease of reference the phrase 'MiFID authorisation' is used to refer to *UK requirements onshoring MiFID*):

- (1) An emission allowance auctioned as a five-day future or a two-day spot contract is regulated under either the *EU auction regulation* or the *UK auctioning regulations*.
- (2) The five-day future auction product is a financial instrument and is regulated under MiFID as onshored by Part 1 of Schedule 2 to the *RAO*. It is included under C4 and C11.
- (3) The two-day spot contract product is also a financial instrument. It is included under C11. It is therefore also regulated under MiFID as onshored by Part 1 of Schedule 2 to the *RAO*.
- (4) In the FCA's view an *emission allowance* (including when auctioned under the *EU auction regulation* or the *UK auctioning regulations*) will not come within C1.
- (5) The *UK auctioning regulations* provide certain exemptions for aircraft operators and operators of plant and other installations. These exemptions continue to apply whether or not a MiFID exemption, as onshored in Part 1 of Schedule 3 to the *RAO* is available, but only for bidding activities covered by the *UK auctioning regulations*.
- (6) Thus for example, regulation 16 of the *UK auctioning regulations* enable business groupings of operators in (5) to be eligible to apply for admission to bid. The MiFID exemption in (12) below may not cover all such persons but they are still entitled to submit bids under the *UK auctioning regulations*.
- (7) The mere fact of being exempt under MiFID, as onshored in Part 1 of Schedule 3 to the *RAO* does not allow someone to bid under the *UK auctioning regulations*. The *UK auctioning regulations* regulate who can and cannot bid.
- (8) The *UK auctioning regulations* cover the reception, transmission and submission of a bid. This corresponds to the MiFID activities of the reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients and dealing on own account.
- (9) Therefore the *UK auctioning regulations* activities of receiving, transmitting and submitting a bid are all also covered by MiFID, whether the *emission allowance* is auctioned as a five-day future or a

two-day spot contract. However, a person exempt under (5) is not subject to MiFID when bidding (subject to (10)).

- (10) If a person who is allowed to bid under the *UK auctioning regulations* or is authorised under MiFID (because for example it wants to carry out other activities for which it needs MiFID authorisation), MiFID will apply to its bidding activities.
- (11) The MiFID investment services and activities that apply to a product covered by the *UK auctioning regulations* are not limited to the bidding activities listed in paragraph (8) of this list. All the MiFID investment services and activities apply to *emission allowances* auctioned as a financial instrument . Therefore, for example, giving personal recommendations about emission allowances (including bids) is covered by MiFID. Anyone wishing to carry out such activities will need to be authorised as a MiFID firm, unless some other exemption is available.
- (12) Article 2.1(e) of MiFID as onshored in Part 1 of Schedule 3 to the *RAO* exempts an operator with compliance obligations under the *trading scheme order 2020* from MiFID.
 - (a) The exemption covers some of the same ground as the exemption in the *UK auctioning regulations* described in (5) to (7) above. However this overlap neither extends nor narrows the effect of the *UK auctioning regulations* exemption.
 - (b) The article 2.1(e) exemption also covers activities not covered by the *UK auctioning regulations*. So, for example, the article 2.1(e) exemption covers buying and selling the underlying *emission allowance* or the five-day future or two-day spot auction product in the secondary market.
 - (c) See the answer to Q35A for more details about the conditions of the exemption.
- (13) An *EU firm* will be carrying on the *regulated activity of bidding in emissions auctions* if they bid from the *UK* on an *EU auction platform*.

Structured deposits

Q34B. How are structured deposits covered?

Article 1.4 of MiFID applies certain provisions of MiFID to an investment firm or credit institution that sells or advises on *structured deposits*.

A *structured deposit* is not a financial instrument. This means, for example, that a firm does not become a *MiFID firm* by advising on or selling them.

13.5 Exemptions from MiFID

13.5

Introduction

Q35. Where do we find a list of MiFID exemptions?

The exemptions found in articles 2 and 3 MiFID, have been onshored in Part 1 of Schedule 3 to the Regulated Activities Order and Regulation 8 of the MiFI Regulations. However, as explained in PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this chapter.

Q35A. Can you give me a complete list of exemptions?

Description of exemption	MiFID reference	Guidance in this chapter
Insurers	article 2.1(a)	Q36
Intra-group services	article 2.1(b)	Q37 and Q38
Services complementary to other professional activities	article 2.1(c)	Q39
Own account dealing (except in commodities or emission allowances)	article 2.1(d)	Q40 to Q40C
An operator with compliance obligations under the <i>UK trading scheme</i> who, when dealing in emission allowances, does not: <ul style="list-style-type: none"> ● execute client orders; or ● provide any investment services or perform any investment activities other than dealing on own account; or ● apply a high-frequency algorithmic trading technique. 	article 2.1(e)	Q34A
Employee share schemes and pension schemes	article 2.1(f) and (g)	Q42
The following public financial institutions:	article 2.1(h)	None

Description of exemption	MiFID reference	Guidance in this chapter
<ul style="list-style-type: none"> ●members of the European System of Central Banks; ●other national bodies performing similar functions in the EU; ●other public bodies charged with or intervening in the management of the public debt in the EU; or ●international financial institutions established by two or more EU Member States which have the purpose of mobilising funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems. 		
Collective investment undertakings and pension funds	article 2.1(i)	Q43
Activities relating to commodity derivatives or emission allowances	article 2.1(j)	Q44 to Q45
Persons providing investment advice in the course of providing another professional activity not covered by MiFID	article 2.1(k)	None
This only applies if the provision of such advice is not specifically remunerated.		
Transmission system operators as defined in article 2(4) of Directive 2009/72/EC or article 2(4) of Directive 2009/73/EC (Directives about common rules for the internal markets in electricity and natural gas). This exemption is subject to various detailed conditions	article 2.1(n)	None
<i>Central securities depositories</i> when providing services explicitly listed in Sections A and	article 2.1(o)	None

Description of exemption	MiFID reference	Guidance in this chapter
B of EU Regulation 909/2014 (Securities settlement and central securities depositories regulation)		
Optional article 3 exemption	article 3	Q48 to Q53
Exemptions relevant to Italy, Denmark and Finland	articles 2.1(l) and (m)	None

Insurance

Q36. We are an insurer. Does MiFID apply to us?

No. Insurers are exempt from MiFID (article 2.1(a)).

Intra-group activities

Q37. We are a non-financial services group company providing investment services to other companies in the same group. Are we exempt under the group exemption in article 2.1(b)?

Yes, if you provide these services exclusively for your parent company, your subsidiaries and those of your parent company. The exemption is narrower than the corresponding exclusion in article 69 of the Regulated Activities Order (groups and joint enterprises) insofar, for example, as it does not apply to investment services supplied to a joint venture participant (see ■ PERG 2.9.10 G).

Q38. We also buy and sell financial instruments for ourselves. Are we still able to use the group exemption?

Yes. As long as your own account dealing does not involve you providing an *investment service* (to which MiFID applies) to non-group entities, you can still rely on the group exemption in respect of the services you provide solely to other group companies.

So far as your own account dealing is concerned, you may be able to rely upon the exemption in article 2.1(d) (see Q39) or 2.1(j) (see Q44 to Q45) if you meet the relevant conditions. The ability to combine reliance on article 2.1(b) and articles 2.1(d) or 2.1(j) could be relevant to companies performing group treasury functions.

The answer to Q46 (Is it possible to combine article 2 exemptions?) explains why it is possible to combine exemptions.

Incidental services as part of a professional activity

Q39. We provide investment services as a complement to our main professional activity. Are we exempt (article 2.1(c) of MiFID and article 4 of the MiFID Org Regulation)?

Yes, you will be exempt under article 2.1(c) MiFID if:

- you provide these services in the course of your professional activity;
- a close and factual connection exists between your professional activity and the provision of the investment service to the same client, such that

the investment service can be regarded as accessory to your main professional activity;

- the provision of investment services to the clients of your main professional activity does not aim to provide a systematic source of income to you;
- you do not market or otherwise promote your ability to provide investment services, except where these are disclosed to clients as being accessory to your main professional activity; and
- your professional activity is regulated by legal or regulatory provisions or a code of ethics that do not exclude the provision of investment services.

This exemption is relevant, for example, to firms belonging to *designated professional bodies*, such as accountants, actuaries and solicitors, to whom Part XX of the *Act* applies. It could also apply to *authorised professional firms* which provide investment services in an incidental manner in the course of their professional activity. In our view, the criteria set out in ■ PROF 2.1.14 G in relation to section 327(4) of the *Act* are also relevant to considering whether a firm can rely on the this MiFID exemption (see further guidance in ■ PROF 2.1.16G).

If an *authorised professional firm* has the standard requirement on its permission that it "...must not carry on the specified regulated activities otherwise than in an incidental manner in the course of the provision by it of professional services (that is, services which do not consist of regulated activities)", our assumption is that it is exempt from MiFID if it complies with this requirement.

If you are an *authorised professional firm* not falling within article 2.1(c) MiFID, you may also wish to consider whether you are exempt or otherwise from MiFID requirements by virtue of the domestic implementation of the article 3 exemption (see Q48 and Q49).

The article 2.1(c) MiFID exemption may also apply to journalists, broadcasters and publishers (where they are subject to regulation or a code of ethics), although in most cases the FCA would not expect these persons to fall within the MiFID definition of investment firm (see Q7 and Q8).

Own account

Q40. We regularly buy and sell financial instruments ourselves but never as a service to third parties. Are there any exemptions which might apply to us?

Yes, you could fall within the article 2.1(d) MiFID exemption but not if you:

- are a market maker (please see Q41 below);
- are a member of, or a participant in, a regulated market or an MTF (except that non-financial entities can be members or participants as described in the answer to Q40A);
- have direct electronic access to a regulated market, an MTF or an OTF (except that non-financial entities can have such access, as described in the answer to Q40A);
- apply a high-frequency *algorithmic trading* technique (see Q41A); or
- deal on own account when executing client orders.

This exemption does not apply to dealing on own account in commodity derivatives, emission allowances or derivatives thereof (the exemption

discussed in the answer to Q44 (Activities in relation to commodity derivatives) is relevant instead).

MiFID says that persons exempt under the commodities exemption described in the answer to Q44 are not required to meet the conditions laid down in the own account exemption described in this answer in order to be exempt. In the FCA's view that does not mean that you can do business of the type covered by the article 2.1(d) exemption without meeting the exemption conditions described in this answer just because you qualify for the commodities exemption. Recital 22 to MiFID confirms that the two exemptions apply cumulatively. Another reason for this conclusion is that articles 2.1(d) and (j) apply to different asset classes and there does not seem to be any reason apparent from MiFID why exemption under article 2.1(j) should be relevant to the asset classes in article 2.1(d).

See the answer to Q46 for more information about combining this exemption with other exemptions, particularly the exemption for commodity derivatives business.

Q40A. When can a non-financial entity have direct electronic access to or be a participant in a trading venue without losing the benefit of the own account exemption described in the answer to Q40?

The article 2.1(d) exemption can still be available if you are a member of, or a participant in, a regulated market or an MTF or you have direct electronic access to a regulated market, an MTF or an OTF, as long as:

- you are a non-financial entity; and
- your transactions are objectively measurable as reducing risks directly relating to your commercial or treasury financing activity, or the commercial or treasury financing activity of your group.

Q40B. What does direct reduction of risk mean in the answer to Q40A?

The second condition described in the answer to Q40A (objectively measurable reduction of risks) is designed to allow a non-financial business to hedge without losing the exemption. The following points are relevant to whether hedging meets this second condition:

- The exception covers hedging for commercial activities as well as treasury activities. It can therefore cover risks to a change in value of your group's assets, services, inputs, products, commodities or liabilities.
- Hedging may cover potential indirect impacts on your business as well as direct ones.
- A transaction may qualify as risk-reducing taken on its own or in combination with other hedging transactions.
- A transaction may be treated as risk-reducing even though it is not a perfect hedge. Thus for example your group may use proxy hedging through a closely correlated instrument to cover an exposure, such as an instrument with a different but very close underlying in terms of economic behaviour.
- If your group uses portfolio or macro hedging, it may not be able to establish a one-to-one link between a specific hedging transaction and a specific risk directly related to the commercial and treasury financing activities being hedged. The risks related to the commercial and treasury financing activities may be complex. For example, the risks may cover several geographic markets, products, time horizons or entities. Nevertheless, macro or portfolio hedging used to hedge a risk in relation to your group's overall risks may be treated as risk-reducing.

- Positions do not qualify as risk-reducing solely on the grounds that they form part of a risk-reducing portfolio on an overall basis. In such cases your group's risk management systems should prevent such transactions from being categorised as risk-reducing.
- A risk may evolve over time and, in order to adapt to the evolution of the risk, a hedging transaction initially executed for reducing risk may have to be offset through the use of additional hedging transactions. As a result, hedging of a risk may be achieved by a combination of hedging transactions and offsetting transactions that close out earlier hedging transactions that have become unrelated to the risk.
- If a transaction originally qualifies as risk-reducing it does not stop being treated as risk-reducing just because the risk it hedges has since evolved.
- A transaction may be treated as risk-reducing if it qualifies as a hedging contract pursuant to International Financial Reporting Standards adopted in accordance with article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council.

Q40C. What does non-financial entity mean in the answer to Q40A?

In the FCA's view, non-financial entity means the same thing as it does in *MiFID RTS 21*.

Q41. What is a market maker?

A market maker is "a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person" (article 4.1(7) MiFID). In our view anyone who satisfies the definition will be a market maker for the purposes of MiFID, even if they have not entered into the agreement with the regulated market required by article 48(2) of MiFID (Systems resilience, circuit breaker and electronic trading).

Q41A. What is a high-frequency algorithmic trading technique?

This question is included here because it is relevant to the own account exemption described in the answer to Q40 and to the commodities exemption described in the answer to Q44.

A high-frequency *algorithmic trading* technique is a type of *algorithmic trading* technique. Article 4.1(40) of MiFID defines a high-frequency *algorithmic trading* technique as an *algorithmic trading* technique characterised by:

- infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry:
 - o co-location;
 - o proximity hosting; or
 - o high-speed direct electronic access;
- system-determination of order initiation, generation, routing or execution without human intervention for individual trades or orders; and
- high message intraday rates which constitute orders, quotes or cancellations.

Employee share and company pension schemes

Q42. Is there an exemption relating to employee share schemes and company pension schemes?

Yes, there is an exemption in article 2(1)(f) MiFID for persons providing investment services consisting exclusively in the administration of employee-participation schemes, for example employee share schemes and company pension schemes. In our view, whilst administration for these purposes could extend to services comprising reception and transmission or execution of orders on behalf of clients or placing, it would not include *personal recommendations* in relation to, or managing, the assets of employee share schemes or company pension schemes.

This exemption can also be combined with the “group exemption” in article 2.1(b) of MiFID, by virtue of article 2.1(g) of MiFID. See the answer to Q46 for more about combining exemptions.

Collective investment undertakings

Q43. Are we right in thinking that MiFID does not apply to collective investment undertakings and their operators?

Yes. Generally speaking, collective investment undertakings are specifically exempt, as are their *depositories* and managers. For collective investment undertakings within the scope of the *UCITS Directive* or *AIFMD* the “manager” corresponds to the *management company* or *AIFM* of the undertaking. So far as *collective investment schemes* which are outside the scope of the *UCITS Directive* or *AIFMD* are concerned, the “manager” corresponds, in essence, to the *operator* of a *scheme* and not to a person who is managing the assets of the *scheme* (unless that person is also the *operator*). In our view, the manager of a collective investment undertaking only benefits from the exemption in respect of any investment services or activities it may carry on in that capacity. To the extent that it also provides investment services or performs investment activities in a different capacity, for example, if it provides investment advice to, or manages the assets of, an individual third party, these services and activities fall outside the scope of this exemption.

In the case of *UCITS management companies*, some *MiFID* provisions will apply to those who provide portfolio management services (other than *collective portfolio management*), investment advice or safekeeping and administration services in relation to *units* to third parties, by virtue of article 6.4 of the *UCITS Directive* (see Q6). *UK AIFMs* will also be subject to *MiFID* if they provide *investment services or activities* for an undertaking other than a *fund* for which they are appointed as manager or *operator*. *Full-scope UK AIFMs* are only able to provide a limited range of such activities, for which they are subject to specific *MiFID* provisions by virtue of article 6.6 of *AIFMD* (see Q6A).

Exemption for commodity derivatives business

Q44. Who can rely on the exemption in article 2.1(j)?

You may be able to rely on the exemption if:

- you deal on own account in commodity derivatives or emission allowances or derivatives thereof; or
- provide other investment services in commodity derivatives or emission allowances or derivatives thereof to clients or suppliers of your main business (or if you are part of a group, the group’s main business); or
- both.

This exemption can include someone dealing on own account as a market maker.

If you deal on own account when executing client orders you can only meet the exemption condition if the client is a client or supplier of your group's main business.

The article 2.1(j) exemption does not apply to you if you apply a high frequency *algorithmic trading* technique.

The exemption will only apply if what you do is ancillary to your main business (see Q45 for more about this).

The exemption is not available if your group's main business is any of the following (see the answer to Q44A for what main business means in this context):

- the provision of investment services; or
- the provision of banking services; or
- acting as a market maker in relation to commodity derivatives.

Q44A. How do I know whether my main business is investment, banking or commodities?

When considering what is a group's 'main business' for the purpose of the requirement described in the answer to Q44 that your main business should not be investment services, banking services or commodity derivatives market making, in our view various factors are likely to be relevant including turnover, profit, capital employed, numbers of employees and time spent by employees. These factors should then be considered in the round in deciding whether any one operation or business line amounts to your group's main business.

The determination of your main business as described in this answer is not directly related to the test for deciding whether your commodities business is ancillary to your main business (the ancillary test is referred to in the answer to Q45). This is because the ancillary test compares the size of your commodities business with the rest of your business but does not specify how to identify what your main business is within your non-commodities business.

Q44B. Are there any formalities for using the commodities exemption?

It is a condition of the commodities exemption described in the answer to Q44 that you:

- should notify annually the relevant competent authority that you make use of this exemption; and
- upon request, report to the competent authority the basis on which you consider that the requirement for the commodities business to be ancillary is met.

If you are a UK firm, the FCA is the relevant competent authority for these purposes.

If you carry out some occasional commodity derivatives activities you may not need to rely on this exemption. See the answer to Q7 (We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?) for more on this.

Q44C. Can the commodities exemption be combined with other exemptions?

Yes.

There is no requirement that someone relying on this exemption must not carry on an activity covered by one of the other exemptions. In particular, this exemption can be combined with the exemption for own account transactions

described in the answer to Q40 (see recital 22 to MiFID). For more on combining exemptions, please see the answer to Q46.

Q45. What is an ancillary activity for the purposes of the commodities exemption?

You can find the meaning of 'ancillary' for the purposes of the commodities exemption described in the answer to Q44 in MiFID RTS 20 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business). You will need to consider whether your commodity derivatives business exceeds the main business threshold as stipulated in article 3 of MiFID RTS 20.

This answer does not give a full summary as the definition is too detailed for *PERG*.

The test as stipulated by article 3 of MiFID RTS 20 has two calculation methods. If the result of either calculation is that you fall below the specified threshold, you meet the test.

- One method is based on the size of group trading activities in commodity derivatives and emission allowances.
- The second measure compares the estimated capital employed for carrying out commodity derivative and emission allowance activities with group capital.

Both methods are based on commodities trading activities in the EEA, as if the UK were still part of the EU.

Q46. Is it possible to combine article 2 exemptions?

Various other answers to questions in this section deal with certain detailed combinations of exemptions:

- Q42 deals with employee share schemes and company pension schemes.
- It is possible to combine the exemption for own account dealing in article 2.1(d) and the exemption for commodity derivatives in article 2.1(j). The answer to Q40 deals with the treatment of the commodity derivatives business of a firm relying on article 2.1(d). The answer to Q44C deals with the treatment of business within article 2.1(d) for a firm relying on the commodity derivatives exemption in article 2.1(j).

In certain cases a firm will not need to combine exemptions. For example an insurer relying on the exemption described in the answer to Q36 (We are an insurer. Does MiFID apply to us?) does not need to rely on any other exemption.

The answer to this question (Q46) is about whether there is a more general principle that article 2 exemptions can be combined.

There is an argument that the drafting of some of the exemptions does not allow this approach. For example, the group exemption (see the answer to Q37) says that the exemption is available to persons providing investment services exclusively for their fellow group members. However in the FCA's view it is generally possible to combine article 2 exemptions. Recital 22 to MiFID says that exemptions apply cumulatively and that the ability to combine the exemptions in articles 2.1(d) (own account dealing) and 2.1(j) (commodity derivatives) is just an example of this principle. This is consistent with the point that there is no reason apparent from MiFID why combining exemptions should not be allowed.

Where an exemption is only available if the person only carries on a limited range of investment services or activities (as is the case for example with the group exemption) it can be argued that this restriction does not cover a service or activity which is covered by another exemption. This is on the basis that an exempt activity is not an investment service or activity for these purposes. The European Commission's Q&A's dealing with MiFID 1 take this approach.

Treating an exempt activity as not being a MiFID investment service or activity in this way only applies for the purpose of article 2 of MiFID, meaning that it is only relevant for deciding whether a person is a MiFID investment firm.

Q46A. Is it possible to combine the article 2 and article 3 exemptions?

The FCA does not believe that it is generally possible to combine the exemptions in article 2 with the exemption in article 3. However in the FCA's view, a firm that relies on the article 2(1)(i) exemption (see Q43) can combine this with article 3 in relation to business falling outside the article 2(1)(i) exemption.

If however you are subject to the UCITS Directive or the AIFMD you may be restricted in your ability to carry out all the activities within the article 3 exemption.

Locals

Q47. We traded on an investment exchange as a local firm and were exempt from MiFID 1. Are we exempt under MiFID?

The exemption for locals in MiFID 1 no longer applies. It is unlikely that the own account exemption in article 2.1(d) will be available as that exemption does not apply to members of, or participants in, a regulated market (see Q40).

The article 3 exemption

Q48. Article 3 is an optional exemption. Will the exemption apply to UK firms?

Yes, in part. The exemption in articles 3.1(a) to (c) has been exercised by The Treasury. The answers to Q49 to Q53 explain the exemption in more detail.

Articles 3.1(d) and (e) of MiFID provide additional optional exemptions, but they have not been implemented in the UK.

Q49. Which firms might fall within this exemption?

The exemption applies to persons who meet all the following conditions:

- they do not hold clients' funds or securities and do not, for that reason, at any time, place themselves in debit with their clients;
- they do not provide any investment service other than reception and transmission of orders or investment advice, or both, in relation to transferable securities and units in collective investment undertakings;
- they transmit orders only to one or more of the following:
 - o other MiFID investment firms;
 - o credit institutions authorised under the *CRD*;
 - o branches of third country investment firms or credit institutions which are subject to, and comply with, prudential rules considered by the *appropriate regulator* to be at least as stringent as those laid down in MiFID, MiFID, the *CRD* or the *UK CRR*;
 - o collective investment undertakings or their managers authorised under the law of the *United Kingdom* to market units to the public;

oEU incorporated investment companies the securities of which are listed or dealt in on a *United Kingdom regulated market*, for example investment trust companies.

If you are a UK firm that meets these qualifying conditions, you will be exempt from regulations made by the European Commission under MiFID.

Where you provide *personal recommendations* or receive and transmit orders in relation to derivatives which are MiFID financial instruments but not transferable securities, you will fall outside the scope of this exemption. In our view, this would be the case, for example, if you provided either or both of these investment services in relation to OTC derivatives concluded by a confirmation under an ISDA master agreement (see ■ PERG 13 Annex 2 Table 2).

Q50. We are (or previously were) an IFA and have a permission which covers (i) arranging (bringing about) deals in investments; (ii) making arrangements with a view to transactions; and (iii) advising on investments, in each case in relation to securities but not derivatives. We are not permitted to hold client money or investments and do not have dealing or managing permissions in relation to MiFID financial instruments. Are we exempt?

The FCA expects so, assuming you do not:

- carry on activities outside your permission; or
- transmit orders to persons other than those listed in Q49 (for example, you will fall outside the exemption if you transmit orders directly to collective investment schemes whose units cannot be marketed to the public in the *UK* either because they are unregulated schemes or non-*UK* authorised collective investment schemes); or
- place MiFID financial instruments without a firm commitment basis (see Q22 and Q23).

We would generally not expect IFAs to be placing MiFID financial instruments without a firm commitment basis as we associate placing of financial instruments with situations where a company or other business vehicle wishes to raise capital for commercial purposes, and in particular with primary market activity.

Q51. What happens if we breach any of the qualifying conditions (see Q49)? Do we then lose the exemption?

You are required to notify us of a breach (see ■ SUP 15.3.11 R). We will then consider whether you should continue to benefit from the exemption and what, if any, supervisory or occasionally enforcement action is appropriate in the circumstances.

Q52. If we fall within the exemption does this prevent us from acquiring passporting rights under MiFID?

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Q53. What is the practical effect of exercising the optional exemption for those firms falling within its scope?

You are not a firm to which MiFID applies and so are not a *MiFID investment firm* for the purposes of the Handbook. Nor are you a *MIFIDPRU investment firm* subject to the prudential requirements in *MIFIDPRU*.

Article 3.2 of MiFID applies certain MiFID requirements to firms making use of the article 3 exemption. These are implemented in the *Handbook* and the *Act*.



13.5A Child trust funds and MiFID

13.5A

Q53A. Is a child trust fund (a CTF) a financial instrument?

No. A CTF account itself is not a *financial instrument*. The funds contributed to a CTF may be invested in financial instruments. However, in the FCA's view, the link between the underlying investment and the rights and interests acquired by the CTF account holder is too remote for the account holder to be considered as having acquired the underlying investment itself. So, the provision of services to a CTF account holder (such as in relation to the establishment of the account and the making of further contributions) will not be an *investment service*.

Q53B. Will the operator of a CTF be carrying on investment services or activities?

Possibly, but it is likely that he will be exempt from the scope of MiFID. Where the CTF is invested wholly or partly in *financial instruments*, the operator may be providing an *investment service* when he executes the transaction or arranges to transfer funds to a new financial instrument (such as a security or collective investment scheme unit). However, in the FCA's opinion, the exemption in article 2(1) (c) of MiFID (see Q39) should be available to CTF operators such that these activities will effectively be outside the scope of MiFID.

The key question in applying this exemption is whether the investment services are incidental to the other activities involved in operating a CTF when viewed on a global basis. In the FCA's view, this is likely to be the case as most CTFs do not involve active trading, such as day trading, by the account holder and, as a result, involve little or no ongoing investment service within the scope of MiFID.

An issue arises as to whether a focus on deal-based charges as the main source of remuneration (instead of charges related to the administration of the CTF itself) might indicate that trading is not incidental. In this respect, the FCA would expect firms designing an account in this way to follow the principle of treating their customers fairly. For example, firms may want to explain to potential account holders the possible impact of frequent switching if this incurs costs and erodes capital. More generally, where active trading is likely to have a detrimental effect on capital value, it may well be that this would be viewed as more than an incidental activity such that the exemption would not apply.

It is necessary to balance investment services against all the activities that are not investment services that have taken place or will take place in the CTF accounts that the firm operates over their full term. The FCA would not expect firms to have to investigate each CTF on a trade-by-trade basis. The

exemption may still apply even if particular accounts experience higher levels of dealing activity.

Q53C. Is a person who provides services relating to investments that underlie the CTF within the scope of MiFID?

Possibly. Firms which provide *investment services* to the CTF operator in relation to financial instruments held within the CTF account (such as executing trades) will be within the scope of MiFID unless an exemption applies to them.

Q53D. Does the same analysis apply to other types of schemes where financial instruments may be held for the benefit of investors such as an ISA or a pension scheme?

This depends on the nature of the scheme in question. CTFs have very particular product features. Other types of schemes such as ISA accounts may simply be tax efficient ways to hold the beneficial interest in financial instruments which may, at the behest of the account holder, be transferred into his direct ownership. So, the beneficial interest that an investor acquires in a share, bond or collective investment scheme unit held under an ISA will be a financial instrument for the purposes of MiFID. And the operation of an ISA will essentially be an investment service such that the exemption in article 2.1(c) of MiFID will not be relevant. Pension schemes, on the other hand, bear a closer similarity to CTFs in that they will have particular product features and the underlying investments are held for the purpose of providing or determining the value of the member's cash benefits. Generally speaking, a member of a pension scheme can only transfer the value of his benefits and not transfer the underlying investments into his direct ownership. For this reason, as explained in ■ PERG 10.4A, the FCA does not consider that a member of a pension scheme acquires a financial instrument purely as a result of having a financial instrument held for his benefit under the trusts of an occupational or personal pension scheme.



13.6 CRD IV [deleted]

13.6

UK CRR .



13.7

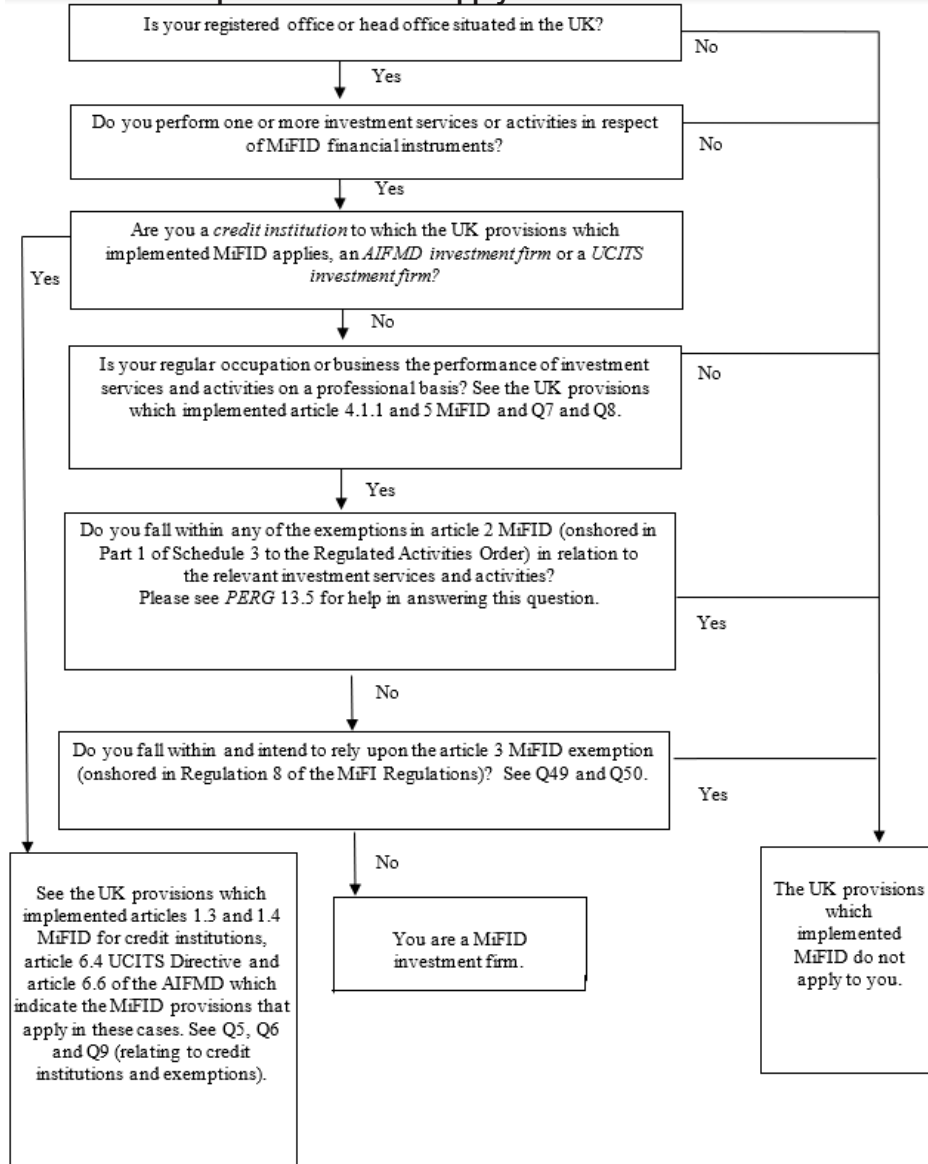
The territorial application of MiFID [deleted]

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- Q72. [deleted]

Annex 1

Do the UK provisions which implemented MiFID apply to us?



Annex 2

The list of MiFID investment services in Section A of Annex 1 of MiFID, has been onshored in Part 3 of Schedule 2 to the Regulated Activities Order and the list of MiFID instruments in Section C of Annex 1 to MiFID has been onshored in Part 1 of Schedule 2 to the Regulated Activities Order. However, as explained in ■ PERG 13.1 above, for ease of reference we have retained the references to the relevant MiFID provisions in this Annex.

Table 1 - MiFID Investment services and activities and the Part 4A permission regime

MiFID Investment Services and Activities	Part 4A permission	Comments
A1- Reception and transmission of orders in relation to one or more financial instruments	<p>Arranging (bringing about) deals in investments (article 25(1) RAO)</p> <p>Bidding in emissions auctions (article 24A RAO)</p>	<p>Generally speaking, only firms with permission to carry on the activity of arranging (bringing about) deals in investments in relation to securities and contractually based investments which are financial instruments can provide the service of reception and transmission. This is because a service must bring about the transaction if it is to amount to reception and transmission of orders.</p> <p>The activity of arranging (bringing about) deals in investments is wider than A1, so a firm carrying on this regulated activity will not always be receiving and transmitting orders.</p> <p>See Q13, Q14 and Q34A for further guidance.</p>
A2- Execution of orders on behalf of clients	<p>Dealing in investments as agent (article 21 RAO)</p> <p>Dealing in investments as principal (article 14 RAO)</p> <p>Bidding in emissions auctions (article 24A RAO)</p>	<p>Usually, where a firm executes orders on behalf of clients it will need permission to carry on the activity of dealing in investments as agent. Where a firm executes client orders on a true back-to-back basis or by dealing on own account, it also needs permission to carry on the activity of dealing in investments as principal.</p> <p>See Q15, Q15A and 34A for further guidance.</p>

MiFID Investment Services and Activities	Part 4A permission	Comments
A3- Dealing on own account	Dealing in investments as principal (article 14 RAO)	Where a firm is dealing on own account, it needs permission to carry on the activity of dealing in investments as principal. See Q16 and 34A for further guidance.
A4- Portfolio management	Managing investments (article 37 RAO) Dealing in investments as principal (article 14 RAO) Dealing in investments as agent (article 21 RAO) Arranging (bringing about) deals in investments (article 25(1) RAO) Making arrangement with a view to transactions in investments (article 25(2))	A firm performing the portfolio management service needs a permission to carry on the activity of managing investments. Firms may also need permission to perform other regulated activities to enable them to give effect to decisions they make as part of their portfolio management (see adjacent column). See Q6, Q6A, Q17 and Q43 for further guidance.
A5- Investment advice	<i>Advising on investments (except P2P agreements)</i> (article 53(1) RAO)	A firm providing investment advice will need permission to carry on the activity of advising on investments. See Q18 and Q19 to Q21 for further guidance.
A6- Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	Dealing in investments as principal (article 14 RAO) Dealing in investments as agent (article 21 RAO)	Where a firm underwrites an issue of financial instruments and holds them on its books before they are sold or offered to third parties, it needs permission to carry on the activity of dealing in investments as principal. Where an underwriting firm sells the relevant instruments as agent for the issuer and then purchases any remaining instruments as principal, it needs permission to carry on the activity of dealing in investments as agent in relation to its selling activity and of dealing in investments as principal in relation to

MiFID Investment Services and Activities	Part 4A permission	Comments
A7- Placing of financial instruments without a firm commitment basis	<p>Dealing in investments as agent (article 21 RAO)</p> <p>Arranging (bringing about) deals in investments (article 25(1) RAO)</p>	<p>its purchase of the remaining instruments.</p> <p>See Q22 for further guidance.</p> <p>Where a firm arranges the placement of financial instruments with another entity, it needs permission to carry on the activity of arranging (bringing about) deals in investments.</p> <p>Where a firm sells the relevant instruments on behalf of the issuer, it also needs permission to carry on the activity of dealing in investments as agent.</p> <p>See Q22 for further guidance.</p>
A8- Operation of Multilateral Trading Facilities	Operating a multilateral trading facility (article 25D RAO)	<p>Firms performing this service will need permission to carry on the regulated activity of operating a multilateral trading facility.</p> <p>Firms will not require permission to carry on any other regulated activities if all they do is operate a multilateral trading facility. If they carry on additional regulated activities, they should ensure that their permission properly reflects this.</p> <p>See Q24 for further guidance.</p>
A9- Operation of organised trading facilities	Operating an organised trading facility (article 25DA RAO)	<p>Firms performing this service will need permission to carry on the regulated activity of operating an organised trading facility.</p> <p>Firms will not require permission to carry on any other regulated activities if all they do is operate an organised trading facility. If they carry on additional regulated activities, they should ensure that their permission properly reflects this.</p> <p>See Q24A for further guidance.</p>
<p>Note: The activity of <i>bidding in emissions auctions</i> can form part of A1, A2 or A3. In terms of the <i>permission regime</i>, <i>bidding in emissions auctions</i> does not form part of any other <i>regulated activity</i> (see PERG 2.7.7CG) and so a <i>firm</i> must have a separate <i>permission</i> to undertake that activity.</p>		

Table 2: MiFID financial instruments and the Part 4A permission regime

MiFID financial instrument	Part 4A permission category	Commentary
C1- Transferable securities	share (article 76)	<p>The permission investment categories in column 2 (Part 4A permission category) are wider than the MiFID definition of transferable securities, as they comprise both securitised and non-securitised instruments. An instrument is not a transferable security under MiFID if it is not negotiable on the capital market. Therefore an investment listed in column (2) will not always be a transferable security. Firms with permissions containing any of the Part 4A permission investment categories in column (2) will fall outside the article 3 MiFID exemption as transposed in domestic legislation, where they provide investment services in relation to financial instruments which are non-securitised investments (for example, OTC derivatives concluded by a confirmation under an ISDA master agreement).</p> <p>It is possible in theory that options, futures and contracts for differences under the RAO that are not mentioned in column (2) could be a MiFID transferable security. However column (2) includes the main RAO derivatives that the FCA thinks may in practice be transferable securities.</p> <p>For further guidance on the article 3 exemption see Q49; for further guidance on transferable securities see Q28.</p>
	debenture (article 77)	
	alternative debenture (article 77A)	
	government and public security (article 78)	
	warrant (article 79)	
	certificate representing certain securities (article 80)	
	unit (article 81)	
	option (excluding a commodity option and option on a commodity future)	
	future (excluding a commodity future and a rolling spot forex contract)	
contract for differences (excluding a spread bet, a rolling spot forex contract and a binary bet)		
spread bet		
C2- Money market instruments	debenture (article 77)	<p>Money market instruments are classes of instruments normally dealt in on the money markets.</p> <p>For further guidance on money market instruments see Q28A.</p>
	alternative debenture (article 77A)	
	government and public security (article 78)	
	certificate representing certain securities (article 80)	

MiFID financial instrument	Part 4A permission category	Commentary
C3- Units in a collective investment undertaking	unit (article 81) shares (article 76)	C3 includes units in regulated and unregulated collective investment schemes. This category also includes closed-ended corporate schemes, such as investment trust companies (hence the reference to shares in the adjacent column). For further guidance, see Q29.
C4- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash	option (excluding a commodity option and an option on a commodity future) commodity option and option on a commodity future future (excluding a commodity future and a rolling spot forex contract) rolling spot forex contract contract for differences (excluding a spread bet, a rolling spot forex contract and a binary bet) spread bet binary bet	C4 includes in our view derivatives relating to commodity derivatives, for example options on commodity futures. For further guidance, see Q31A to Q31S. Note that for the purposes of the permission regime, commodity options and options on commodity futures are treated as a single permission category. (see PERG 2 Annex 2 G Table 2).
C5- Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event)	commodity option and option on a commodity future commodity future contract for differences (excluding a spread bet, a rolling spot forex contract and a binary bet) binary bet	C5 instruments are generally contracts for differences. Where a C5 instrument provides for the possibility of physical settlement, it may also be either a commodity future or commodity option, depending on its structure. For further guidance see Q33A.
C6- Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a <i>United Kingdom</i> regulated market, a <i>UK</i> MTF or an a <i>UK</i> OTF	commodity option and option on a commodity future commodity future contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) binary bet	C6 instruments will generally be either commodity futures or commodity options, depending on their structure. Those instruments with a cash settlement option may also be contracts for differences. For further guidance see Q33B.
C7- Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6. This category does not include spot contracts or contracts that meet certain	commodity option and option on a commodity future commodity future contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet)	For further guidance see Q33C.

MiFID financial instrument	Part 4A permission category	Commentary
conditions that are designed to exclude contracts for commercial purposes	binary bet	
C8- Derivative instruments for the transfer of credit risk	option (excluding a commodity option and an option on a commodity future) contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) spread bet rolling spot forex contract	C8 derivatives are financial instruments designed to transfer credit risk, often referred to as credit derivatives. For further guidance see Q31.
C9- Financial contracts for differences	contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) spread bet rolling spot forex contract	In our view, C9 derivatives could include those contracts for differences with a financial underlying, for example the FTSE index.
C10- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to various specified underlyings that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event) This category does not include contracts that meet certain conditions designed to exclude non-financial derivative instruments.	option (excluding commodity option and option on a commodity future) future (excluding a commodity future and a rolling spot forex contract) contract for differences (excluding spread bet, a rolling spot forex contract and a binary bet) spread bet binary bet	For further guidance see Q34.
C11- Emission allowances	Emission allowances	See Q34A
Note:		
In our view, the categories of financial instrument in C1 to C11 are not mutually exclusive, so a financial instrument may fall within more than one category. For example, an interest in an investment trust company falls within C1 and C3.		

Are you subject to the CRD and UK CRR (or allowed to be subject to the recast CAD)? [deleted]

Principal Statutory Instruments relating to MiFID scope issues [deleted]

Chapter 14

Guidance on home reversion and home purchase activities

14.1 Background

Q1. What is the purpose of these questions and answers (“Q&As”) and who should be reading them?

These Q&As are aimed at *persons* involved in the provision or promotion of financial arrangements involving the acquisition or disposal of land for the purpose of enabling an individual:

- to purchase a property; or
- to raise funds from the equity in a property that he already owns, other than by means of a traditional mortgage.

They are intended to help such persons understand whether they will, as a result of the Regulation of Financial Services (Land Transactions) Act 2005 and secondary legislation made following that Act:

- be carrying on a *regulated activity* and need *authorisation* or exemption under section 19 of the Financial Services and Markets Act 2000; or
- be subject to the restriction on *financial promotions* in section 21 of the Financial Services and Markets Act 2000.

The Q&As complement the general *guidance* on regulated activities, which is in Chapter 2 of our Perimeter Guidance Manual (■ PERG 2), the general guidance on regulated mortgage activities in Chapter 4 (■ PERG 4), the general guidance on financial promotions in Chapter 8 (■ PERG 8) and the relevant legislation.

The Q&As that follow are set out in sections:

- general issues (■ PERG 14.2);
- activities relating to home reversion plans (■ PERG 14.3);
- activities relating to home purchase plans (■ PERG 14.4);
- activities relating to regulated sale and rent back agreements (■ PERG 14.4A);
- the ‘by way of business’ test (■ PERG 14.5);
- carrying on a regulated activity in the United Kingdom (■ PERG 14.6);
- exemptions (■ PERG 14.7);and
- financial promotions (■ PERG 14.8).

14.2 General issues

Q2. What is the purpose of the Regulation of Financial Services (Land Transactions) Act 2005?

This Act makes clear that the potential regulatory scope of the Financial Services and Markets Act 2000 enables the FCA to regulate activities that are similar to those that are already regulated when carried on in relation to traditional mortgages but which involve the provider acquiring land rather than simply providing finance for its purchase by the homeowner. This typically includes:

- schemes where a provider buys an interest in a homeowner's property and allows the homeowner to continue to reside in the property ('home reversion plans');
- certain types of Islamic financing arrangements designed to enable the purchase of a home in a way that is acceptable under Islamic law, such as Ijara or diminishing Musharaka ('home purchase plans'); and
- schemes where a provider buys an interest in a homeowner's property and allows the homeowner to continue to reside in the property in return for payment of rent ('sale and rent back agreement').

Q3. I propose to carry on activities in relation to home finance arrangements of the kind mentioned in Q2. In what circumstances will I need to be authorised under FSMA or be an exempt person?

You will need to be an authorised or exempt person if you will:

- be carrying on *regulated activities*;
- be doing so by way of business;
- be doing so on or after 6 April 2007 in relation to home purchase plans and home reversion plans or on or after 1 July 2009 in relation to sale and rent back agreements; and
- be doing so in the *United Kingdom*.

Q4. How will I know if my proposed home finance activities are regulated?

Regulated activities are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the *Regulated Activities Order*'). This was amended, following the enactment of the Regulation of Financial Services (Land Transactions) Act 2005, to extend its scope to cover certain home finance activities. These amendments were made in the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No2) Order 2006 (SI 2006/2383) which came into effect on 6 April 2007 and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009 (SI 2009/1342) which came into effect on 1 July 2009. Regulated home finance activities are:

- *entering into a home reversion plan, entering into a home purchase plan or entering into a regulated sale and rent back agreement* as the provider

of the plan/agreement or, in the case of *home reversion plans* and *regulated sale and rent back agreements* only, as a person to whom rights or obligations acquired by the provider are transferred or who, during the currency of the plan or agreement, acquires all or part of the interest in land bought by the provider;

- *administering a home reversion plan, administering a home purchase plan or administering a regulated sale and rent back agreement;*
- *arranging (bringing about) a home reversion plan, arranging (bringing about) a home purchase plan or arranging (bringing about) a regulated sale and rent back agreement;*
- *making arrangements with a view to home reversion plans, making arrangements with a view to home purchase plans or making arrangements with a view to regulated sale and rent back agreements;*
- *advising on a home reversion plan, advising on a home purchase plan or advising on a regulated sale and rent back agreement; and*
- *agreeing to do any of the above.*

But some activities are specifically excluded from regulatory scope.

14.3 Activities relating to home reversion plans

Q5. What is a home reversion plan?

Broadly speaking, this is an arrangement under which, at the time it is entered into, a *person* (the 'reversion purchaser') buys all or part of an interest in land (other than timeshare accommodation) in the UK from a homeowner (being an individual or a trustee whose beneficiary is an individual) (the 'reversion occupier') on the basis that the individual or a related person is entitled under the arrangement, and intends, to use at least 40% of the land as a dwelling until:

- the end of a fixed period of at least twenty years; or
- the individual dies; or
- the individual enters a care home.

It should be noted that an arrangement will be a *home reversion plan* if the intention is for the land to be used as a dwelling until any one of the above eventualities arises. It is not necessary for the arrangement to provide for all three eventualities, merely one or more of them.

This means that an arrangement is not a home reversion plan if:

- the occupier is not an individual; or
- the land is to be used for the purpose of letting as a dwelling to someone other than a related person of the individual (or beneficiary under the trust) who owns it; or
- the land is used primarily for business purposes; or
- the land is overseas.

A related person, in relation to an individual, means:

- that person's spouse or civil partner; or
- a person (whether or not of the same sex) whose relationship with that person has the characteristics of a husband and wife relationship; or
- that person's:
 - parent or grandparent;
 - child or grandchild; or
 - sibling.

Q6. Will a sale and rent back agreement be a home reversion plan?

Where an arrangement meets the requirements for both a *regulated sale and rent back agreement* and a *home reversion plan*, it will be treated as a *home reversion plan* only and will not be a *regulated sale and rent back agreement*. Guidance on the meaning of a *regulated sale and rent back agreement* is in ■ PERG 14.4A (Activities relating to regulated sale and rent back agreements).

Q7. Can an arrangement that was established before 6 April 2007 be a home reversion plan?

Yes. An arrangement may still be a *home reversion plan* even though it was established before 6 April 2007. However, regulated activities carried on in relation to a home reversion plan established before 6 April 2007 will only be subject to regulation:

- when carried on on or after 6 April 2007; and
- in certain circumstances (see Q21 for a summary).

Q8. When will I be carrying on the activity of entering into a home reversion plan?

This will occur when you enter into the plan at the outset as the reversion purchaser. It can also occur at a later stage if all or part of the rights or obligations of the reversion purchaser are transferred to you or if you acquire all or part of the interest in land bought by the reversion purchaser (where you become a 'reversion transferee'). This is so, whether you are acquiring the rights or obligations from the reversion purchaser or from an existing reversion transferee. This includes acquiring the rights or obligations or the interest in land purely as an investment. However, investors will only be regulated if they satisfy the 'by way of business test' (see Q38). We refer to reversion purchasers and reversion transferees collectively in this guidance as 'reversion providers'.

So, if you are a reversion transferee under a plan that was established before 6 April 2007, you will only be subject to regulation for carrying on the regulated activity of entering into the plan if you do so on or after 6 April 2007.

Q9. What exclusions may be available to me if I am entering into home reversion plans?

The main exclusions are those:

- for trustees who enter into a plan where the reversion occupier is an individual who is a beneficiary under the trust (article 66(6B) of the *Regulated Activities Order*);
- for *overseas persons* who satisfy certain conditions (see Q39); and
- for *local authorities* (article 72G of the *Regulated Activities Order*).

Q10. When will I be carrying on the activity of administering a home reversion plan?

This will arise if you carry out any one or more of the following functions for a reversion provider or a reversion occupier in relation to a plan that was originally established on or after 6 April 2007:

- taking necessary steps to make payments to the reversion occupier; or
- taking necessary steps to collect or recover payments due from the reversion occupier; or
- notifying the reversion occupier of changes in payments due under the plan, or of other matters of which the plan requires him to be notified.

One effect of this is that you will not become subject to regulation if you are administering a plan that was originally established before 6 April 2007 and a reversion transferee enters into the plan after that date. See Q21 for more detail about when activities are regulated if a plan was originally established before 6 April 2007.

It is irrelevant, for the purposes of determining if you are administering a home reversion plan, whether or not the plan was entered into by way of business. In this respect, the activity is different to the regulated activities of

administering a regulated mortgage contract or administering a home purchase plan.

Q11. What exclusions may be available to me if I am administering home reversion plans?

Specific exclusions may apply if you are not an *authorised person* and:

- you arrange for an authorised person with the appropriate *Part 4A permission* to administer the plan - this includes where you administer the plan for a period of up to one month following the termination of such an arrangement; or
- you administer the plan under an agreement with an authorised person who has Part 4A permission to administer such a plan.

The other main exclusions are those:

- for trustees who administer a plan where the reversion occupier is an individual who is a beneficiary under the trust (article 66(6B) of the *Regulated Activities Order*);
- for *overseas persons* who satisfy certain conditions (see Q39); and
- for *local authorities* (article 72G of the *Regulated Activities Order*).

Q12. When will I be carrying on the activity of arranging home reversion plans?

There are three types of arranging activity that are regulated. These are making arrangements:

- (1) for another *person* to enter into a plan as a reversion occupier or as a reversion provider;
- (2) for another person, being a reversion occupier or a reversion provider, to vary the terms of a plan that was originally established on or after 6 April 2007, in such a way as to vary his obligations under that plan; and
- (3) with a view to a person who participates in the arrangements entering into a plan as a reversion occupier or as a reversion provider.

But none of these arranging activities will apply to you if they relate to a plan to which, as a result of your arranging activities, you are or will become a party (article 28A of the *Regulated Activities Order*).

You will only be making arrangements under (1) or (2) if your actions are such as to bring about the entry into the plan or the variation as the case may be (article 26 of the *Regulated Activities Order*). This means that your involvement must be material to whether the transaction occurs. For example, assisting a person by completing the necessary application forms on their behalf or acting as their agent or attorney in negotiating entry will amount to bringing about the transaction.

Arranging activities under (3) will typically include making regular introductions of homeowners to reversion providers or of reversion transferees to reversion purchasers or vice versa or of any of these to a *reversion intermediary*.

Q13. I understand that any transaction that I have arranged before 6 April 2007 is not subject to regulation. But am I regulated if I arrange for a reversion transferee to enter into or vary a home reversion plan on or after 6 April 2007?

This depends on the type of arranging you are carrying on. If you are arranging variations, this will only be regulated if the plan was originally established on or after 6 April 2007. But, if you are arranging for a reversion

transferee to enter into a plan and the arrangements are being made on or after 6 April 2007, you will be regulated for that arranging activity. See Q21 for more detail about when activities are regulated if a plan was originally established before 6 April 2007.

Q14. Will I be regulated for arranging for a reversion provider to dispose of his rights and obligations or his interest in land under a home reversion plan to a reversion transferee?

It is only arranging for a person to enter into or vary the terms of a plan that is subject to regulation. So, you will not be regulated for providing arranging services to the existing provider who wishes to dispose of his rights, obligations or interests but you are likely to be regulated if you are arranging for the transferee to enter into the plan by acquiring the rights, obligations or interests.

Q15. What exclusions may be available to me if I am arranging home reversion plans?

If you are an *unauthorised person* the following exclusions may be available to you:

- where you are arranging for a transaction to be entered into with or through an *authorised person* (article 29 of the *Regulated Activities Order*) (see Q16); and
- where you have arranged for an authorised person to administer the plan or are administering it yourself during the period of one month following the termination of your arrangement with the authorised person (article 29A(2) of the *Regulated Activities Order*).

Whether or not you are an unauthorised person, the other main exclusions that may apply include:

- introductions made with a view to the provision of regulated independent advice (article 33 of the *Regulated Activities Order*) (see Q17);
- introductions made to a regulated person who carries on home reversion plan activities (article 33A of the *Regulated Activities Order*) (see Q18);
- arrangements that are a necessary part of other services provided by a person in the course of carrying on a profession or business other than a *regulated activity* (article 67 of the *Regulated Activities Order*);
- *overseas persons* (article 72 of the *Regulated Activities Order*) (see Q39); and
- arrangements made by *local authorities* (article 72G of the *Regulated Activities Order*).

Q16. When will the exclusion in article 29 of the Regulated Activities Order be available to me if I am arranging home reversion plans?

The exclusion will apply to you when, as an *unauthorised person*, you are arranging any of the following:

- for a homeowner (your client) to enter into a plan with an authorised reversion provider or through an authorised intermediary;
- for a reversion provider (your client) to enter into a plan with a homeowner or to transfer rights or obligations or an interest in land to a reversion transferee if either the reversion transferee is an authorised person or the transaction is to be effected through an authorised intermediary; or
- for a reversion transferee (your client) to acquire rights or obligations from an authorised reversion provider or through an authorised intermediary;

- for your client to vary the terms of a plan where the reversion provider is an authorised person or the variation is arranged through an authorised intermediary.

This is subject to your meeting certain conditions which are, broadly speaking, that:

- you must not advise your client on the merits of his entering into the transaction; and
- you must not be paid by anyone other than your client.

The requirement that you do not receive any payment other than from your client does not prevent you receiving payment from the *authorised person* but you must then treat the sums paid to you as belonging to your client. There is nothing to prevent you then using the sums to offset payments due to you from your client for services rendered to him. This is provided that you have your client's agreement to do so.

Q17. When will the exclusion in article 33 of the Regulated Activities Order be available to me if I am arranging home reversion plans?

Broadly speaking, the exclusion will apply where:

- your arranging activity is limited to *making arrangements with a view to home reversion plans*;
- you make introductions of homeowners, reversion purchasers or reversion transferees to an *authorised person*, an *exempt person* or an *overseas person*; and
- the introduction is made with a view to the provision of independent advice or the provision of independent discretionary services relating to home reversion plans.

Q18. When will the exclusion in article 33A of the Regulated Activities Order be available to me if I am arranging home reversion plans?

Broadly speaking, the exclusion will apply where:

- your arranging activity is limited to *making arrangements with a view to home reversion plans*;
- you make introductions of homeowners or of prospective reversion providers (your client) to an *authorised person*, an *appointed representative* or an *overseas person*;
- you do not receive any money paid by your client in relation to the transaction other than a sum that is due to you for your own account (for example, your fee for providing the introductory service); and
- you disclose to your client certain information about your relationship with the person to whom you are effecting introductions and about any reward you may receive for doing so.

Q19. When will I be carrying on the activity of advising on a home reversion plan?

This will arise if:

- you are giving advice to a *person* who is or who is contemplating becoming a reversion occupier, a reversion purchaser or a reversion transferee; and
- the advice relates to the merits of his entering into a home reversion plan in that capacity or varying the terms of a plan that he has already entered into.

Advice on the merits of varying the terms of a plan will only be regulated where the plan was originally established on or after 6 April 2007. However,

advice given to a reversion transferee on the merits of his entering into a plan that was originally established before 6 April 2007 will be subject to regulation. See Q21 for more detail about when activities are regulated if a plan was originally established before 6 April 2007.

Advice given to a person on the merits of his transferring rights or obligations or interests in land under a plan to another person is not regulated.

Much of the detailed guidance on *advising on regulated mortgage contracts* in ■ PERG 4.6 may be applied to the activity of *advising on a home reversion plan*.

Q20. What exclusions may be available to me if I am advising on home reversion plans?

The main exclusions that are available include:

- advice given in a periodical publication, broadcast or other form of regularly updated news or information service (article 54 of the *Regulated Activities Order*);
- advice that is a necessary part of other services provided by a person in the course of carrying on a profession or business other than a *regulated activity* (article 67 of the *Regulated Activities Order*); and
- advice given by *local authorities* (article 72G of the *Regulated Activities Order*).

Detailed guidance on the exclusion in article 54 is in ■ PERG 7.

Q21. I can see that the fact that the home reversion plan was originally established before 6 April 2007 can affect whether the services that I provide to parties to the plan after that date are regulated. Can you summarise the position in this respect please?

Yes. This all depends on the combination of the date of entry or variation and the capacity in which your customer enters or entered into the plan. The following table clarifies when your services will be regulated activities and when they will not.

Potential home reversion plan activity	Whether the activity is regulated if undertaken on or after 6 April 2007 when the plan was originally established before 6 April 2007
Entering into a plan as reversion purchaser (see Q8)	N/A - this activity will only take place when the plan is first established
Entering into a plan as reversion transferee (see Q8)	Yes
Administering a plan (see Q10)	No
Arranging (see Q12) for a person to enter into a plan as:	
(a) a reversion purchaser or a reversion occupier	N/A - this activity will only take place when the plan is first established
(b) a reversion transferee	Yes
Arranging variations (see Q12) of a plan	No
Advising (see Q19) a person on entering into a plan in his capacity as:	

Potential home reversion plan activity	Whether the activity is regulated if undertaken on or after 6 April 2007 when the plan was originally established before 6 April 2007
(a) a reversion purchaser or a reversion occupier	N/A - this activity will only take place when the plan is first established
(b) a reversion transferee	Yes
Advising (see Q19) a person on varying the terms of a plan	No

Q22. Will changes involving the circumstances of the reversion occupier that may take place after the plan has been entered into (such as moving house, marriage or change of occupants) have any implications in terms of regulated activity?

This depends on the facts and is a question of degree that requires an assessment against the criteria that make up the definition of a home reversion plan. There are two main issues that would need to be considered. These are:

- is the change likely to cause a new plan to be entered into; and
- does the change involve a variation of the terms of the plan (if it was originally entered into on or after 6 April 2007) such as to vary the obligations of the provider or the occupier?

Broadly speaking, it would seem likely that, if the occupier were to move house, there would be a need for the existing plan to be terminated and a new plan to be entered into. Where this happens, the person who enters into the new plan as provider and anyone arranging or advising on the new plan will potentially need to be authorised or exempt. Changes such as may occur due to marriage or change of occupants, change of other relevant details or drawdown of funds under a staggered payment arrangement may necessitate a new plan or may involve a variation in the existing plan depending on the extent to which they alter the obligations of the provider or the occupier. Where such changes do involve a variation, anyone arranging or advising on the variation would potentially need to be authorised or exempt. But this applies only where the plan was originally entered into on or after 6 April 2007.

14.4 Activities relating to home purchase plans

Q23. What is a home purchase plan?

Broadly speaking, a *home purchase plan* is an arrangement under which, at the time it is entered into:

- a *person* (the 'home purchase provider') buys a qualifying interest, or an undivided share of a qualifying interest, in land (other than timeshare accommodation) in the *United Kingdom*;
- an individual or a trustee whose beneficiary is an individual (the 'home purchaser') is obliged to buy that interest over the course of or at the end of a specified period; and
- the individual or a related person is entitled to use at least 40% of the land as a dwelling during that fixed period and intends to do so.

Where an undivided share of a qualifying interest is bought, the interest must be held on trust for the home purchase provider and the individual or trustee as beneficial tenants in common.

This means that an arrangement is not a home purchase plan if:

- the home purchaser is not an individual or trustees;
- the land is used for the purpose of letting as a dwelling to someone other than a related person of the individual who is obliged to buy it;
- the land is used primarily for business purposes; or
- the land is overseas.

A related person, in relation to an individual, means:

- that person's spouse or civil partner; or
- a person (whether or not of the same sex) whose relationship with that person has the characteristics of a husband and wife relationship; or
- that person's:
 - parent or grandparent;
 - child or grandchild; or
 - sibling.

Q24. Are home purchase plans limited to arrangements designed to comply with Islamic principles?

There is nothing in the definition of a *home purchase plan* to suggest that this is the case. However, it is clear from the comments made by HM Treasury in relation to the introduction of the Regulation of Financial Services (Land Transactions) Act 2005 that the definition is primarily directed at arrangements of this kind.

Q25. Will all Islamic *home financing* arrangements be home purchase plans?

No. Murabaha arrangements involve the homeowner buying the property from the provider on deferred payment terms. These types of arrangement will be *regulated mortgage contracts* assuming that they meet the necessary conditions including that there is a first legal charge over the property (see ■ PERG 4).

Ijara arrangements (where the provider buys the land and allows the customer to occupy it whilst also making regular payments towards eventually buying the land) and diminishing Musharaka arrangements (where the provider and the customer share an interest in the land and the customer gradually acquires a greater interest in the land over a period of time) will be *home purchase plans* provided they meet the necessary conditions (see Q23).

A home purchase plan may also satisfy the requirements for a *regulated mortgage contract*. Where this arises, the plan is treated as a home purchase plan and not a regulated mortgage contract.

Q26. When will I be carrying on the activity of entering into a home purchase plan?

You will carry on this activity by entering into a *home purchase plan* as the home purchase provider. Unlike a reversion transferee under a *home reversion plan*, you will not be carrying on a regulated activity purely as a result of acquiring rights, obligations or interests in land from the provider.

Q27. What exclusions may be available to me if I am entering into home purchase plans as a provider?

The main exclusions are:

- for trustees who enter into a plan where the home purchaser is an individual who is a beneficiary under the trust (article 66(6C) of the *Regulated Activities Order*);
- for *overseas persons* who satisfy certain conditions (see Q39); and
- for providers that are *local authorities* (article 72G of the *Regulated Activities Order*).

Q28. When will I be carrying on the activity of administering a home purchase plan?

This will arise if you carry out either or both of the following functions in relation to a plan that was entered into by the home purchase provider by way of business on or after 6 April 2007:

- notifying the home purchaser of changes in payments due under the plan, or of other matters of which the plan requires him to be notified; and
- taking any necessary steps for the purposes of collecting or recovering payments due under the plan from the home purchaser.

But you will not be treated as *administering a home purchase plan* merely because you have, or you exercise, a right to take action for the purposes of enforcing the plan (or to require that such action is or is not taken).

Q29. I propose to administer home purchase plans. How will I know if the plan I propose to administer has been entered into by way of business?

In most cases, this will be obvious because the provider will be a body corporate whose business involves being a provider under such plans and, in

the majority of cases, should be an *authorised person*. We understand that this is the usual situation with Islamic home financing arrangements. However, if the plan were to have been entered into by an investor, the factors set out in Q38 will need to be considered to determine whether it was entered into by way of business. A typical example of a plan not entered into by way of business would be where the provider is a friend or relative who does not seek to profit from acting as the provider. Another example might be a plan entered into by a charitable organisation that occasionally purchases interests in land with sums derived from charitable donations and that does so on non-commercial terms.

Q30. What exclusions may be available to me if I am administering home purchase plans?

Specific exclusions may apply if you are not an *authorised person* and:

- you arrange for an authorised person with the appropriate *Part 4A permission* to administer the plan - this includes where you administer the plan for a period of up to one month following the termination of such an arrangement; or
- you administer the plan under an agreement with an authorised person who has Part 4A permission to administer such a plan.

The other main exclusions are those:

- for trustees who administer a plan where the home purchaser is an individual who is a beneficiary under the trust (article 66(6C) of the *Regulated Activities Order*);
- for *overseas persons* who satisfy certain conditions (see Q39); and
- for *local authorities* (article 72G of the *Regulated Activities Order*).

Q31. When will I be carrying on the activity of arranging home purchase plans?

There are three types of arranging activity that are regulated. These are making arrangements:

- (1) for another person to enter into a plan as a home purchaser;
- (2) for another person being a home purchaser to vary the terms of a plan entered into by him on or after 6 April 2007, in such a way as to vary his obligations under that plan; and
- (3) with a view to a person who participates in the arrangements entering into a plan as a home purchaser.

But none of these arranging activities will apply to you if they relate to a plan to which you are or will, as a result of your arranging activities, become a party (article 28A of the *Regulated Activities Order*).

You will only be making arrangements under (1) or (2) if your actions are such as to bring about the entry into the plan or the variation as the case may be (article 26 of the *Regulated Activities Order*). This means that your involvement must be material to whether the transaction occurs. For example, assisting a home purchaser by completing the necessary application forms on their behalf or acting as their agent or attorney in negotiating entry will amount to bringing about the transaction.

Arranging activities under (3) will typically include making regular introductions of prospective home purchasers to a provider or intermediary.

Unlike home reversion plans, arranging for a person to enter into, or vary, a plan as a provider is not, itself, a regulated activity.

Q32. What exclusions may be available to me if I am arranging home purchase plans?

If you are an *unauthorised person* the following exclusions may be available to you:

- where you are arranging for a transaction to be entered into with or through an authorised person (article 29 of the *Regulated Activities Order*) (see Q33);
- where you have arranged for an *authorised person* to administer the plan or are administering it yourself during the period of one month following the termination of your arrangement with the authorised person (article 29A(3) of the *Regulated Activities Order*).

Whether or not you are an unauthorised person, the other main exclusions that may apply include:

- introductions made with a view to the provision of regulated independent advice (article 33 of the *Regulated Activities Order*) (see Q17 which applies equally to *home purchase plans*);
- introductions made to a regulated person who carries on home reversion plan activities (article 33A of the *Regulated Activities Order*) (see Q34);
- arrangements that are a necessary part of other services provided by a person in the course of carrying on a profession or business other than a *regulated activity* (article 67 of the *Regulated Activities Order*);
- *overseas persons* (article 72 of the *Regulated Activities Order*) (see Q39); and
- arrangements made by *local authorities* (article 72G of the *Regulated Activities Order*).

Q33. When will the exclusion in article 29 of the Regulated Activities Order be available to me if I am arranging home purchase plans?

The exclusion will apply to you when, as an *unauthorised person*, you are arranging for a prospective home purchaser (your client) to enter into a plan with an authorised home purchase provider or through an authorised intermediary;

This is subject to your meeting certain conditions which are, broadly speaking, that:

- you must not advise your client on the merits of his entering into the transaction; and

The requirement that you do not receive any payment other than from your client does not prevent you receiving payment from the *authorised person* but you must then treat the sums paid to you as belonging to your client. There is nothing to prevent you then using the sums to offset payments due to you from your client for services rendered to him. This is provided that you have your client's agreement to do so.

Q34. When will the exclusion in article 33A of the Regulated Activities Order be available to me if I am arranging home purchase plans?

Broadly speaking, the exclusion will apply where:

- the arranging activity you carry on is limited to *making arrangements with a view to home purchase plans*;
- you make introductions of prospective home purchasers (your client) to an *authorised person*, an *appointed representative* or an *overseas person*;
- you do not receive any money paid by your client in relation to the transaction other than a sum that is due to you for your own account (for example, your fee for providing the introductory service); and

- you disclose to your client certain information about your relationship with the person to whom you are effecting introductions and about any reward you may receive for doing so.

Q35. When will I be carrying on the activity of advising on home purchase plans?

This will arise if you are:

- giving advice to a person who is or who is contemplating becoming a home purchaser; and
- the advice relates to the merits of his entering into a *home purchase plan* in that capacity or varying the terms of a plan that he has already entered into.

Advice on the merits of varying the terms of a plan is only regulated when the plan was entered into on or after 6 April 2007.

This differs from the position in relation to *home reversion plans* where advice given to the provider is also regulated.

Much of the detailed guidance on *advising on regulated mortgage contracts* in ■ PERG 4.6 may be applied to the activity of *advising on a home purchase plan*.

Q36. What exclusions may be available to me if I am advising on home purchase plans?

The main exclusions that are available include:

- advice given in a periodical publication, broadcast or other form of regularly updated news or information service (article 54 of the *Regulated Activities Order*);
- advice that is a necessary part of other services provided by a person in the course of carrying on a profession or business other than a *regulated activity* (article 67 of the *Regulated Activities Order*); and
- advice given by *local authorities* (article 72G of the *Regulated Activities Order*).

Detailed guidance on the exclusion in article 54 is in ■ PERG 7.

Q37. Will changes involving the circumstances of the home purchaser that may take place after the plan has been entered into (such as moving house, marriage or change of occupants) have any implications in terms of regulated activity?

This depends on the facts and is a question of degree that requires an assessment against the criteria that make up the definition of a home purchase plan. There are two main issues that would need to be considered. These are:

- is the change likely to cause a new plan to be entered into? and
- does the change involve a variation of the terms of the plan (if it was originally entered into on or after 6 April 2007) such as to vary the obligations of the home purchaser?

Broadly speaking, it would seem likely that, if the home purchaser were to move house, there would be a need for the existing plan to be terminated and a new plan to be entered into. Where this happens, the person who enters into the new plan as provider and anyone arranging, or advising the home purchaser on, the new plan will potentially need to be authorised or exempt. Changes such as may occur due to marriage or change of occupants or of other relevant details may necessitate a new plan. Alternatively, they

may involve a variation in the existing plan, depending on the extent to which they alter the obligations of the home purchaser. Where such changes do involve a variation, anyone advising the home purchaser on, or arranging, the variation would potentially need to be authorised or exempt. But this applies only where the plan was originally entered into on or after 6 April 2007.

14.4A Activities relating to regulated sale and rent back agreements

Q37A. What is a regulated sale and rent back agreement?

Broadly speaking, this is an arrangement under which, at the time it is entered into, a person (the "agreement provider") buys all or part of an interest in land (other than time share accommodation) in the *United Kingdom* from a homeowner (being an individual or a trustee whose beneficiary is an individual) ("the agreement seller") on the basis that the individual or a related person is entitled under the arrangement, and intends, to use at least 40% of the land as a dwelling. However such an arrangement is not a *regulated sale and rent back agreement* if it is a *home reversion plan*.

This means that an arrangement is not a *regulated sale and rent back agreement* if:

- the agreement seller is not an individual; or
- the land is to be used for the purpose of letting as a dwelling to someone other than a related person of the individual (or beneficiary under the trust) who owns it; or
- the land is used primarily for business purposes; or
- the land is overseas; or
- if it is a *home reversion plan* (see Q5).

A related person, in relation to an individual, means:

- that person's spouse or civil partner;
- a person (whether or not of the same sex) whose relationship with that person has the characteristics of a husband and wife relationship; or
- that person's:
 - parent or grandparent;
 - child or grandchild; or
 - sibling.

As regards the requirement that the conditions need to be met 'at the time the arrangement was entered into', it should be noted that a *regulated sale and rent agreement* is an arrangement that may actually comprise several agreements. For example, a *regulated sale and rent back agreement* may include an agreement for the sale of a freehold interest in land and a subsequent tenancy agreement relating to the occupation of that land. Just because the tenancy agreement was not completed at the same time as the sale of the freehold interest does not mean there is no *regulated sale and rent back agreement*.

Q37B. Can an arrangement that was established before 1 July 2009 be a regulated sale and rent back agreement?

Yes it can be. An arrangement may still be a *regulated sale and rent back agreement* even if it was established before 1 July 2009. However, regulated activities carried on in relation to a sale and rent back agreement established before 1 July 2009 will only be subject to regulation:

- when carried on on or after 1 July 2009; and
- in certain circumstances (see Q37Q for a summary).

Q37C. When will I be carrying on the activity of entering into a regulated sale and rent back agreement?

This will occur when you enter into the agreement at the outset as the agreement provider even if you do so only once. It can also occur at a later stage if all or part of the rights or obligations of the agreement provider are transferred to you or if you acquire all or part of the interest in land bought by the agreement provider (where you become an 'agreement transferee'). This is so, whether you are acquiring the rights or obligations from the agreement provider or from an existing agreement transferee. This includes acquiring the rights or obligations or the interest in land purely as an investment. However, investors will only be regulated if they satisfy the 'by way of business test' (see 14.5). We refer to agreement providers and agreement transferees collectively in this guidance as 'agreement purchasers'.

So, if you are an agreement transferee under a plan that was established before 1 July 2009, you will only be subject to regulation for carrying on the regulated activity of entering into the plan if you do so on or after 1 July 2009.

Q37D. What exclusions may be available to me if I am entering into regulated sale and rent back agreements as agreement provider?

The main exclusions are those:

- for trustees who enter into a plan where the agreement seller is an individual who is a beneficiary under the trust (article 66(6D) of the *Regulated Activities Order*);
- for *overseas persons* who satisfy certain conditions (see Q39); and
- for *local authorities* (article 72G of the *Regulated Activities Order*).

Q37E. When will I be carrying on the activity of administering a regulated sale and rent back agreement?

This will arise if you carry out any one or more of the following functions for an agreement purchaser or an agreement seller in relation to an agreement that was originally entered into on or after 1 July 2009:

- taking necessary steps to make payments to the agreement seller; or
- taking necessary steps to collect or recover payments due from the agreement seller; or
- notifying the agreement seller of changes in payments due under the agreement, or of other matters of which the agreement requires him to be notified.

One effect of this is that you will not become subject to regulation if you are administering an agreement that was originally established before 1 July 2009 and an agreement transferee enters into the plan after that date. See Q37Q for more detail about when activities are regulated if an agreement was originally entered into before 1 July 2009.

It is irrelevant for the purposes of determining if you are administering a regulated sale and rent back agreement whether or not the agreement was entered into by way of business. In this respect the activity is similar to the regulated activity of *administering a home reversion plan*.

Q37F. If I collect rent due to an agreement purchaser under a regulated sale and rent back agreement or help the agreement seller set up a direct debit in favour of the agreement purchaser do I need to be regulated?

Yes, it is likely that you will need to be authorised to carry out the *regulated activity of administering a regulated sale and rent back agreement*. However the following exclusions may be available:

- where you arrange for an authorised person with the appropriate *Part 4A permission* to administer the agreement - this includes where you administer the agreement for a period of up to one month following the termination of such an arrangement; or
- you administer the plan under an agreement with an authorised person which has a *Part 4A permission* to administer such an agreement.

Q37G. Are there any other exclusions available in relation to administering a regulated sale and rent back agreement?

The other main exclusions are those:

- for trustees who administer a plan where the agreement seller is an individual who is a beneficiary under the trust (article 66(6D) of the *Regulated Activities Order*);
- for *overseas persons* who satisfy certain conditions (see Q39); and
- for *local authorities* (article 72G of the *Regulated Activities Order*).

Q37H. When will I be carrying on the activity of arranging regulated sale and rent back agreements?

There are three types of arranging activity that are regulated. These are making arrangements:

- (1) for another *person* to enter into a plan as an agreement purchaser or as an agreement seller;
- (2) for another *person*, being an agreement seller or an agreement purchaser, to vary the terms of an agreement that was originally established on or after 1 July 2009, in such a way as to vary his obligations under that agreement; and
- (3) with a view to a *person* who participates in the arrangements entering into an agreement as an agreement seller or as an agreement purchaser.

But none of these arranging activities will apply to you if they relate to an agreement to which, as a result of your arranging activities, you are or will become a party (article 28A of the *Regulated Activities Order*).

You will only be making arrangements under (1) or (2) if your actions are such as to bring about the entry into the agreement or the variation, as the case may be (article 26 of the *Regulated Activities Order*). This means that your involvement must be material to whether the transaction occurs. For example, assisting a person by completing the necessary application forms on their behalf or acting as their agent or attorney in negotiating entry will amount to bringing about the transaction.

Arranging activities under (3) will typically include making regular introductions of homeowners to agreement providers or of agreement

transferees to agreement providers or vice versa or any of these to a *firm* with *permission* (or which ought to have *permission*) to carry on a *regulated sale and rent back mediation activity*.

Q37I. I understand that any transaction that I have arranged before 1 July 2009 is not subject to regulation. But do I need permission if I arrange for an agreement transferee to enter into or vary a regulated sale and rent back agreement on or after 1 July 2009?

This depends on the type of arranging you are carrying on. If you are arranging variations, this will only be regulated if the agreement was originally established on or after 1 July 2009. But, if you are arranging for an agreement transferee to enter into an agreement and the arrangements are being made on or after 1 July 2009, you will be regulated for that arranging activity. See Q39Q for more detail about when activities are regulated if a plan was originally established before 1 July 2009.

Q37J. Will I need to be regulated for arranging for an agreement provider to dispose of his rights and obligations or his interest in land under a regulated sale and rent back agreement to an agreement transferee?

It is only arranging for a person to enter into or vary the terms of an agreement that is subject to regulation. So, you will not need to seek authorisation for providing arranging services to the existing provider who wishes to dispose of his rights, obligations or interests but you are likely to be regulated if you are arranging for the transferee to enter into the agreement by acquiring the rights, obligations or interests.

Q37K. What exclusions may be available to me if I am arranging regulated sale and rent back agreements?

If you are an *unauthorised person* the following exclusions may be available to you:

- where you are arranging for a transaction to be entered into with or through an *authorised person* (article 29 of the *Regulated Activities Order*) (see Q37L); and
- where you have arranged for an authorised person to administer the agreement or are administering it yourself during the period of one month following the termination of your arrangement with the authorised person (article 29A(4) of the *Regulated Activities Order*).

Whether or not you are an unauthorised person, the other main exclusions that may apply include:

- introductions made with a view to the provision of regulated independent advice (article 33 of the *Regulated Activities Order*) (see Q37M);
- introductions made to a regulated person who carries on regulated sale and rent back agreement activities (article 33A of the *Regulated Activities Order*) (see Q37N);
- arrangements that are a necessary part of other services provided by a person in the course of carrying on a profession or business other than a *regulated activity* (article 67 of the *Regulated Activities Order*);
- *overseas persons* (article 72 of the *Regulated Activities Order*) (see Q39); and
- arrangements made by *local authorities* (article 72G of the *Regulated Activities Order*).

Q37L. When will the exclusion in article 29 of the Regulated Activities Order be available to me if I am arranging regulated sale and rent back agreements?

The exclusion will apply to you when, as an *unauthorised person*, you are arranging any of the following:

- for a homeowner (your client) to enter into an agreement with an authorised agreement provider or through an authorised intermediary;
- for an agreement provider (your client) to enter into an agreement with a homeowner or to transfer rights or obligations or an interest in land to an agreement transferee if either the agreement transferee is an authorised person or the transaction is to be effected through an authorised intermediary; or
- for an agreement transferee (your client) to acquire rights or obligations from an authorised agreement provider or through an authorised intermediary;
- for your client to vary the terms of a plan where the agreement purchaser is an authorised person or the variation is arranged through an authorised intermediary.

This is subject to your meeting certain conditions which are, broadly speaking, that:

- you must not advise your client on the merits of his entering into the transaction; and
- you must not be paid by anyone other than your client.

The requirement that you do not receive any payment other than from your client does not prevent you receiving payment from the *authorised person* but you must then treat the sums paid to you as belonging to your client. There is nothing to prevent you then using the sums to offset payments due to you from your client for services rendered to him. This is provided that you have your client's agreement to do so.

Q37M. When will the exclusion in article 33 of the Regulated Activities Order be available to me if I am arranging regulated sale and rent back agreements?

Broadly speaking, the exclusion will apply where:

- your arranging activity is limited to *making arrangements with a view to regulated sale and rent back agreements*;
- you make introductions of agreement sellers or agreement purchasers to an *authorised person*, an *exempt person* or an *overseas person*; and
- the introduction is made with a view to the provision of independent advice or the provision of independent discretionary services relating to *regulated sale and rent back agreements*.

Q37N. When will the exclusion in article 33A of the Regulated Activities Order be available to me if I am arranging regulated sale and rent back agreements?

Broadly speaking, the exclusion will apply where:

- your arranging activity is limited to *making arrangements with a view to regulated sale and rent back agreements*;
- you make introductions of agreement sellers, agreement purchasers or prospective agreement sellers or agreement purchasers (your client) to an *authorised person* or an *overseas person*;
- you do not receive any money paid by your client in relation to the transaction other than a sum that is due to you for your own account (for example, your fee for providing the introductory service); and

- you disclose to your client certain information about your relationship with the person to whom you are effecting introductions and about any reward you may receive for doing so.

Q37O. When will I be carrying on the activity of advising on a regulated sale and rent back agreement?

This will arise if:

- you are giving advice to a *person* who is or who is contemplating becoming an agreement seller, an agreement provider or an agreement transferee; and
- the advice relates to the merits of his entering into a regulated sale and rent back agreement in that capacity or varying the terms of an agreement that he has already entered into.

Advice on the merits of varying the terms of an agreement will only be regulated where the agreement was originally established on or after 1 July 2009. However, advice given to an agreement transferee on the merits of his entering into an agreement that was originally established before 1 July 2009 will be subject to regulation. See Q37Q for more detail about when activities are regulated if an agreement was originally established before 1 July 2009.

Advice given to a person on the merits of his transferring rights or obligations or interests in land under an agreement to another person is not regulated.

Much of the detailed guidance on *advising on regulated mortgage contracts* in ■ PERG 4.6 may be applied to the activity on a *regulated sale and rent back agreement*.

Q37P. What exclusions may be available to me if I am advising on regulated sale and rent back agreements?

The main exclusions that are available include:

- advice given in a periodical publication, broadcast or other form of regularly updated news or information service (article 54 of the *Regulated Activities Order*);
- advice that is a necessary part of other services provided by a person in the course of carrying on a profession or business other than a *regulated activity* (article 67 of the *Regulated Activities Order*); and
- advice given by *local authorities* (article 72G of the *Regulated Activities Order*).

Detailed guidance on the exclusion in article 54 is in ■ PERG 7.

Q37Q. I can see that the fact that the regulated sale and rent back agreement was originally established before 1 July 2009 can affect whether the services that I provide to parties to the agreement after that date are regulated. Can you summarise the position in this respect?

Yes. This all depends on the combination of the date of entry or variation and the capacity in which your customer enters or entered into the agreement. The following table clarifies when your services will be regulated activities and when they will not.

Potential regulated sale and rent back activity	Whether the activity is regulated if undertaken on or after 1 July 2009 when the agreement was originally established before 1 July 2009
Entering into an agreement as agreement provider (see Q37C)	N/A - this activity will only take place when the plan is first established
Entering into an agreement as agreement transferee (see Q37C)	Yes, any transfer of the agreement provider's interest in land will be caught
Administering an agreement (see Q37E)	No
Arranging (see Q37H) for a person to enter into an agreement as:	
(a) an agreement provider or an agreement seller	N/A - this activity will only take place when the agreement is first established
(b) an agreement transferee	Yes
Arranging variations (see Q37H) of an agreement	No
Advising (see Q37O) a person on entering into an agreement in his capacity as:	
(a) an agreement provider or an agreement seller	N/A - this activity will only take place when the agreement is first established
(b) an agreement transferee	Yes
Advising (see Q37O) a person on varying the terms of an agreement	No

Q37R. Will changes involving the circumstances of the agreement seller that may take place after the agreement has been entered into (such as moving house, marriage or change of occupants) have any implications in terms of regulated activity?

This depends on the facts and is a question of degree that requires an assessment against the criteria that make up the definition of a regulated sale and rent back agreement. There are two main issues that would need to be considered. These are:

- is the change likely to cause a new agreement to be entered into; and
- does the change involve a variation of the terms of the agreement (if it was originally entered into on or after 1 July 2009) such as to vary the obligations of the provider or the seller?

Broadly speaking, it would seem likely that if the occupier were to move house, the *regulated sale and rent back agreement* would cease as the tenancy agreement would come to an end and the agreement seller would no longer have the right of occupation.

Changes such as may occur due to marriage or change of occupants, change of other relevant details or drawdown of funds under a staggered payment arrangement may necessitate a new agreement or may involve a variation in the existing agreement depending on the extent to which they alter the obligations of the provider or the occupier. Where such changes do involve a variation, anyone arranging or advising on the variation would potentially

need to be authorised or exempt. But this applies only where the agreement was originally entered into on or after 1 July 2009.

Q37S. I am an exempt professional firm. Do I need to be authorised in relation to regulated sale and rent back agreement activities?

Yes, you may need to be authorised. See Q42 for more detail.

Q37T. I am an estate agent. Do I need to be authorised where the vendor of a property has approached me to sell their property but has expressed a desire to remain in the property as tenant?

Yes, it is likely that you will need to be authorised unless you are an exempt person or exclusions apply (see Q37K). This is because it is likely that you will be making arrangements with a view a person who participates in the arrangements entering into an agreement as *SRB agreement provider* and/or *SRB agreement seller*.

Q37U. I am a receiver appointed under the Law of Property Act 1925. Will my activities need to be regulated by the FCA?

Your activities in relation to properties subject to regulated sale and rent back agreements could amount to *administering a regulated sale and rent back agreement* where the agreements have been entered into on or after 1 July 2009. Accordingly you may need to be authorised unless you are an exempt person or exclusions apply (see Q37E for the relevant administering activities and Q37F and Q37G for the available exclusions).

Q37V What happens when the agreement seller's right to occupy the land in question under an assured shorthold tenancy ('AST') ends?

A regulated sale and rent back agreement must, at the time it is entered into, give the agreement seller, or related person, an entitlement to occupy at least 40% of the land in question. In the absence of such an entitlement there is no regulated sale and rent back agreement.

As the definition of a regulated sale and rent back agreement refers to 'an arrangement comprised in one or more instruments or agreements', in considering the effect of the end of the tenancy you should look at the arrangement as a whole rather than just any tenancy agreement that may comprise the arrangement. So -

- (1) if the arrangement expressly grants the agreement seller an entitlement to occupy the land in question for a specified period of time then the agreement seller retains this entitlement under the regulated sale and rent back agreement even where the AST ends before the specified period ends; and
- (2) if the regulated sale and rent back agreement is expressly stated to end after the termination of the AST then it ceases to be a regulated sale and rent back agreement at that point unless the arrangements are varied by, for example, granting the agreement seller a new AST.

14.5 The 'by-way-of-business' test

Q38. How do I know if I am carrying on regulated activities by way of business?

A *person* will only need to be an *authorised person* or *exempt person* if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the Act (Regulated activities)).

Whether or not any particular *person* will meet the requirement that he carries on a *regulated activity* by way of business and so needs to be an *authorised person* or *exempt person* will invariably depend on that person's individual circumstances. Generally speaking, a number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular regulated activity that is carried on.

However, there are in fact four different forms of business test that are applied to the *home finance transactions* (see Q38A). For example, the ordinary business test is significantly widened in scope in relation to *entering into a regulated sale and rent back agreement* (see Q38B).

Corporate plan providers and those who provide professional services to them or to home occupiers are likely to be carrying on their activities by way of business. Unpaid individuals who act as trustees for home occupiers are not likely to be.

Q38A. What are the four different forms of business test referred to in Q38?

They are:

- (1) the 'by way of business' test in section 22 of the Act applies unchanged in relation to the activity of *entering into a home finance transaction* other than *entering into a regulated sale and rent back agreement*;
- (1A) in the case of *entering into a regulated sale and rent back agreement*, the effect of article 5 of the *Business Order* is that an *SRB agreement provider* is to be regarded as acting 'by way of business' unless that *person* is a *related party* in relation to the *SRB agreement seller*;
- (2) the 'by way of business' test in section 22 of the Act applies unchanged in relation to the activity of *administering a home finance transaction*, but another 'by way of business' test arises in relation to *administering a home purchase plan* because the plan being administered by way of business must itself have been entered into by way of business (see Q28); and
- (3) in the case of arranging and advising, the effect of articles 3B to 3D of the *Business Order* is that a *person* is not to be regarded as acting 'by way of

business' unless he is 'carrying on the business of engaging in one or more of those activities'.

Q38B. How does the business test in the Business Order differ from the business test in section 22 of the Act?

The 'by way of business' test in article 5 of the *Business Order* is wider than the 'by way of business' test in section 22 of the *Act* because, for example, it does not require any degree of continuity; entering into just one *regulated sale and rent back agreement* is enough.

On the other hand, the 'carrying on the business' test in articles 3B to 3D of the *Business Order* is a narrower test than that of carrying on *regulated activities* 'by way of business' in section 22 of the *Act* as it requires the *regulated activities* to represent the carrying on of a business in their own right.

Q38C. Can you give me some examples where the business test is unlikely to be satisfied?

Examples are:

- (1) when an individual enters into a *regulated sale and rent back agreement* as *SRB agreement provider* where that individual is a *related party* in relation to the *SRB agreement seller* whether at market interest rates or not; and
- (2) when a person provides a service without any expectation of reward or payment of any kind (but see ■ PERG 7.3.4 G for examples of when the giving of 'free' advice in relation to *home finance transactions* might still amount to a business).

Q38D. Will I meet the business test if I only enter into one home purchase plan or home reversion plan a year?

Yes, you might meet the business test. Whether or not you do will depend largely on the facts. The following issues may be helpful to bear in mind:

- the relevant business test here is not the narrower business test under the *Business Order* but the wider one under section 22 of the *Act*: that is whether the activity is being carried on by way of business (see Q38B);
- the expression "carrying on business" suggests the need for a degree of continuity in the activity. Hence, one-off or extremely infrequent acts would usually not be thought to be enough to satisfy the test. However, it is unlikely that a person could successfully claim that entering into a plan or agreement was a "one-off" or very infrequent act if, in all the circumstances, it cannot be shown that they intended this to be the case. This is because there is always a first time that any regular activity is carried on;
- some individuals are clearly in business as sole traders - they will represent themselves as running a business and be registered for VAT etc. Other individuals may not so clearly be in business. In the latter case, it is necessary to consider the scale of the potential regulated activity. Where a person expects to make a living, or a substantial part of their living, from entering into *home finance transactions* it is likely that they are carrying on such activities by way of business.

With this in mind, if you intend on entering into just one *home reversion plan* or *home purchase plan* each year this may be enough to meet the 'by way of business' test if the scale of this activity is likely to be significant in relation to your other activities.

Q38E. Will I meet the business test if I only enter into one sale and rent back agreement?

Yes, provided you are an *SRB agreement provider* that is not a *related party* in relation to the *SRB agreement seller*.

This is because of an amendment to the *Business Order* made by the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2014 (SI 2014/3340) which came into force on 31 December 2014. This Order also provides that the amendment will cease to have effect on 1 January 2022. The Treasury is required to review the operation and effect of the amendment and to publish a report before the end of 2017. Following the review, the Treasury will decide whether the amendment should be allowed to expire, be revoked early, or be maintained in force with or without amendments. A further instrument would be needed to maintain the amendment in force or to revoke the amendment early.



14.6 Carrying on a regulated activity in the United Kingdom

Q39. Does a person who acts as provider, administrator, arranger or adviser in relation to home reversion plans, home purchase plans or regulated sale and rent back agreements from overseas and without maintaining an office in the UK need to be an authorised or exempt person?

The position on territorial application is complex. Detailed guidance on this aspect is provided in relation to regulated mortgage activities in ■ PERG 4.11 and that guidance may generally be applied to home finance activities.

But, briefly, there are two issues to be considered by such a person:

- am I carrying on a home finance activity in the *United Kingdom*? and
- if so, does the exclusion for *overseas persons* in article 72 of the *Regulated Activities Order* apply to me?

Whether you are carrying on the activity in the UK depends on a combination of factors. In very broad terms, however, as an overseas person, you are more likely than not to be carrying on a home finance activity in the UK if the home occupier, reversion occupier or agreement seller is normally resident in the UK at the time that he enters into the plan. The table that follows applies this broad principle to the various permutations taking account of the conditions applying to the exclusions for home finance activities under article 72.

Table indicating whether authorisation or exemption is likely to be needed by a person who is carrying on home finance activities from overseas.

Activity carried on by overseas person	Where the reversion occupier, home purchaser or agreement seller is or was normally resident in the UK at the time he enters or entered into the plan			Where the reversion occupier, home purchaser or agreement seller is or was not normally resident in the UK at the time he enters or entered into the plan		
	Home reversion plan	Home purchase plan	Regulated sale and rent back agreement	Home reversion plan	Home purchase plan	Regulated sale and rent back agreement
Entering into or administering	Yes	Yes	Yes	No	No	No
Arranging for	Yes	Yes	Yes	No, provided	No	No, provided

persons to enter into plans.				the reversion purchaser or the reversion transferee, as the case may be, is or was also not normally resident in the UK.		the agreement provider or agreement transferee, as the case may be, is or was also not normally resident in the UK.
Arranging variations	Yes	Yes	Yes	No	No	No
Advising	Yes	Yes	Yes	No, unless the reversion occupier, reversion provider or reversion transferee is located in the UK at the time the advice is given to him.	No, unless the home purchaser is located in the UK at the time the advice is given.	No, unless the regulated sale and rent back agreement adviser is located in the UK at the time the advice is given.

14.7 Exemptions

Q40. Am I an exempt person in relation to home finance activities?

Yes, if you are:

- a *person* who is specifically exempt under the Financial Services and Markets Act 2000 (Exemption) Order 2001, such as a registered social landlord; or
- an *appointed representative* whose agreement with his principal permits him to carry on the activities in question; or
- an *exempt professional firm*.

Q41. What home finance activities can I carry on as an appointed representative?

You will be able to carry on any of the following *regulated activities*:

- *arranging (bringing about) a home reversion plan or arranging (bringing about) a home purchase plan; or*
- *making arrangements with a view to home reversion plans or making arrangements with a view to home purchase plans; or*
- *advising on a home reversion plan or advising on a home purchase plan; or*
- agreeing to do any of the above.

You will not be able to carry on any of the following regulated activities:

- *entering into a home reversion plan, entering into a home purchase plan or entering into a regulated sale and rent back agreement; or*
- *administering a home reversion plan, administering a home purchase plan or administering a regulated sale and rent back agreement; or*
- *arranging (bringing about) a regulated sale and rent back agreement; or*
- *making arrangements with a view to a regulated sale and rent back agreement; or*
- *advising on a regulated sale and rent back agreement; or*
- agreeing to do any of the above.

Q42. I am an exempt professional firm. Will I be able to carry on any of the regulated activities relating to home reversion plans, home purchase plans and regulated sale and rent back agreements without needing FCA authorisation?

This depends on the activity in question. Subject to your being able to satisfy the general requirements of Part XX of the Financial Services and Markets Act 2000 you will be able:

- to carry on the *regulated activities* of:
 - *entering into a home reversion plan; or*
 - *entering into a home purchase plan; or*
 - *entering into a regulated sale and rent back agreement; or*
 - *administering a home reversion plan; or*

- administering a home purchase plan; or
 - administering a regulated sale and rent back agreement; or
 - agreeing to do any of these things,
- but only where you are acting as a trustee or personal representative and the *reversion occupier, home purchaser or SRB agreement seller* is a beneficiary under the trust, will or intestacy;
- to carry on the *regulated activities* of:
 - arranging (bringing about) a home reversion plan; or
 - arranging (bringing about) a home purchase plan; or
 - arranging (bringing about) a regulated sale and rent back agreement; or
 - making arrangements with a view to home reversion plans; or
 - making arrangements with a view to home purchase plans; or
 - making arrangements with a view to regulated sale and rent back agreements; or
 - agreeing to do any of these things,
- without any further restriction; and
- to carry on the *regulated activities* of:
 - advising on a home reversion plan; or
 - advising on a home purchase plan; or
 - advising on a regulated sale and rent back agreement; or
 - agreeing to do any of these things,
- but only provided that:
- the advice is given to a trustee or a reversion provider or agreement purchaser who, in either case, is not an individual; or
 - the advice is given to an individual but does not amount to a recommendation to enter into a plan as reversion provider, *reversion occupier, home purchaser* or agreement seller; or
 - the advice is given to an individual and does amount to a recommendation to enter into a plan as reversion provider, *reversion occupier, agreement seller, agreement provider or home purchaser* with a reversion provider, agreement provider or a *home purchase provider* but only if the advice endorses a corresponding recommendation that has been given to the individual by a suitably authorised or exempt person.



14.8 Financial promotions

Q43. Are there any restrictions if I wish to promote my home finance activities?

Yes. The restriction in section 21 of the Financial Services and Markets Act 2000 will apply, broadly speaking, to any communication which:

- is made in the course of business; and
- invites or induces persons to:
 - become a *reversion occupier*, *SRB agreement seller* or *home purchaser*; or
 - become a *reversion provider* or *SRB agreement provider*; or
 - vary the terms of a *home reversion plan* or a *home purchase plan* that was originally established on or after 6 April 2007 or a *regulated sale and rent back agreement* that was originally established on or after 1 July 2009; or
 - be provided, as a *reversion occupier*, *SRB agreement seller* or *home purchaser* or as a *reversion provider* or *SRB agreement provider*, with arranging or advisory services.

Communications of this kind are termed *financial promotions*.

Promotions of *home finance administration* services or promotions intended to dissuade persons from entering into or varying the terms of regulated plans will not be financial promotions and so no restriction will apply to them.

The following table summarises when the restriction will apply.

Table indicating when the financial promotion restriction will apply to communications about home finance plans.

A communication inviting or inducing...	To...	Will be a financial promotion?
...potential reversion occupiers, <i>SRB agreement sellers</i> or home purchasers	...enter into a home reversion plan, <i>regulated sale and rent back agreement</i> , or a home purchase plan	Yes
...potential home reversion purchasers or transferees or <i>SRB agreement providers</i> or transferees	...enter into a home reversion plan or <i>regulated sale and rent back agreement</i>	Yes (in the case of transferees, regardless of whether the plan was originally established before 6 April 2007 in the case of <i>home reversion</i> transferees and 1 July 2009 in the case of <i>regulated sale and rent</i>

A communication inviting or inducing...	To...	Will be a financial promotion?
		<i>back agreement transferees</i>)
...potential home purchase providers	...enter into a home purchase plan	Yes
...potential or existing: <ul style="list-style-type: none"> • reversion occupiers, <i>SRB agreement sellers</i> or home purchasers; or • reversion or home purchase providers or <i>SRB agreement providers</i> 	...be provided with administration services	No
...potential or existing: <ul style="list-style-type: none"> • reversion occupiers, <i>SRB agreement sellers</i> or home purchasers; or • reversion purchasers or transferees or <i>SRB agreement providers</i> or transferees 	...be provided with arranging or advisory services	Yes (but where the promotion relates to such a person varying the terms of a plan or agreement, this is only where the plan or agreement was originally established on or after 6 April 2007 in the case of <i>home reversion plans</i> or <i>home purchase plan</i> and 1 July 2009 in the case of <i>regulated sale and rent back agreements</i>)
...potential or existing home purchase providers	...be provided with arranging or advisory services	No in relation to advisory services Yes in relation to arranging services
...potential or existing: <ul style="list-style-type: none"> • reversion occupiers, <i>SRB agreement sellers</i> or home purchasers; or • reversion or home purchase providers or <i>SRB agreement providers</i> 	...decline from entering into or varying the terms of a plan or agreement	No
...potential or existing: <ul style="list-style-type: none"> • reversion occupiers, <i>SRB agreement sellers</i> or home purchasers; or • reversion or home purchase providers or <i>SRB agreement providers</i> 	...dispose of rights, obligations or interests in land that they have under a plan or agreement	No

Q44. What are the restrictions that apply if I am making a financial promotion about home finance plans or activities?

The *financial promotion* will need either to be communicated or approved by an *authorised person* or to be exempt under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the *Financial Promotion Order*).

If you are an authorised person who is communicating or approving the financial promotion and it is not exempt, you will need to comply with the provisions of the Mortgages and Home Finance: Conduct of Business Sourcebook ■ MCOB 3A for financial promotions of qualifying credit, a *home reversion plan*, a *home purchase plan* or a *regulated sale and rent back agreement*).

Q45. What exemptions may be likely to be available to me when I communicate financial promotions about home finance plans or activities?

A number of exemptions may be available. Those most likely to apply are summarised below.

- (1) Introductions (article 15 of the *Financial Promotion Order*). This applies, broadly speaking, where you introduce clients to an *authorised person* or an *exempt person* in the circumstances covered by the exclusion in article 29 of the *Regulated Activities Order* (see Q17). But this is provided the person to whom you make the introduction is not your close relative or a member of your *group*. In addition, there is an exemption for promotions concerning introductions relating specifically to home finance plans - see (5).
- (2) Exempt persons (article 16 of the *Financial Promotion Order*). This applies, subject to certain conditions, if you are an exempt person such as a registered social landlord or an *appointed representative*.
- (3) Generic promotions (article 17 of the *Financial Promotion Order*). This applies to a general promotion that does not identify any particular persons as being either providers of, or as offering arranging or advisory services relating to, home finance plans.
- (4) One-off promotions (articles 28 and 28A of the *Financial Promotion Order*). These apply to promotions that are intended for a particular recipient (or group of connected recipients).
- (5) Introductions relating to home finance plans (article 28B of the *Financial Promotion Order*). This applies to real time financial promotions relating to home finance plans for the purpose of making introductions. This exemption is subject to the same conditions as apply to the exclusion in article 33A of the *Regulated Activities Order* (see Q18 and Q34); and
- (6) Advice centres (article 73 of the *Financial Promotion Order*). This applies to bodies such as citizens' advice bureaux when they make promotions about home finance plans in the course of their business of providing free advice about debt matters.

Further guidance on these and other exemptions from the financial promotion restriction is in Chapter 8 of PERG (■ PERG 8).

Chapter 15

Guidance on the scope of the Payment Services Regulations 2017

15.1 Introduction

The purpose of this chapter is to help businesses in the UK consider whether they fall within the scope of the Payment Services Regulations 2017 (the 'PSRs 2017'). The PSRs 2017 create a separate authorisation and registration regime which differs from the authorisation requirements under the Financial Services and Markets Act. In particular, it is aimed at helping these businesses consider whether they need to be separately authorised or registered for the purposes of providing payment services in the UK. References to individual regulations are to the PSRs 2017, unless otherwise stated.

Background

The PSRs 2017 implemented the Second Payment Services Directive (2015/2366/EC) (PSD2) in the *United Kingdom*. The PSRs 2017 provide an authorisation regime for payment service providers which are neither deposit-takers nor electronic money institutions.

The relevant payment services are set out fully in Annex 2 to this chapter and include, amongst other things, services relating to the operation of payment accounts (for example, cash deposits and withdrawals from current accounts and flexible savings accounts), execution of payment transactions, card issuing, merchant acquiring, and money remittance. The PSRs 2017 focuses on electronic means of payment including direct debit, debit card, credit card, standing order, mobile or fixed phone payments and payments from other digital devices as well as money remittance services; they do not apply to cash-only transactions or paper cheque-based transfers.

The PSRs 2017 also creates authorisation and registration regimes for firms who provide holders of online payment accounts with payment initiation services and account information services.

All payment service providers (including credit institutions and electronic money institutions) must comply with the conduct of business requirements of the PSRs 2017.

Scope

In terms of scope, the PSRs 2017 are likely to be of relevance to a range of firms including credit institutions, electronic money institutions, the Post Office Limited, money remitters, certain bill payment service providers, card issuers, merchant acquirers, payment initiators, account aggregators and certain electronic communication network service providers. It is also likely to be relevant to those agents of the above businesses which provide payment services.

Generally speaking, depending on the nature and size of its activities, a business to which the PSRs 2017 apply (other than a credit institution, an electronic money institution and their agents) will need to be:

- authorised by the FCA as an authorised payment institution; or
- registered as a "small payment institution"; or
- registered as a registered account information services provider; or

- registered as an agent of an authorised payment institution, a small payment institution or a registered account information services provider.

The conditions for authorisation as a payment institution are set out in regulation 6. In addition to the authorisation regime for payment institutions, there is an alternative regime for those which fall within the category of small payment institutions (that is businesses which meet the conditions in regulation 14). Broadly, the category of small payment institutions will only be relevant to firms executing payment transactions with a monthly average of 3 million euros (or an equivalent amount) or less, over a 12 month period and that do not carry on account information services or payment initiation service. Broadly, small payment institutions are not subject to the requirements in Part 3 of the PSRs 2017 (including capital requirements), but they are subject to a registration regime and the conduct of business provisions in Parts 6 and 7. There is a further registration regime for payment service providers providing no payment services other than account information services. The conditions for registration are set out in regulation 18. Registered account information services providers must comply with certain conduct provisions, as set out in the regulations.

The PSRs 2017 also provide for the appointment of agents by authorised payment institutions, small payment institutions and registered account information services providers. These agents are not required to be authorised under regulation 6 but they are required to be registered on the Financial Services Register by their principal (or each of their principals). A business can also provide payment services as an agent of a credit institution, in which case there are no registration requirements under the PSRs 2017. Electronic money institutions can provide payment services through agents, in which case the registration requirements of the Electronic Money Regulations 2011 apply (see PERG 3A).

Exemptions and exclusions

As well as small payment institutions, registered account information services providers and agents, the PSRs 2017 make provision for a limited number of exempt bodies, notably credit unions and municipal banks. The regulations do not apply to these bodies although municipal banks are required to notify the FCA if they propose to provide payment services.

More generally, there is a broad range of activities which do not constitute payment services under Schedule 1 Part 2 to the PSRs 2017. Amongst these excluded activities, set out more fully in Annex 3, are:

- payment transactions through commercial agents acting on behalf of either the payer or the payee;
- cash-to-cash currency exchange activities (for example, bureaux de change);
- payment transactions linked to securities asset servicing (for example, dividend payments, share sales or unit redemptions);
- services provided by technical service providers (which does not include account information services or payment initiation services);
- payment services based on instruments used within a limited network of service providers or for a very limited range of goods or services ('limited network exclusion'); and
- payment transactions for certain goods or services up to certain value limits, resulting from services provided by a provider of electronic communication networks or services ('electronic communications exclusion').

These and other activities are the subject of Q&A in ■ PERG 15.5. A firm will be exempt from authorisation and registration requirements under the regulations to the extent that its activities fall within one or more of the exclusions in Schedule 1 Part 2 to the regulations. In each case, it will be for businesses to consider their own circumstances and whether they fall within the relevant exclusions. However, firms making use of the limited network exclusion must notify us when the total value of payment transactions executed through relevant services exceeds 1 million euros in any 12 month period beginning on or after 13 January 2018, and we will assess whether the notified services fall within this exclusion. Providers of electronic communications networks or services providing services falling within the electronic communications exclusion must notify us and provide us with an annual audit opinion which testifies that the transactions comply with the value limits set out in that exclusion as directed. See <https://www.fca.org.uk/firms/electronic-communications-exclusion>.

Other scope issues

As explained in ■ PERG 15.2, Q13, the regulations also apply in limited circumstances to non-payment service providers, if they provide a currency conversion service. Likewise, a non-payment services provider which imposes charges or offers reductions for the use of a given payment instrument is required to provide information on any such charges or reductions (see regulations 58 and 141).

Transitionals

Subject to the exclusions and exemptions outlined above, a person (other than a credit institution, an electronic money institution and certain other specified bodies such as the Post Office) is caught by the authorisation and registration requirements of the PSRs 2017 when it provides payment services, as a regular occupation or business activity, in or from the UK. That said, there are important transitional provisions which delay the need for businesses authorised or registered under the Payment Services Regulations 2009 to re-apply for authorisation or registration under the PSRs 2017, before and during an initial period after the commencement of regulation on 13 January 2018. There is also a transitional provision applying to providers of account information services and payment initiation services which were providing those services before 12 January 2016 – see 15.7.

How does this chapter work?

The chapter is made up of Q&As divided into the following sections:

- General (■ PERG 15.2)
- Payment services (■ PERG 15.3)
- Small payment institutions, agents and exempt bodies (■ PERG 15.4)
- Negative scope/exclusions (■ PERG 15.5)
- Territorial scope (■ PERG 15.6)
- Transitional arrangements (■ PERG 15.7)
- Tables ■ PERG 15 Annex 2 and ■ PERG 15 Annex 3)

Definitions

The PSRs 2017 contain their own definitions which you can find in regulation 2. We refer to some of these in the Q&A including "payment transaction", "payment account", "payment instrument" and "money remittance".

15.2 General

Q1. Why does it matter whether or not we fall within the scope of the PSRs 2017?

Broadly, when you provide payment services, as a regular occupation or business activity

, in the UK and these services do not fall within an exclusion or exemption, you must be:

- (a) an authorised payment institution; or
- (b) (c) a small payment institution; or
 - a registered account information services provider; or
- (d) a credit institution (with a Part 4A permission to accept deposits); or
- (e) an electronic money institution; or
- (f) the Post Office Limited, Bank of England or government departments and local authorities; or
- (g) an exempt person (that is a credit union, municipal bank and the National Savings Bank)
- (h) Unless you are one of the above (or acting as an agent – see ■ PERG 15.4), subject to transitional provisions you risk committing a criminal offence under regulation 138.

Q2. Is there anything else we should be reading?

The Q&As complement, and should be read in conjunction with, the PSRs 2017. The FCA provides guidance on its regulatory approach under the PSRs 2017 in its Approach Document.

Q3. How much can we rely on these Q&As?

The answers given in these Q&As represent the FCA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of the PSRs 2017 affects the regulatory position of any particular person will depend on his individual circumstances. If you have doubts about your position after reading these Q&As, you may wish to seek legal advice. The Q&As do not purport to be exhaustive and are not a substitute for reading the relevant legislation. In addition to FCA guidance, some PSD2 provisions (from which the PSRs 2017 are derived) may be the subject of guidance or communications by the European Commission or the European Banking Authority.

Q4. We are a UK firm not authorised under FSMA providing payment services to our clients, as a regular business activity. Are we required to be authorised or registered under the regulations?

Yes, unless the exclusions or exemptions in the regulations apply to you or you are an electronic money institution, the Post Office Limited or an agent of a credit institution or electronic money institution. If this is not the case, you need to be:

- authorised by the FCA as an authorised payment institution; or
- registered as a small payment institution; or
- registered as an account information services provider; or
- registered as an agent of an authorised payment institution or a small payment institution.

Q5. As a payment institution rather than a credit institution, are we right in thinking that our maintenance of payment accounts does not amount to accepting deposits?

Yes, articles 9AB and 9L of the *Regulated Activities Order* provide that funds received by payment institutions from payment services users with a view to the provision of payment services shall constitute neither deposits nor *electronic money*.

As a payment institution, any payment accounts you hold must only be used in relation to payment transactions (see regulation 33 of the PSRs 2017). A "payment transaction" for these purposes is defined in regulation 2 of the PSRs 2017 as meaning "an act, initiated by the payer or payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and payee". Our view is that this means that a payment institution cannot hold funds for a payment service user unless accompanied by a payment order for onward transfer (whether to be executed immediately or on a future date). Funds cannot be held indefinitely. They should not be held for longer than is necessary for operational and technical reasons.

The fact that a payment account operated by a payment institution can only be used for payment transactions distinguishes it from a deposit. A deposit can nevertheless be a form of payment account (for example a bank current account is both a deposit and a payment account). For guidance on what constitutes a deposit for the purposes of the regulated activity of "accepting deposits" and guidance on the regulated activity itself, see ■ PERG 2.6.2 G to ■ 2.6.4 G and ■ PERG 2.7.2 G.

A payment institution is not prohibited from paying interest on a payment account but such interest cannot be paid from funds received from customers. More generally, if a payment institution were to offer savings facilities to its customers in the accounts it provides, in our view it would be holding funds not simply in relation to payment transactions and so would be in breach of regulation 33.

Q6. We are a credit card company and a payment institution. We are not a bank. Sometimes our customers will have a positive balance on their account because they have accidentally overpaid or because of refunds. Would this put us in breach of the requirement in regulation 33 that payment accounts held by payment institutions may be used only in relation to payment transactions?

No. In our view, this does not amount to a breach of regulation 33 and nor does the handling of credit balances in the circumstances constitute the activity of accepting deposits.

Q7. We are a credit institution. Do the PSRs 2017 apply to us?

Yes. If you are a credit institution, you will be subject to the conduct of business requirements in the PSRs 2017 to the extent that you provide payment services. The authorisation process applying to credit institutions remains that imposed by Part 4A of the Act. Authorised credit institutions will do not though need to apply for a separate Part 4A permission, in order to provide payment services. In other words, if a UK credit institution has a Part IV permission to carry on the regulated activity of accepting deposits, it will not need to be separately authorised to provide payment services in the UK. However, credit institutions intending to provide account information services or payment initiation services should have regard to the notification requirements in ■ SUP 15.8. The UK branch of a non-UK credit institution with a Part 4A permission to accept deposits is also authorised to provide payment services in the UK.

Q8. We are an electronic money institution. Do the PSRs 2017 apply to us?

Yes. If you are an electronic money institution, you will be subject to the conduct of business requirements in the PSRs 2017. If you are a credit institution, a credit union or a municipal bank, issuing electronic money is a regulated activity and you will require permission under the Act (see ■ PERG 2.6.4A). The authorisation and registration requirements for any other person intending to issue electronic money are governed by the Electronic Money Regulations (see ■ PERG 3A for guidance on the scope of the Electronic Money Regulations). If you are an authorised or small electronic money institution, the PSRs 2017 introduce a transitional provision into the Electronic Money Regulations which affects your right to continue to provide services in the UK after 12 July 2018 – see ■ PERG 3A.7.

Q9. If we provide payment services to our clients, will we always require authorisation or registration under the regulations?

Not necessarily; you will only be providing payment services, for the purpose of the regulations, when you carry on one or more of the activities in ■ PERG 15 Annex 2:

- as a regular occupation or business activity; and
- these are not excluded or exempt activities (see ■ PERG 15.5 Negative scope/exclusions).

Simply because you provide payment services as part of your business does not mean that you require authorisation or registration. You have to be providing payment services, themselves, as a regular occupation or business to fall within the scope of the regulations (see definition of "payment services" in regulation 2(1)). In our view this means that the services must be provided as a regular occupation or business activity in their own right and not merely as ancillary to another business activity. Accordingly, we would not generally expect the following to be providing payment services as a regular occupation or business activity:

- solicitors or broker dealers, merely through operating their client accounts in connection with their main professional activities;
- letting agents, handling tenants' deposits or rent payments in connection with the letting of a property by them;
- debt management companies, receiving funds from and making repayments for a customer as part of a debt management plan being administered for that customer;

- individuals initiating payments and dealing with payment account information for another person under a power of attorney they have entered into in a personal capacity, for example for a family member; and
- operators of loan or investment based crowd funding platforms transferring funds between participants as part of that activity.

The fact that a service is provided as part of a package with other services does not, however, necessarily make it ancillary to those services – the question is whether that service is, on the facts, itself carried on as a regular occupation or business activity.

Q10. [deleted]

Q11. Is it possible to be both an authorised person under FSMA and the agent of an authorised payment institution, a small payment institution or a registered account information provider?

Yes. There is nothing in the PSRs 2017 or the Act (for example section 39) which prevents a person from being both an authorised person and the agent of an authorised payment institution or a small payment institution or a registered account information provider.

Q11A. Is it possible to be both an authorised person under FSMA and an authorised payment institution, a small payment institution or a registered account information provider?

Yes. There is nothing in the PSRs 2017 or the Act which prevents a person from being both an authorised person and an authorised payment institution, a small payment institution or a registered account information provider. In some cases, for example if you issue credit cards (see further Q20A), it is likely that you will need permissions under the Act and the PSRs 2017 in order to provide your services.

Q11B. Is it possible to be both an authorised payment institution and the agent of an authorised payment institution, a small payment institution or a registered account information provider?

Yes. There is nothing in the PSRs 2017 which prevents a person from being both an authorised payment institution or electronic money institution and the agent of an authorised payment institution, a small payment institution or a registered account information provider. However, businesses will need to make clear to payment service users the capacity in which they are providing services, in accordance with regulation 34(16) and consumer protection legislation.

Q12. We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSRs 2017?

Not necessarily, as providing foreign exchange services is not itself a payment service. Foreign exchange transactions may exist as part of, or independent from, payment services. You will fall within the scope of the PSRs 2017 if you are providing payment services, by way of business, in the UK. For example, where a customer instructs their bank to make payment in euros from the customer's sterling bank account to a payee's bank account, we expect conduct of business requirements in the regulations to apply to the transfer of funds including information requirements relating to the relevant exchange rate.

By contrast, we would not expect the conduct of business provisions (including the right of cancellation) in the Payment Services Regulations to apply to a spot or forward fx transaction itself. That said, the electronic transmission, for example, by a bank on behalf of a customer to an fx services provider is likely to be subject to the PSRs 2017, because this is a transfer of funds executed by the bank. Similarly, the onward payment by a bank or fx services provider, on behalf of a client, to a third party of currency purchased in an fx transaction may amount to a payment service.

If you are a small payment institution or an authorised payment institution under the PSRs 2017, you may provide foreign exchange services that are closely related and ancillary to your payment services. However, that does not allow you to provide foreign exchange derivative services that would otherwise require authorisation under FSMA. You therefore need to consider the availability of exclusions for your foreign exchange business (see ■ PERG 13 Q31K).

Q13. We are a business that does not provide payment services. We usually accept payment in sterling for our goods and services but also offer a facility to our customers who prefer to pay us in other currencies, to do so on the basis of a currency conversion when making electronic payments via their payment service provider. Do the regulations apply to us?

Generally no. You are not required to be authorised or registered under the regulations. You will though be required to disclose information relating to your currency conversion service, including charges and the exchange rate to be used (for further information including details of criminal sanctions, see regulations 57 and 141).

15.3 Payment services

Q14. Where do we find a list of payment services?

In Schedule 1 Part 1 to the PSRs 2017. There are eight payment services, set out in full in Annex 2 to this chapter (including six activities which were payment services under the PSD regulations and the two new activities of payment initiation services and account information services). References to categories of payment services below adopt the structure of Schedule 1 to the PSRs 2017: for example, paragraph (1)(f) refers to "money remittance".

The payment service referred to in paragraph (1)(g) of Schedule 1 to the PSD regulations does not appear as a separate payment service in the PSRs 2017. Telecommunications, IT system or network operators with a paragraph (1)(g) permission should consider which permission(s) they require under the PSRs 2017, such as executing a payment transaction within (1)(c) or issuing a payment instrument under (1)(e). If the services within your paragraph 1(g) permission are also of the type described in paragraph 1(c), under the transitional provisions in regulation 152 of the PSRs 2017 you will be treated as an authorised payment institution, subject to the requirement to provide us with evidence, by 13 January 2020, that you hold the required own funds.

Q15. When might we be providing services enabling cash to be placed on a payment account (paragraph 1(a))?

When you are accepting cash electronically or over the counter or through ATMs which is placed on a payment account which you operate.

The crediting of interest to a payment account is not a service enabling cash to be placed on a payment account.

If you are a professional cash in transit business, or a non-professional cash collector in the not-for-profit sector, you may benefit from one of the exclusions in Schedule 1 paragraphs 2(b) and (c) of the PSRs 2017 (see Q33B and Q34A below).

Q16. What is a payment account?

"Payment account" is defined in regulation 2 as "an account held in the name of one or more payment service users which is used for the execution of payment transactions". The possibility of making payment transactions to a third party from an account or of benefitting from such transactions carried out by a third party is one of the defining features of the concept of "payment account". When determining whether or not an account is a "payment account" for the purposes of the regulations, in our view it is also appropriate to focus on its underlying purpose. To establish this it is necessary to consider a number of factors including:

- the purpose for which the account is designed and held out;

- the functionality of the account (the greater the scope for carrying out payment transactions on the account, the more likely it is to be a payment account);
- restrictive features relating to the account (for example, an account that has notice periods for withdrawals, or reduced interest rates if withdrawals are made, may be less likely to be a payment account);
- a limited ability to place and withdraw funds unless there is additional intervention or agreement from the payment service provider (this will tend to point more towards the account not being a payment account); and
- the extent to which customers use an account's payment service functionality in practice.

Accordingly, in our view, "payment accounts" can include, for example, current accounts, e-money accounts, flexible savings accounts, credit card accounts, other *running-account credit accounts* and current account mortgages. On the other hand, in our view fixed term deposit accounts (where there are restrictions on the ability to make withdrawals), child trust fund deposit accounts and certain cash Individual Savings Accounts (ISAs) are not payment accounts.

We consider only the features of the account used for the purpose of making transactions, to which the regulations apply, fall within scope. For example, in the case of a current account mortgage, the mortgage element of the account would be out of scope, albeit that a mortgage payment from the current account would be subject to the regulations.

In our view, mortgage or loan accounts do not fall within the scope of the regulations. This is on the basis that the simple act of lending funds or receiving funds by way of repayment of that loan does not amount to provision of a payment service.

The definition of 'payment account' in the PSRs 2017 is different to (and wider than) that in the Payment Accounts Regulations 2015.

If you are a provider of non-payment accounts, you may still be carrying on the payment services in paragraphs 1(c) and (d), for example if you execute payment transactions out of those non-payment accounts. Chapter 8 of the Approach Document provides guidance on how the PSRs 2017 conduct of business requirements apply to you.

Q17. When might we be providing services enabling cash withdrawals from a payment account (paragraph 1(b))?

When you provide, for example, an ATM cash withdrawal or over the counter cash withdrawal service in relation to the payment accounts which you operate.

Q18. When might we be providing execution of payment transactions, including transfers of funds on a payment account with a user's payment service provider or with another payment service provider: (i) direct debits, including one-off direct debits, or (ii) payment transactions through a payment card or a similar device, or (iii) credit transfers, including standing orders (paragraph 1(c))?

When you transfer funds from or to your clients, enabling them to pay or receive payment by way, for example, of direct debit, payment card (such as a debit card), electronic cheque or credit transfer (such as a standing order).

Where the funds are covered by a credit line though, you will be providing the service in paragraph 1(d).

In our view, the simple act of accepting payment by way of debit card or credit card for supply of your own goods or services does not generally amount to the provision of the service of execution of payment transactions through a payment card. For instance, where a restaurant accepts payment from a customer using the customer's payment card it is not providing a payment service to the customer, but simply accepting payment for the price of the meal. It is merely a payment service user receiving payment from the customer. The firm providing the merchant acquiring service enabling the restaurant to process the card transaction and receive payment is providing a payment service in this instance.

As regards a "direct debit", regulation 2 defines this as meaning "a payment service for debiting the payer's payment account where a payment transaction is initiated by the payee on the basis of consent given by the payer to the payee, to the payee's payment service provider or to the payer's own payment service provider". As well as the likes of utility and other household bills, in our view this definition extends to a case where sender and recipient are the same person, for example where the person holds two bank accounts in two different banks.

Providers of electronic communications networks or services may be providing this service or the service in paragraph 1(d). For example, where a subscriber to a mobile network can buy digital content from a third party via premium SMS services and the payment transactions do not fall within the exemption in ■ PERG 15 Annex 3(l), the service in paragraph (c) may be provided (this may be the case where the payment is made from the subscriber's prepaid account) or (if the provider is giving the subscriber credit to finance the purchase) the service in paragraph (d) may be provided (this may be the case where the payment is charged to the subscriber's monthly bill).

Q19. When might we be providing execution of the following types of payment transaction where the funds are covered by a credit line for the payment user-

- (i) direct debits, including one-off direct debits,**
- (ii) payment transactions executed through a payment card or a similar device,**
- (iii) credit transfers, including standing orders (paragraph 1(d))?**

When you provide a service to clients enabling them to complete payment, for example, by way of direct debit using overdraft facilities, payment card such as deferred debit or credit card, electronic cheque using overdraft facilities or credit transfer (such as a standing order) using overdraft facilities.

Q20. When might we be issuing payment instruments (paragraph 1(e))?

Issuing of payment instruments is defined in regulation 2 as 'a payment service by a payment service provider contracting with a payer to provide a payment instrument to initiate payment orders and to process the payer's payment transactions'.

A payment instrument is defined in regulation 2 and means any (a) personalised device or (b) personalised set of procedures agreed between the

payment service user and the payment service provider, in both cases where used by the payment service user in order to initiate a payment order.

Examples of persons issuing payment instruments, for the purposes of Schedule 1 to the regulations, include credit card and debit card issuers and electronic money institutions. In addition to the issue of physical instruments such as cards, arrangements by way of telephone call with password, or online instruction or a mobile telephone application by which a payment order can be initiated could also amount to issuing payment instruments, depending on the service being provided (see further the Court of Justice of the European Union decision in T-Mobile Austria GmbH v Verein für Konsumenteninformation, C-616/11).

In our view, it is the person who agrees the set of procedures with the payer and agrees that the payer can use those procedures to initiate an instruction to them requesting that they transfer funds to a payee that is issuing the payment instrument. So, for example, a business that provides a payer with a mobile application that transmits the payer's card details (or a number or series of numbers that will be recognised by the recipient as corresponding to that card, which may sometimes be described as a 'token'), along with a payment order, for processing by another person who is a payment service provider, is not issuing a payment instrument.

We would not generally expect you to be issuing payment instruments (or providing other payment services) if all you do is issue direct debit mandates simply for the purpose of being paid for the goods or services you provide to your customers or clients.

Q20A We are applying to become an authorised payment institution. Do we also need to be authorised under FSMA in order to issue credit cards?

Probably yes. While regulation 32(2) of the PSRs 2017 permits authorised payment institutions and small payment institutions to grant credit as an ancillary activity in certain circumstances, this regulation does not exempt you if you otherwise need to be an authorised person under FSMA. If you issue payment instruments and provide a credit line under a regulated credit agreement which covers transactions initiated using those payment instruments, you are likely to need to be an authorised person under FSMA (see ■ PERG 2.7 and CONC generally), with permission to carry on credit-related regulated activity, in addition to being authorised or registered under the PSRs 2017.

This is not necessarily the case, however, if you do not provide credit to individuals or relevant recipients of credit, or if the credit agreements are exempt agreements or an exclusion applies.

Q21. When might we be acquiring payment transactions (paragraph 1(e))?

Acquiring of payment transactions is defined in regulation 2 as "a payment services provided with a payment service provider contracting with a payee to accept and process payment transactions which result in a transfer of funds to the payee."

This includes traditional 'merchant acquiring' services enabling suppliers of goods, services, accommodation or facilities to be paid for purchases arising from card scheme transactions. However, as set out in Recital 10 of PSD2 it is designed to be technology neutral and capture different business models, in particular:

- those where more than one acquirer is involved (and so you may be acquiring payment transactions even if you are not the 'acquirer of record' from the point of view of the card scheme);

- regardless of the payment instrument used to initiate the transaction (for example where the instrument is a mobile telephone application); and
- those where there is no actual transfer of funds from acquirer to payee, because another form of settlement is agreed.

In our view, this definition is likely to capture 'master merchants' or 'payment facilitators' that contract with payees for the provision of acquiring services and activities carried out by businesses that aggregate carrier billing transactions. However, provision of merely technical services to merchants, such as processing or storage of data and provision of terminals or online gateways, will not itself constitute acquiring.

Q22. When might we be providing money remittance services (paragraph 1(f))?

Money remittance is defined in regulation 2 as: "... a service for the transmission of money (or any representation of monetary value), without any payment accounts being created in the name of the payer or payee, where-

- (a) funds are received from a payer for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee; or
- (b) funds are received on behalf of, and made available to, the payee".

The service of money remittance cannot therefore involve the creation of payment accounts. Recital 9 of PSD2 describes money remittance as "a simple payment service that is usually based on cash provided by a payer to a payment service provider, which remits the corresponding amount, for example, via communication network, to a payee or to another payment service provider acting on behalf of the payee".

This service is likely therefore to be relevant, for example, to money transfer companies and hawala brokers.

Although money remittance is traditionally a cash-based service, the definition is technology neutral and may therefore apply to business models where funds are received and transferred electronically.

Q23. We are a mobile network operator offering our client facilities to make payments - how do we tell whether and when the regulations apply to us?

You will be subject to the regulations if you provide a payment service as a regular occupation or business activity in the UK and this service does not fall within an exclusion.

You will not be providing a payment service when a customer uses their mobile device merely as an authentication tool to execute payment from the customer's payment account held with another provider (for example, simply providing instructions to their bank via SMS or a payment application), and payment is not made via you.

If your client can use pre-paid airtime to make purchases, you should also consider whether you are issuing electronic money, see ■ PERG 3A.

Mobile network operators and other electronic communication network operators may be able to take advantage of the exclusion set out in ■ PERG 15 Annex 3(I), see Q41A.

Q24 [deleted]

Q25. We are a bill payment firm. Do the PSRs 2017 apply to us?

Not in our view where you receive payment on behalf of the payee so that your receipt constitutes settlement of the payer's debt to the payee. By contrast, if you provide a remittance service which does not involve receipt on behalf of the payee and corresponds to the definition of "money remittance" in regulation 2, you will be providing a money remittance service.

Q25A. When might we be providing an account information service?

The service of providing account information is an online service to provide consolidated information on one or more payment accounts held by the payment service user with another payment service provider or with more than one payment service provider. This includes whether information is provided in its original form or after processing; and whether it is provided only to the payment service user or to the payment service user and to another person in accordance with the payment service user's instructions.

Account information service providers include businesses that provide users with an on-line 'dashboard' where they can view information from various payment accounts in a single place, businesses that use payment account data to provide users with personalised comparison services supported by presentation of account information, and businesses that provide information from the user's various payment accounts to both the user and another party (such as a lender or a financial advisor) on a user's instruction.

Whether a service is an account information service depends on whether there has been access to payment accounts. The account information service provider is subject to rights and obligations concerning such access under the PSRs 2017 (see Chapter 17 of the Approach Document). For a service to be an account information service it is also necessary for it to involve the provision of payment account information to the payment service user that has been consolidated in some way (although a service may be an account information service even if the information relates to only one payment account).

In our view, an account information service is not provided if the only information provided to the customer is the customer's name, account number and sort code.

More than one business may be involved in obtaining, processing and using payment account information to provide an online service to a customer. However, the business that requires authorisation or registration to provide the account information service is the one that provides consolidated account information to the payment service user (including through an agent) in line with the payment service user's request to that business.

A business that obtains and processes payment account information in support of an authorised or registered account information service provider, but does not itself provide the information to the user, is a technical service provider. It does not require authorisation or registration as an account information service provider. The authorised or registered account information service provider is responsible for compliance with the PSRs 2017 where account access is outsourced to a technical service provider.

An agent of an account information service provider cannot provide or purport to provide account information services in its own right. This means that if a firm (Firm A) (which may or may not be an account information service provider) passes data to another firm (Firm B), and Firm B uses that data to provide account information services to its customers, Firm B must be authorised or registered with permission to provide account information services. However, if Firm A is an account information service provider and

Firm B is acting as Firm A's agent, it may present Firm A's account information service to users through its own platform: for example, its website or application. It must be clear to the customer that Firm B is acting as agent of Firm A, the principal. This may include, for example, using Firm A's branding within Firm B's application. Further, the agreement for the provision of account information services must be between the customer and Firm A, the principal.

Q25B. When might we be providing a payment initiation service?

The service of payment initiation is defined in regulation 2 as 'an online service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider'.

This includes businesses that contract with online merchants to enable customers to purchase goods or services through their online banking facilities, instead of using a payment card or other payment method. However, it is not limited to arrangements where the service provider has a pre-existing relationship with the merchant. Any business offering payment initiation services as a regular occupation or business activity will require this permission unless exempt under Schedule 1 Part 2.

In our view, the provider of a service that transmits a payer's card details, along with a payment order, to the payer's payment service provider, but does not come into possession of personalised security credentials, is not carrying out a payment initiation service.

15.4 Small payment institutions, agents and exempt bodies

Q26. What criteria must we meet to be a "small payment institution"?

The conditions are set out in regulation 14 and include the following:

- the average of the preceding 12 months' total amount of payment transactions executed by you, including your agents in the UK, does not exceed 3 million euros (or an equivalent amount) per month;
- your business must not include the provision of account information services or payment initiation services;
- none of the individuals responsible for the management or operation of your business has been convicted of offences relating to money laundering or terrorist financing, the Act, the PSRs 2017 or the PSD regulations or financial crimes;
- if you are a partnership, an unincorporated association, or a body corporate, you must satisfy us that any persons having a qualifying holding in your business are fit and proper persons having regard to the need to ensure the sound and prudent conduct of the affairs of a small payment institution;
- you must satisfy us that your directors (if you are a body corporate), any persons responsible for the management of your business, and where relevant the persons responsible for the management of your payment services, are of good repute and possess appropriate knowledge and experience to provide payment services;
- if you are a body corporate you must satisfy us that any close links you have with another person are not likely to prevent our effective supervision of you. If it appears to us that you have any close links that are subject to the laws, regulations or administrative provisions of a territory outside of the UK ("the foreign provisions") you must satisfy us that neither the foreign provisions, nor any deficiency in their enforcement, would prevent our effective supervision of you;
- your head office, registered office or place of residence, as applicable, is in the UK; and
- you must comply with the registration requirements of the Money Laundering Regulations 2017, where they apply to you.

Q27. We satisfy the conditions for registration as a small payment institution - does that mean we have to register as one?

No, there are other options available to you. You may choose to become an agent of a payment services provider.

Q28. We only wish to be an agent. Do we need to apply to the FCA and/or PRA for registration?

No. If your principal is a payment institution, it is its responsibility to register you as its agent. You are required to be registered on the Financial Services Register before you provide payment services.

You may act for more than one principal, but each principal must register you as its agent.

An agent can only provide its principal's payment services; the agent cannot provide or purport to provide the services in its own right. A person who behaves, or otherwise holds themselves out, in a manner which indicates (or which is reasonably likely to be understood as indicating) that they are a payment service provider is guilty of an offence under regulation 139 of the PSRs 2017. It must be clear to a customer that the agent is acting on behalf of the principal and the agreement to provide payment services must be between the principal and the customer.

Q29. We are an agent of a credit institution for the purpose of providing payment services. Do we need to apply to the FCA and/or PRA for registration?

No. If you are such an agent of a credit institution which is permitted to provide payment services in the UK, you are not required to be registered under the PSRs 2017. A credit institution will be permitted to provide payment services if it has a Part 4A permission to accept deposits.

Q30. We are an agent of an electronic money institution for the purpose of providing payment services. Do we need to apply to the FCA for registration under the PSRs 2017?

As such an agent you will need to be registered by your principal under the *Electronic Money Regulations*, see ■ PERG 3A Q21.

Q31. We are a credit union. Are we exempt from the regulations?

Yes. You are exempt from the PSRs 2017 by virtue of regulation 3. Note, however, that as a consequence of this the conduct requirements set out in the FCA's Banking: Conduct of Business sourcebook (BCOBS) will apply to you in circumstances in which they would not apply to other payment service providers.

Q32. We are a municipal bank. Are we exempt from the regulations?

Yes. You are exempt from the PSRs 2017 (together with credit unions and the National Savings Bank), by virtue of regulation 3. Unlike credit unions, you are required to notify us if you wish to provide payment services, although you only need to do this once.

15.5 Negative scope/exclusions

Schedule 1 Part 2 to the PSRs 2017 contains a list of activities which do not constitute payment services. The following questions only deal with a selection of these. You should consult Annex 3 to this chapter for a full list of provisions, if you require more details.

Q33. Our business consists of cash payments directly from or to our customers - do the regulations apply to us?

No. The PSRs 2017

do not apply to payment transactions made in cash, without the intervention of an intermediary (see ■ PERG 15 Annex 3, paragraph (a)).

Q33A. We are an e-commerce platform that collects payments from buyers of goods and services and then remits the funds to the merchants who sell goods and services through us – do the regulations apply to us?

Recital 11 of PSD2 makes it clear that some e-commerce platforms are intended to be within the scope of regulation. Whether an e-commerce platform is in or out of scope of the PSRs 2017 will depend on its business model.

An e-commerce platform may not be carrying on payment services at all: for example, if the platform is a re-seller of the goods or services (i.e. is acting as principal in the sale or supply of goods or services having purchased them from a third party), such that it is the intended recipient of the funds paid by the customer and there is no contract between the customer to whom the goods or services are now being sold and the third party from whom the platform purchased the goods or services.

If they are providing payment services, the platform should consider whether they are doing so as a regular occupation or business activity (see Q9).

The platform should also consider whether they fall within the exclusion at ■ PERG 15 Annex 3, paragraph (b). The PSRs 2017 do not apply to payment transactions from the payer to the payee through a commercial agent authorised via an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of either the payer or the payee but not both the payer and the payee.

An example of where a platform will be acting for both the payer and the payee would be where the platform allows a payer to transfer funds into an account that it controls or manages, but this does not constitute settlement of the payer's debt to the payee, and then the platform transfers corresponding amounts to the payee, pursuant to an agreement with the payee.

In our view, you have the authority to conclude the sale or purchase of goods or services on behalf of the payer or the payee only if you have the

authority to affect the legal relations of your principal, who is the payer or the payee, with third parties and to bind the payer or payee to a purchase or sale of goods or services. This would not be fulfilled simply by providing the technical means by which a payer places or a payee accepts an order.

If an e-commerce platform is providing payment services as a regular occupation or business activity and does not benefit from an exclusion or exemption, it will need to be authorised or registered by us.

An example of an e-commerce platform that is likely to need to be authorised or registered by the FCA is one that provides escrow services as a regular occupation or business activity. Escrow services generally involve a payment service consisting of the transfer of funds from a payer to a payee, with the platform holding the funds pending the payee's fulfilment of certain conditions or confirmation by the payer. It should be kept in mind that an escrow service may be a regular occupation or business activity of a platform even if it is provided as part of a package with other services. Escrow providers do not typically have the authority to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee, and in those circumstances, would not fall within the exclusion for commercial agents.

Q33B. We are a professional cash collection company. We collect coins and banknotes from our customers and then remit them electronically to our customers' bank accounts – do the regulations apply to us?

No. The PSRs 2017 do not apply to the professional physical transport of banknotes and coins, including their collection, processing and delivery (■ PERG 15 Annex 3, paragraph (c)). In our view, the exclusion applies to the delivery of funds to the customer, whether in physical or electronic form. However, it does not extend to the remitting of funds to third parties on the customer's behalf.

Q34. We are a charity which collects donations in the form of coins, banknotes and electronic payments and transmits funds via bank transfer to the causes that we support do the regulations apply to us?

No. The PSRs 2017 do not apply to payment transactions consisting of non-professional cash collection and delivery as part of a not-for-profit or charitable activity (see ■ PERG 15 Annex 3, paragraph (d)).

Q34A. We are an online fundraising platform which collects donations in the form of electronic payments and transmits funds electronically to the causes and charities that have an agreement with us - do any of the exclusions apply to us?

Persons collecting cash on behalf of a charity and then transferring the cash to the charity electronically do not fall within the exclusion in ■ PERG 15 Annex 3, paragraph (d), unless they themselves are carrying this out both non-professionally and as part of a not-for-profit or charitable activity. For example, a group of volunteers that organises regular fundraising events to collect money for charities would fall within this exclusion. On the other hand, an online fundraising platform that derives an income stream from charging charities a percentage of the money raised for them (whether or not this is for profit) is unlikely to fall within this exclusion.

Nor will an online fundraising platform accepting donations and then transmitting them to the intended recipient be able to take advantage of the exclusion in paragraph (b), as they are not a commercial agent authorised via an agreement to negotiate or conclude the sale or purchase

of goods or services on behalf of either the payer or the payee but not both the payer and the payee.

Online fundraising platforms should also consider the guidance in Q33A.

Q35. We provide a "cashback" service to our customers when they pay for their goods at the checkout - do the regulations apply to us?

No. The PSRs 2017 do not apply to cashback services (see ■ PERG 15 Annex 3, paragraph (e)).

Q36. We are a bureau de change providing cash only forex services and our clients do not have accounts with us - are these services outside the scope of the regulations?

Yes. The PSRs 2017 do not apply to cash-to-cash currency exchange operations where the funds are not held on a payment account (see ■ PERG 15 Annex 3, paragraph (f)). If you allow a customer to pay for foreign currency using a payment card, this does not mean that you will be providing a payment service. The regulations will though apply to the payment transaction made using the payment card and the payment service provided to you by the merchant acquirer. In other words, the regulations apply to the merchant acquirer's services but yours remain outside the scope of authorisation or registration.

The PSRs 2017 do not affect your obligations under the *Money Laundering Regulations*.

Q37. Do the regulations distinguish between (i) payment transactions between payment service providers and (ii) payment services provided to clients?

Yes, broadly the object of the PSRs 2017 is the payment service provided to specific clients and not the dealings among payment service providers to deliver the end payment arising from that service. The PSRs 2017 do not apply to payment transactions carried out between payment service providers, their agents or branches for their own account (see PERG 15 Annex 3, paragraph (m)). This would include, for example, electronic payment from one payment services provider to another acting as such, in discharge of a debt owed by one to the other.

A payment transaction may involve a chain of payment service providers. Where a bank, for example, provides a cash withdrawal or execution of payment transaction service to its customer which involves the use of a clearing bank, it will still be providing a payment service to its customer.

The regulations do not though cover inter-bank settlement. More specifically, the regulations do not apply to payment transactions carried on within a payment or securities settlement system between payment service providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system (see ■ PERG 15 Annex 3, paragraph (h)).

Q38. We are an investment firm providing investment services to our clients - are payment transactions relating to these services caught by the regulations?

Generally, no. Where payment transactions only arise in connection with the main activity of providing investment services, in our view it is unlikely that you will be providing payment services by way of business. In those limited

cases where you are, the PSRs 2017 do not apply to securities assets servicing, including dividends, income or other distributions and redemption or sale (see ■ PERG 15 Annex 3, paragraph (i)).

Q39. We are a firm simply providing IT support in connection with payment system infrastructures - are these services subject to the regulations?

No. There is an exclusion for technical service providers which simply provide IT support for the provision of payment services (see ■ PERG 15 Annex 3, paragraph (j)). Other support services that may be provided by technical service providers include data processing, storage and authentication. This does not mean that where these services form part of a payment service they are not regulated, but in that case it is the payment service provider that is responsible under the PSRs 2017 for the provision of these services, not the person they have outsourced these technical services to.

Providers of payment initiation services or account information services are not technical service providers.

Q40. Which types of payment card could fall within the so-called "limited network" exclusion (see PERG 15, Annex 3, paragraph (k))?

The "limited network" exclusion forms part of a broader exclusion which applies to services based on specific payment instruments that can be used only in a limited way and -

- (a) allow the holder to acquire goods or services only in the issuer's premises;
- (b) are issued by a professional issuer and allow the holder to acquire goods or services only within a limited network of service providers which have direct commercial agreements with the issuer;
- (c) may be used only to acquire a very limited range of goods or services; or
- (d) are valid only in the United Kingdom, are provided at the request of an undertaking or a public sector entity, and are regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer.

It is an overarching requirement for the exclusion to apply that the payment instrument can be used only in a 'limited way'. This means that even if a payment instrument could be said to fall under one of the paragraphs (a) to (d) above, it may not qualify for the exclusion if, on a reasonable view, it is not sufficiently limited. In particular, the recitals to PSD2 (which the PSRs 2017 implemented) indicate that the following should not be considered 'limited' (see recitals 13 and 14 PSD2):

- payment instruments that can be used to acquire goods and services within more than one limited network;
- payment instruments that can be used to acquire an unlimited range of goods and services;

specific-purpose instruments which become general-purpose;
instruments that can be used in a network of service providers which is continuously growing.

Generally, it will not be sufficient to rely on the customer terms and conditions alone to demonstrate that an instrument can only be used in a limited way. We would expect providers to take such steps as are reasonably practicable to ensure the limitation is effective, including functional restrictions where technically possible. The limitation should also be reflected in the marketing of the product.

As regards (a), examples of excluded instruments could include:

- (1) staff catering cards - reloadable cards for use in the employer's canteen or restaurant;
- (2) tour operator cards - issued for use only within the tour operator's holiday village or other premises (for example, to pay for meals, drinks and sports activities);

team related cards - cards that can only be used at a specific stadium or team's website;

- (3) store cards - where the card can only be used at the issuer's premises or website (so where a store card is co-branded with a third party debit card or credit card issuer and can be used as a debit card or credit card outside the store, it will not benefit from this exclusion).

While store cards that can be used on a department store website to purchase items from concessions may benefit from the exclusion, payment instruments that can be used on online marketplaces are unlikely to do so. This is because the scale of the operation and the very broad range of the goods and services that can be sold or the sellers that can sell through such marketplaces mean that instruments that can be used on them are unlikely to be sufficiently limited.

In our view, 'gift cards' where the issuer is a retailer and the gift card can only be used to obtain goods or services from that retailer are not payment instruments within the meaning of the PSRs 2017. This is because these basic gift cards do not initiate payment orders; payment for the goods or services is made by the customer to the retailer of the goods in advance, when the card is purchased from the retailer. Accordingly, this exclusion is not relevant to them.

In order to meet the test in (b), recital 13 of PSD2 states that the instrument must be limited to use at a 'specific retailer or specific retail chain, where the entities involved are directly linked by a commercial agreement which for example provides for the use of a single payment brand and that payment brand is used at the points of sale and appears, where feasible, on the payment instrument that can be used'. It also states that to help limit risks to consumers, it should not be possible to use the same instrument to make payment transactions to acquire goods and services within more than one limited network.

Recital 14 of PSD2 goes on to state that 'instruments which can be used for purchases in stores of listed merchants should not be excluded from the scope of this Directive as such instruments are typically designed for a network of service providers which is continuously growing.'

In our view, examples of excluded instruments falling within (b) include:

- (1) transport cards - where these are used only for purchasing travel tickets from providers within a closed system (for example, the Oyster card which provides access to different service providers within the London public transport system);
- (2) fuel cards (including pan-European cards) - where these are issued for use at a specified chain of fuel stations and forecourts at these stations;
- (3) membership cards - where a card can only be used to pay for goods or services offered by a specific club or organisation;
- (4) store cards - where the card can be used at a specified chain of stores sharing a common brand, whether under common ownership or under a franchise agreement;

store cards - where the card can be used at stores under common ownership, even where they do not share a common brand;

a card that can only be used to buy goods or services within a specific university campus.

We would not generally expect 'city cards' to fall within this exclusion, to the extent that participation is open to all a city's shops and businesses.

'Mall cards' may fall within this exclusion if, on the facts, the criteria are met. In our view you will not be able to take advantage of this exclusion unless: it is made clear in the relevant terms and conditions of the card that the purchaser of the value is only permitted to use the card to buy from outlets of merchants with whom you have direct commercial agreements located within a particular shopping centre; and the card is functionally restricted to one shopping centre. A card that can be used at a number of different shopping centres, or where use is restricted only by the terms and conditions that apply to the card and is not functionally restricted is unlikely to fall within this exclusion. There must be direct commercial agreements in place between the issuer and the merchants – this will not be satisfied where the merchant's agreement is with the shopping centre, a programme manager or a different entity in the issuer's group and not the issuer.

Outside these cases there may be other situations where a network is sufficiently limited. In these cases, we will consider what factors constrain the growth of the network, and whether these are sufficiently robust and independent to ensure the overarching condition is met.

We also believe that placing an arbitrary cap on the number of firms that can be within a network, without any reference to the specific characteristics of the case, is not an appropriate approach. Similarly, we believe that a cap on membership numbers volunteered by an issuer without reference to any independent limitation will not be an appropriate approach.

Examples of where the network is not sufficiently limited include: trade associations that have membership criteria which are open and which could not therefore exclude continuous growth; and mobile app-based payment instruments which have an unlimited number of providers of goods and services.

In relation to (c), recital 13 states that it should only be possible to purchase a 'very limited range of goods or services, such as where the scope of use is effectively limited to a closed number of functionally connected goods or services regardless of the geographical location of the point of sale'.

Examples of instruments falling within (c) could be:

fuel cards - where these can only be used to purchase fuel and a closed number of goods or services that are functionally connected to fuel (such as engine oil and brake fluid), including where the cards can be used at multiple retail chains;

transport cards – where these are used only for purchasing travel tickets;

payment instruments that can be used only to purchase taxi journeys;

payment instruments that can be used only to purchase live entertainment tickets and services directly tied to live entertainment events;

payment instruments that can be used only to purchase digital content within an online game to pay developers of these games.

In our view, instruments falling within (d) could include:

pre-paid cards provided by local authorities to benefit recipients for use at a specified chain of grocery stores;

government-issued childcare vouchers.

Instruments for the purpose of this exclusion can include vouchers, mobile applications, cards and other devices.

Service providers relying on paragraphs (a) to (c) of this exclusion are required to notify the FCA where the total value of payment transactions executed through such services exceeds 1 million euros in any 12 month period as directed: see <https://www.fca.org.uk/firms/limited-network-exclusion>.

Q41. [deleted]

Q41A. In what circumstances are payments made via a mobile phone excluded?

The 'electronic communications exclusion' (see PERG 15 Annex 2 paragraph (l)) applies to payment transactions resulting from services provided by a provider of electronic communications networks or services.

For this exclusion to apply the service must be provided in addition to electronic communications services for a subscriber to the network or service and the payment must be charged to the related bill.

Where the provider of the network or service allows the customer to pay for eligible transactions out of a prepaid balance that is also used to purchase the electronic communications services, in our view this will amount to the payment transaction being charged to the related bill.

The exclusion only applies:

to the purchase of digital content and voice-based services (such as music and other digital downloads and premium rate services), regardless of the device used for the purchase or consumption of the digital content; or

when performed from or via an electronic device for donations to charity (for example SMS donations) or for the purchase of tickets.

In all cases the value of any single payment transaction must not exceed £40, and the cumulative value of payment transactions for an individual subscriber in a month must not exceed £240.

The exclusion does not only apply to purchases made via mobile phones. It could, for example, apply to the purchase of music streaming, news content or other digital services through a smart TV or set-top box if provided in addition to electronic communications services and charged to the related bill.

The exclusion does not apply to the purchase of physical goods.

An electronic communications network or service provider providing services falling within the electronic communications exclusion must notify the FCA and provide it with an annual audit opinion that the transactions to which the services relate comply with the financial limits - as directed. See: <https://www.fca.org.uk/firms/electronic-communications-exclusion>. For the purpose of application of the financial limits, the FCA will expect notification on the basis of individual telephone numbers or SIM cards being treated as separate 'subscribers', rather than account holders.

Where a provider of a network or service sells subscribers additional goods or services itself (i.e. where it is acting as principal) this exclusion will not be relevant, as no payment service is being provided by the provider of the network or service even if the payment is charged to the related bill.

Q41B.I act as an intermediary between suppliers of digital goods and services and network operators. Does the electronic communications exclusion apply to me?

In practice, electronic network operators often do not deal directly with suppliers of digital goods and services, but via carrier billing platforms that act as intermediaries or aggregators.

The PSRs 2017 make clear that where a network operator benefits from the exclusion with respect to a particular transaction, the provider of any other payment service resulting from that transaction will also benefit from the exclusion (this is known as the "cascade").

The service provided by the billing platform to merchants will amount to a payment service (for example, merchant acquiring or operation of a payment account) only where it results from transactions that do not fall within this exclusion.

All firms which form part of the cascade with respect to a particular transaction can benefit from the ECE for that transaction. However, if the firm at the start of the cascade does not comply with the conditions for the ECE, this will affect the other firms within the chain of providers. Since they cannot benefit from the cascade if the original transaction is not within the ECE, they will need to consider what action they need to take to avoid breaching the regulations, such as becoming authorised.

This may be a particular issue for phone-paid services where both 'originating operators' and terminating operators potentially provide payment services to their customers. Typically, the originating operator is the telecoms provider of the purchaser of the digital goods or services and the 'terminating operator' is typically the telecoms provider to the supplier of digital goods and services. A terminating operator's carrier billing platform may for example involve the provision of merchant acquiring services to and/or operation of a payment account for a supplier.

Originating operators can directly ensure financial thresholds in the ECE conditions are not breached with respect to a particular transaction. For

example, they can cap the cost of a call and put in place monthly spend caps. This will not be possible for terminating operators. As a result, they will need to consider how they can ensure that the ECE limits have not been exceeded if they wish to rely on the exclusion.

Q42. [deleted]

Q43. We are a company which performs a group treasury function, including providing payment services directly to other group companies - are these intra-group payment services excluded from the regulations?

Yes. Intra-group payment transactions and related services are excluded from the PSRs 2017, where payment is made direct from one group company to another (see ■ PERG 15 Annex 3, paragraph (n)). This includes the case where the group company providing the payment service is, itself, a payment service provider otherwise subject to the regulations. However, it does not include intra-group payment transactions that are made through a payment service provider that does not belong to the group.

In our view, this exclusion is likely to extend to payment initiation services and account information services where these are provided by one group company to another member of the same group as part of a group treasury function.

Q44. We are an independent ATM deployer offering cash dispensing facilities to users on behalf of card issuers. We are not a bank. Are we subject to the regulations?

No, assuming you do not provide other payment services listed in Schedule 1 Part 1 to the PSRs 2017 and are not party to the framework contract with the customer withdrawing money (see ■ PERG 15 Annex 3, paragraph (o)). However, you must still provide the customer with the information referred to in regulation 61 of the PSRs on withdrawal charges. If other payment services are provided, all your payment services (including the ATM cash dispensing facilities) will be subject to the regulations, to the extent that other exclusions are inapplicable.

15.6 Territorial scope

Q45. We are a UK payment institution - when will we need to make a passport notification?

[deleted]

Q46. We are a non- UK payment institution providing payment services to UK customers from a location outside the UK. Do we require authorisation or registration under the regulations?

No. When considering whether you fall within the scope of the PSRs 2017, our starting point is to consider whether an EEA payment services provider would be providing cross-border services in analogous circumstances (for example, when it provides payment services to EEA customers in an EEA State other than the place in which it is located).

As regards the provision of cross-border payment services between EEA States, in our view the Commission Interpretative Communication (Freedom to provide services and the interest of the general good in the Second Banking Directive (97C 209/04)) provides a useful starting point, in particular because payment services form part of the *CRD* passport.

Accordingly, we would not generally expect a payment services provider incorporated and located outside the UK to be within the scope of the regulations, if all it does is to provide internet-based and other services to UK customers from that location.

15.7



15.7 Transitional provisions [deleted]

[deleted]

[deleted]

Payment Services in Schedule 1 Part 1 to the PSRs 2017

- (a) Services enabling cash to be placed on a payment account and all of the operations required for operating a payment account
- (b) Services enabling cash withdrawals from a payment account and all of the operations required for operating a payment account
- (c) The execution payment transactions, including transfers of funds on a payment account with the user's payment service provider or another payment service provider-
 - (i) execution of direct debits, including one-off direct debits;
 - (ii) execution of payment transactions through a payment card or a similar device;
 - (iii) execution of credit transfers, including standing orders
- (d) The execution of payment transactions where the funds are covered by a credit line for the payment user-
 - (i) execution of direct debits, including one-off direct debits;
 - (ii) execution of payment transactions executed through a payment card or a similar device;
 - (iii) execution of credit transfers, including standing orders
- (e) Issuing payment instruments or acquiring payment transactions
- (f) Money remittance
- (g) Payment initiation services
- (h) Account information services

Schedule 1 Part 2 to the PSRs 2017: Activities which do not constitute payment services

- (a) Payment transactions executed wholly in cash and directly between the payer and the payee, without any intermediary intervention.
- (b) Payment transactions between the payer and the payee through a commercial agent authorised in an agreement to negotiate or conclude the sale or purchase of goods or services on behalf of either the payer or the payee but not both the payer and the payee.
- (c) The professional physical transport of banknotes and coins, including their collection, processing and delivery.
- (d) Payment transactions consisting of non-professional cash collection and delivery as part of a not-for-profit or charitable activity.
- (e) Services where cash is provided by the payee to the payer as part of a payment transaction for the purchase of goods or services following an explicit request by the payer immediately before the execution of the payment transaction.
- (f) Cash-to-cash currency exchange operations where the funds are not held on a payment account.
- (g) Payment transactions based on any of the following documents drawn on the payment service provider with a view to placing funds at the disposal of the payee-
 - (i) paper cheques of any kind, including travellers' cheques;
 - (ii) bankers' drafts;
 - (iii) paper-based vouchers;
 - (iv) paper postal orders.
- (h) Payment transactions carried out within a payment or securities settlement system between payment services providers and settlement agents, central counterparties, clearing houses, central banks or other participants in the system.
- (i) Payment transactions related to securities asset servicing, including dividends, income or other distributions, or redemption or sale, carried out by persons referred to in sub-paragraph (h) or by investment firms, credit institutions, collective investment undertakings or asset management companies providing investment services or by any other entities allowed to have the custody of financial instruments.
- (j) Services provided by technical service providers, which support the provision of payment services, without the provider entering at any time into possession of the funds to be transferred, excluding payment initiation services or account information services but including-
 - (i) the processing and storage of data;
 - (ii) trust and privacy protection services;
 - (iii) data and entity authentication;
 - (iv) information technology;
 - (v) communication network provision; and
 - (vi) the provision and maintenance of terminals and devices used for payment services.
- (k) Services based on specific payment instruments that can only be used in a limited way and meet one of the following conditions:
 - (i) allow the holder to acquire goods or services only in the issuer's premises;

- (ii) are issued by a professional issuer and allow the holder to acquire goods or services only within a limited network of service providers which have direct commercial agreements with the issuer;
- (iii) may be used only to acquire a very limited range of goods or services; or
- (iv) are valid only in the United Kingdom, are provided at the request of an undertaking or a public sector entity, and are regulated by a national or regional public authority for specific social or tax purposes to acquire specific goods or services from suppliers which have a commercial agreement with the issuer,

and for these purposes the "issuer" is the person who issues the instrument in question.

- (l) Payment transactions resulting from services provided by a provider of electronic communications networks or services, including transactions between persons other than that provider and a subscriber, where those services are provided in addition to electronic communications services for a subscriber to the network or service and where the additional service is-
 - (i) for the purchase of digital content and voice-based services, regardless of the device used for the purchase or consumption of the digital content, and charged to the related bill; or
 - (ii) performed from or via an electronic device and charged to the related bill for the purchase of tickets or for donations to organisations which are registered or recognised as charities by public authorities, whether in the United Kingdom or elsewhere.

provided that the value of any single payment transaction does not exceed £40, and the cumulative value of payment transactions for an individual subscriber in a month does not exceed £240.

- (m) Payment transactions carried out between payment service providers, or their agents or branches, for their own account.
- (n) Payment transactions and related services between a parent undertaking and its subsidiary or between subsidiaries of the same parent undertaking, without any intermediary intervention by a payment service provider other than an undertaking belonging to the same group.
- (o) Cash withdrawal services provided through automated teller machines, where the provider-
 - (i) is acting on behalf of one or more card issuers;
 - (ii) is not party to the framework contract with the customer withdrawing money from a payment account; and
 - (iii) does not conduct any other payment service.

Chapter 16

Scope of the Alternative Investment Fund Managers Regime

16.1 Introduction

G **Question 1.1: What is the purpose of the questions and answers in this chapter?**

The purpose is to consider the scope of *regulated activities* specifically relating to the Alternative Investment Fund Managers Directive 2011/61/EU ("AIFMD") as it was implemented in the UK through the RAO. The AIFMD regime in the *United Kingdom* is based on the AIFMD and the AIFMD level 2 regulation as well as other UK legislation, including the AIFMD UK regulation.

Question 1.2: What are the regulated activities specifically relating to AIFMD?

The *regulated activities* that specifically relate to the AIFMD regime in the *United Kingdom* are:

- (1) *managing an AIF* (see ■ PERG 16.3); and
- (2) acting as a depositary of an AIF (see ■ PERG 16.4).

Question 1.3: What are the main measures dealing with the scope?

They are the UK provisions which implemented the AIFMD, which include:

- (1) the AIFMD level 2 regulation
- (2) the ESMA document "Guidelines on key concepts of the AIFMD" (ESMA/2013/611); and
- (3) the AIFMD UK regulation which largely implemented the AIFMD in the UK.

Question 1.4: What is the approach to deciding whether something is covered by the AIFMD?

When defining what an AIF is, the drafters of AIFMD faced a dilemma. If there is a precise and detailed definition there is a risk that some funds that should be regulated would fall outside regulation, given the wide variety of legal forms they can take. However, a broad definition entails a risk that AIFMD is given a much wider scope than intended. The agreed definition of AIF is drafted at a high level of generality and uses words which have a wide meaning. So we have approached ■ PERG 16 by looking at what sorts of entities are clearly meant to be caught and then using that as a guide to identify cases which are not fairly within the definition, to avoid an interpretation that would give an exorbitantly wide scope. In the same way, descriptions of what is excluded should not be read in a way that would take cases out of scope that are fairly within it.

A number of answers in ■ PERG 16 take a broad purposive interpretation and look at economic substance. The definition of *AIF* is drafted at a high level without much detail and uses broad concepts rather than precise technical or legal ones, meaning that ■ PERG 16 takes a similar approach to interpreting it.

Question 1.5: Are there transitional arrangements?

Yes. Some of the transitional arrangements for implementing the *AIFMD* may affect the date by which a *person* who would otherwise be *managing an AIF* or acting as a depositary of an AIF needs *permission* to do so.

■ PERG 16 does not deal with these arrangements. Details are in Part 9 of the *AIFMD UK Regulation*.

16.2 What types of funds and businesses are caught?

G Question 2.1: What is the basic definition of an AIF?

For the purposes of the *AIFMD* regime in the *United Kingdom*, an *AIF* is a collective investment undertaking, including investment compartments of such an undertaking, which:

- (1) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (2) is not a *UK UCITS*.

The key elements of the definition are:

- (3) it is a collective investment undertaking (*CIU*);
- (4) it has a defined investment policy;
- (5) it raises capital with a view to investing that capital for the benefit of those investors in accordance with that policy;
- (6) an *AIF* does not include a *UK UCITS*.

It is necessary to satisfy all the elements of the definition in order to be an *AIF*.

Question 2.2: Does an AIF have to take any particular legal form?

No.

- An *AIF* may be open-ended or close-ended.
- It may or may not be listed.
- It does not matter whether it is set up under contract, trust or statute or if it takes another type of legal form. It does not matter what kind of legal structure it has.
- A limited partnership, a limited liability partnership, a limited liability company, an ordinary partnership, a unit trust, an *ICVC* and a contractual scheme could all be covered.
- It does not matter where the *AIF* is formed. It may be formed under the laws of the *United Kingdom* or any other country.

Question 2.3: What is an undertaking for these purposes?

It covers a wide range of entities and goes beyond the *Glossary* definition of *undertaking*. It will include a *body corporate*, a *partnership*, an unincorporated association and a fund set up as a trust.

Question 2.4: Is an AIF the same as a collective investment scheme?

No, although the two concepts overlap considerably.

Question 2.5: Is an undertaking excluded because it has no external manager?

No. An undertaking that has no external manager and is managed by its own *governing body* may be an *AIF*.

Question 2.6: Is the definition restricted to funds that invest in certain kinds of asset?

No. Assets can include traditional financial assets (equity, equity related and debt), private equity, real estate and also non-traditional asset classes such as ships, forests, wine, and any combination of these assets. These are just examples; assets can include assets of any kind or combinations.

Question 2.7: Does the definition depend on how the underlying property is held?

No. The investors may receive a beneficial interest in the underlying property, as might be the case in a trust structure. They may also receive no interest in the underlying property but, instead, their interest may be represented by shares or units in the *AIF*, as would be the case where the *AIF* takes the form of a company limited by shares. It might even be possible for the investors to own the assets jointly.

Question 2.8: Must the scheme be time-limited or designed to allow investors to exit from time to time or at a particular time?

A scheme may be an *AIF* even if there are no arrangements for units or shares to be repurchased, redeemed or cancelled. Likewise a scheme may be an *AIF* even if it does not have a finite life.

Question 2.9: Is a business excluded because it is exclusively or largely funded by debt or other types of leverage rather than equity capital?

No. See the answers to Questions 2.37 (Is a securitisation vehicle covered?) and 2.44 (Can an issue of debt securities be an *AIF*?).

Key elements of the definition

Capital-raising

Question 2.10: You say that an undertaking needs to raise capital to be an AIF. What does capital raising involve?

Under the *ESMA AIFMD key concepts guidelines*, the commercial activity by an undertaking or a *person* (or entity acting on its behalf - typically, the *AIFM*) of taking direct or indirect steps to procure the transfer or commitment of capital by one or more investors to the undertaking for the purpose of investing it in accordance with a defined investment policy, should amount to the activity of raising capital.

It is immaterial whether:

- (1) the activity takes place once, on several occasions or on an ongoing basis;
- (2) the transfer or commitment of capital is in the form of subscriptions in cash or in kind.

If the capital raising is complete before the *regulated activities of managing an AIF* and acting as a depositary of an AIF come into force, the undertaking may still be an AIF, although transitional arrangements may apply (see Part 9 of the *AIFMD UK Regulation*).

An undertaking which makes investments will not be an AIF if those investments are funded by the undertaking other than by raising capital in accordance with the definition of an AIF. The fact that the undertaking's shares can be bought and sold on a stock exchange is not, of itself, the raising of capital by the undertaking.

Question 2.11: Is a fund that only allows a single investor caught?

Under the *ESMA AIFMD key concepts guidelines*, an undertaking which is not prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors. This is the case even if it has only one investor.

A limited partnership in which there is a single limited partner making a substantive contribution and a general partner making a nominal £1 contribution will not be an AIF (subject to the answer to Question 2.12 (Is a fund that only allows a single investor always outside the definition of an AIF?)) as the undertaking will only have raised capital from one investor. The £1 contribution should be ignored for this purpose as it is wholly nominal.

Question 2.12: Is a fund that only allows a single investor always outside the definition of an AIF?

No. Under the *ESMA AIFMD key concepts guidelines*, an undertaking which is prevented by its national law, the rules or instruments of incorporation, or any other provision or arrangement of binding legal effect, from raising capital from more than one investor should be regarded as an undertaking which raises capital from a number of investors if the sole investor:

- (1) invests capital which it has raised from more than one legal or natural person with a view to investing it for the benefit of those persons; and
- (2) consists of an arrangement or structure which in total has more than one investor for the purposes of UK provisions which implemented the *AIFMD*.

Examples of arrangements or structures of this type include:

- (3) master / feeder structures where a single feeder fund invests in a master undertaking;
- (4) fund of funds structures where the fund of funds is the sole investor in the underlying undertaking; and
- (5) arrangements where the sole investor is a nominee acting as agent for more than one investor and aggregating their interests for administrative purposes.

Defined investment policy

Question 2.13: What indicative criteria could be taken into account in determining whether or not an undertaking has a defined investment policy?

Under the *ESMA AIFMD key concepts guidelines*, an undertaking which has a policy about how the pooled capital in the undertaking is to be managed to generate a pooled return (see the answer to Question 2.16 for what pooled return means) for the investors from whom it has been raised should be considered to have a defined investment policy. The following factors would, singly or cumulatively, tend to indicate the existence of such a policy.

- (1) Whether the investment policy is determined and fixed, at the latest by the time that investors' commitments to the undertaking become binding.
- (2) Whether the investment policy is in a document which becomes part of, or is referenced in, the rules or instruments of incorporation of the undertaking.
- (3) Whether the undertaking, or the legal person managing the undertaking, has an obligation (however arising) to investors, which is legally enforceable by them, to follow the investment policy, including all changes to it.
- (4) Whether the investment policy specifies investment guidelines, with reference to criteria including any or all of the following:
 - (a) to invest in certain categories of asset, or conform to restrictions on asset allocation; or
 - (b) to pursue certain strategies; or
 - (c) to invest in particular geographical regions; or
 - (d) to conform to restrictions on leverage; or
 - (e) to conform to minimum holding periods; or
 - (f) to conform to other restrictions designed to provide risk diversification.

For the purposes of (4), any guidelines for the management of an undertaking that determine investment criteria, other than those in the business strategy followed by an undertaking having a general commercial or industrial purpose, should be regarded as investment guidelines. See the answer to Question 2.18 (Is an ordinary commercial business a collective investment undertaking?) for what an undertaking having a general commercial or industrial purpose means.

Following the approach in the *ESMA AIFMD key concepts guidelines*, leaving full discretion to make investment decisions to the legal person managing an undertaking should not be used to circumvent the *UK* provisions that implemented *AIFMD*. Part of the definition of an *AIF* is that there should be a defined investment policy. It is our view that this guidance is aimed at arrangements that whilst in form do not meet the definition, may in practice do so. For example, say that the manager has a legal discretion that is too wide to meet the definition of a defined investment policy but publishes a detailed investment policy (which is not legally binding) and leads the investors to expect that it will follow it. Under the approach in *ESMA AIFMD key concepts guidelines* that fund may still be an *AIF*.

Collective investment undertaking

Question 2.14: What is a collective investment undertaking?

See Questions 2.15 to 2.25.

It is important to remember that even if a business is a *CIU* that does not necessarily mean it is an *AIF*. To be an *AIF* it must meet all the criteria set out in the answer to Question 2.1 (What is the basic definition of an *AIF*?).

Question 2.15: What is the basic definition of a collective investment undertaking?

Under to the *ESMA AIFMD key concepts guidelines*, the following characteristics, if all of them are exhibited by an undertaking, should show that the undertaking is a *CIU*:

- (1) the undertaking does not have a general commercial or industrial purpose (please see the answer to Question 2.18 (Is an ordinary commercial business a collective investment undertaking?) to see what this means);
- (2) it pools together capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors from investments; and
- (3) the Unitholders or shareholders of the undertaking - as a collective group - have no day-to-day discretion or control.

For (3), the fact that one or more, but not all, of the Unitholders or shareholders are granted day-to-day discretion or control should not be taken to show that the undertaking is not a *CIU*.

Question 2.16: What is a pooled return for these purposes?

Under the *ESMA AIFMD key concepts guidelines*, it is the return generated by the pooled risk arising from acquiring, holding or selling investment assets - including activities to optimise or increase the value of these assets - irrespective of whether different returns to investors, such as a tailored dividend policy, are generated.

Question 2.17: The answer to Question 2.15 refers to day-to-day control. Is it necessary to show day-to-day control to show that there is no *AIF*?

No. This is explained further in the answer to Question 2.47 (What factors are relevant to whether a joint venture is excluded on the basis that it is managed by its members?).

Question 2.18: Is an ordinary commercial business a collective investment undertaking?

No. An undertaking with a general commercial or industrial purpose is not a *CIU*. The primary purpose of a *CIU* is investment to generate a pooled return. This is in contrast to an ordinary commercial business of manufacturing, production, trading or the supply of services. Hence a supermarket, professional services firm or manufacturer is not generally a *CIU* or an *AIF*. However, distinctions between "investment" and "trading" for tax purposes are not determinative here.

A general commercial or industrial purpose is defined in the *ESMA AIFMD key concepts guidelines* as the purpose of pursuing a business strategy which includes characteristics such as running predominantly:

- (1) a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services; or
- (2) an industrial activity, involving the production of goods or construction of properties; or
- (3) a combination thereof.

Question 2.19: Does that mean that if my undertaking deals in non-financial assets it can't be a CIU?

Not necessarily. As explained in the answer to Question 2.6 (Is the definition restricted to funds that invest in certain kinds of asset?), an *AIF* may invest in non-financial assets. In deciding whether an undertaking is for general commercial or industrial purposes you must look at all relevant factors. Other examples include:

- (1) whether the undertaking merely holds the property to take advantage of changing market prices or the income stream (which points towards it being a *CIU*), or whether the undertaking carries on construction, professional service, industrial or manufacturing works (which points away from it being a *CIU*);
- (2) if the undertaking is designed to further the existing commercial businesses of the investors, rather than to achieve gain by realisation of the underlying assets, this points away from it being a *CIU*;
- (3) whether the undertaking itself creates the property underlying the scheme (which points away from it being a *CIU*).

Question 2.20: Are there any other factors to take into account?

If the application of the factors in the answer to Question 2.1 (What is the basic definition of an *AIF*?) gives a clear answer then the matter is resolved. However, sometimes there will not be a clear answer. In that case, our view is that you must also look at whether the undertaking is structured like a typical fund. If it is, that points towards it being an *AIF*.

One important factor is whether there is a defined mechanism for winding up or distribution of investment returns at a particular time or over a designated period. This may apply if the undertaking is open ended, allowing an investor to redeem his interest within a reasonable time.

Hence if the undertaking is set up to carry out a particular project and then to wind itself up and distribute the profits to investors, that points towards it being an *AIF*.

Another factor is whether an offer to invest in an undertaking is marketed as an investment in a fund.

A key factor is how strongly the factors listed in the answer to Question 2.13 (What indicative criteria could be taken into account in determining whether or not an entity undertaking has a defined investment policy?) point towards a defined investment policy. If it is clear that there is no defined investment policy then there is no *AIF*, because a defined investment policy forms part of the definition of an *AIF*. However, if the application of the factors in the answer to Question 2.1 does not give a clear answer, the fact it is very clear that the undertaking has a defined investment policy points towards it being an *AIF*. In particular, the following key factors should be taken into

account (in each case an affirmative answer points towards the entity being an *AIF*):

- (1) Whether the investment policy is fixed by the time that investors' commitments to the business become binding on them.
- (2) How detailed the investment policy is.
- (3) Whether the investors may take legal action against the manager of the *AIF* or the investment vehicle for a breach of the policy.
- (4) Whether the investors' consent is needed for a change to the investment policy or whether the investors have the right to redeem their holdings if the policy changes.

Question 2.21: Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund.

- (1) Whether the undertaking requires substantial numbers of personnel to run it (which points away from it being an *AIF*). One would look at whether the business is carrying out commercial activities which require the employment of employees, such as for the development of properties. However, an undertaking having its own employees does not definitively mean that it is not an *AIF* - for example, it may be consistent with being a fund for it to have skeleton staff to ensure that the value of its investment is maintained, eg, to ensure adequate maintenance work on the physical investments of the fund is carried out.
- (2) The extent to which the undertaking outsources its core operations to a third party (and the large-scale outsourcing of core operations points towards its being an *AIF*).
- (3) Whether the undertaking has the skill to monitor and control the work outsourced to a delegate and whether the undertaking has expertise in the area of the work being outsourced (each of which points towards its being an *AIF*).
- (4) Whether the undertaking has an external manager (which points towards its being an *AIF*).
- (5) Whether all the directors of the undertaking are non-executive and whether their compensation packages reflect this (each of which points towards its being an *AIF*).
- (6) The frequency of board meetings (the more frequent the meetings, the more this points away from its being an *AIF*).
- (7) Whether the undertaking's business is to invest in businesses carried on by others without having control over the management of those businesses (which points towards its being an *AIF*).
- (8) Where the potential *AIFM* controls a portfolio of several different groups, it is helpful to ask whether those investee companies/groups:
 - (a) are segregated from one another and if each of them is held and structured for their most effective future disposal (which points towards its being an *AIF*); or
 - (b) support one another and the group as a whole (which points away from its being an *AIF*).
- (9) How much of the undertaking's revenue is derived from activities that are characteristic of a *CIU*.

None of these factors are conclusive.

Question 2.22: Do the answers to Question 2.18 (Is an ordinary commercial business a collective investment undertaking?) to Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) apply where the relevant business is a financial business?

If the underlying business of the undertaking relates to financial assets, it will not be an undertaking set up for a general commercial or industrial purpose. In that case it does not matter whether the business involves short-term buying and selling or holding for the medium term or until maturity.

However, a conventional non-financial business will often carry out its business through shares in its subsidiaries. A share in a subsidiary is a financial asset. Thus it is necessary to distinguish between a conventional holding company of this sort and an *AIF*. Similarly, if a business holds an asset through a shell company or bare nominee, the categorisation of the business should generally look through the shell to the underlying assets. The answer to Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) is relevant to identify such a case. An undertaking holding assets through subsidiaries in this way is not a financial business for the purposes of

■ PERG 16.

The ordinary cash management activities and treasury functions of a general commercial venture do not indicate that the venture is a *CIU*.

Question 2.23: What are financial assets for the purpose of Question 2.22?

Financial assets include investments under the *UK* provisions which implemented *MiFID* and investment life insurance contracts; real estate is not considered a financial asset.

An asset held for hedging purposes is not generally considered to be a financial asset for these purposes.

Question 2.24: What factors are relevant in the case of a financial business?

A financial business must meet the definition of an *AIF*. In our view the answer is likely to depend on the following factors.

- (1) The need for a defined investment policy (see Question 2.13).
- (2) Whether it raises external capital (see Question 2.10).
- (3) The main activity of a *CIU* is the investment of capital, not the provision of services. Hence a professional partnership, even with outside investors, is unlikely to be a *CIU*.
- (4) The pooled return point in Question 2.15 (What is the basic definition of a collective investment undertaking?) and Question 2.16 (What is a pooled return for these purposes?).
- (5) The day-to-day discretion or control point in Question 2.15.

Question 2.25: What is the justification for the approach in the answers to Questions 2.15 (What is the basic definition of a collective investment undertaking?) to 2.23 (What are financial assets for the purpose of Question 2.22)?

If the definition of *CIU* were interpreted broadly it would cover many ordinary commercial undertakings with external passive investors. The only things preventing such undertakings from being an *AIF* would then be the requirements for a defined investment policy and to raise capital.

In one sense the shareholders in a supermarket invest on a collective basis in the underlying business of the company. It invests its assets to buy goods and sell them at a profit. The supermarket may set out its policy for investing shareholder funds in a formal policy document and it may raise external capital to fund its business. On a broad reading of the *AIF* definition, that would mean that the supermarket would be an *AIF*.

Not all commercial ventures have the general commercial objects of a standard private company; many will have very specific and detailed objects. For example, say that a new business is set up to sell consumer electronics. It raises capital and to reassure its investors its constitutional documents restrict it to this business. However, in every other way it is a conventional consumer retailer. On a broad reading of the *AIF* definition, this too would be an *AIF*.

Such a wide interpretation would be unreasonable. It would be unreasonable to say that a detailed statement of commercial objects turns an undertaking into a *CIU*. It would be contrary to the early recitals of *AIFMD*. The exclusion for holding companies (see Questions 6.2 to 6.5) may not apply because the business may not be acting through subsidiaries. Therefore, it is necessary to consider the policy objectives of the *AIFMD* regime in the *United Kingdom*.

The *AIFMD* regime in the *United Kingdom* is aimed at funds. The lists of the main types of undertaking covered by the *UK* provisions which implemented *AIFMD* in the answer to Question 2.28 (What are the commonest types of AIFs?) are taken from formal documents, which assist in analysing the intended scope of the *UK* provisions which implemented *AIFMD*.

The *FCA* considers that the term investment is being used in contrast to "commercial". ■ PERG 16.2 is designed to draw out that distinction.

The reason for looking at whether an undertaking is set up as a fund is that it helps to make the distinction required by the *AIFMD* regime in the *United Kingdom* between a fund that invests in non-financial assets and an undertaking with a general commercial or industrial purpose and to reflect the fact that the regime is aimed at funds.

However, it is clear from *AIFMD* and the documents referred to in the answer to Question 2.28 that private equity, hedge funds and venture capital funds are intended to be within the scope of the *UK* provisions that implemented *AIFMD* and the *AIFMD* regime in the *United Kingdom*. *AIFMD* expressly refers to these types of funds in a number of places.

Also, a fund controlling a business is more than an investor, as it is in a position to control and run that business. Indeed, one of the benefits of a private equity fund is that it can restructure and improve businesses of target companies for the long term. These funds may need an extensive staff to carry on the business of the fund. It is clear though that a fund that takes over a business can still be an *AIF*, as the *UK* provisions that implemented *AIFMD* has detailed requirements for *AIFs* that do that.

Another point is that, as far as financial businesses are concerned, it is not a question of identifying businesses that should not be subject to financial services legislation, as many financial services businesses that do not fall within the scope of the *AIFMD* regime in the *United Kingdom* are regulated under the *UK* provisions that implemented *MiFID* instead.

Therefore, the distinctions in the answers to Question 2.19 (Does that mean that if my undertaking deals in non-financial assets it can't be a CIU?) to 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund) do not work for all the types of undertakings to which the *AIFMD* regime in the *United Kingdom* is meant to apply. The distinction between an undertaking with a general commercial or industrial purpose and a financial purpose made by the *ESMA AIFMD key concepts guidelines* (see the answer to Question 2.18) is the key to reconciling the aim of excluding ordinary businesses and regulating funds.

Looking at whether an undertaking is set up as a fund is less useful for a financial business as that factor is based on the distinction between an ordinary commercial business and an investment one. For the reasons discussed in this answer a financial business is not an ordinary commercial business for these purposes. However, this factor has some relevance to a financial business for the reasons explained in the answer to Question 2.22 (Do the answers to Question 2.18 to Question 2.21 apply where the relevant business is a financial business?).

Overview of the AIF definition

Question: 2.26: Could you give a brief overview of how I should go about applying the guidance in PERG 2.2 in deciding whether AIFMD applies?

(1) Apply the definition in the *AIFMD UK regulation* to see if it gives a clear answer. If it does, there is no need to go further.

(2) See whether one of the exclusions summarised in ■ PERG 16.6 (Exclusions) could apply.

(3) Look at all the factors and come to an overall judgment. In particular, look at the following issues.

(a) Whether it has a defined investment policy.

(b) Whether it raises external capital from a number of investors.

(c) Whether there is pooling.

(d) Whether capital is invested on behalf of the investors, as opposed to the parties investing the capital for themselves. In particular, see whether the undertaking is excluded as a joint venture (Questions 2.46 to 2.49).

(e) Whether it is structured as a typical fund. The answer to Question 2.22 (Do the answers to Question 2.18 to Question 2.21 apply where the relevant business is a financial business?) explains how this is relevant to a financial business.

(f) Whether it carries on an ordinary commercial business as opposed to investment and whether it is a financial business. If an undertaking carries on a commercial business, and not a financial or investment one, that points towards it not being an *AIF*.

A financial business is described in the answer to Question 2.23 (What are financial assets for the purpose of Question 2.22?).

In some cases, the factors in (3)(e) and (f) will point to different answers. One may have an otherwise conventional business that is deliberately structured as a fund. In general, it is likely that the tests of whether it is an undertaking set up for a general commercial or industrial purpose (see (3)(f)) will give the answer, as this is the most important factor in the *ESMA AIFMD*

key concepts guidelines and these factors are closest to the distinction between investment and commercial activities. However, it is our view that the *AIF* definition should be interpreted in a way that allows a fund to be set up to come within the *AIF* definition, even though the underlying business of the fund is a conventional commercial one, if it is very clear that the undertaking is being set up as a fund

Question: 2.27: Should all the factors be considered together?

Yes. As the *ESMA AIFMD key concepts guidelines* point out, appropriate consideration should be given to the interaction between the individual concepts of the definition of an *AIF*. An undertaking should not be considered an *AIF* unless all the elements in the definition (summarised in the answer to Question 2.1 (What is the basic definition of an *AIF*?)) are present. For example, undertakings which raise capital from a number of investors, but not with a view to investing it in accordance with a defined investment policy, should not be considered *AIFs* for the purposes of the *United Kingdom's AIFMD* regime.

Another example is a company formed for the purpose of operating a family-owned business. Later, the business is sold and the proceeds of sale invested by the company. The company may have become an investment vehicle but, without any capital being raised in accordance with an investment policy, it will not be an *AIF*. See the answer to Question 2.50 (family vehicles) for another reason why the company is unlikely to be an *AIF*.

Examples of schemes that are AIFs and of ones that are likely not to be AIFs

Question 2.28: What are the commonest types of AIFs?

The Commission Staff Working Document (Impact Assessment) accompanying the Proposal for the Directive (COM(2009) 207) lists the commonest types:

- (1) hedge funds;
- (2) commodity funds;
- (3) private equity funds (including large buy-out funds, mid-cap investment funds and venture capital funds);
- (4) infrastructure funds;
- (5) real estate funds;
- (6) conventional non-UCITS investment funds. These invest primarily in traditional asset classes (such as equities, bonds and derivatives) and pursue traditional investment strategies.

The list of fund types in the reporting templates in the *AIFMD level 2 regulation* is also useful. The main types it lists are:

- (7) hedge funds;
- (8) private equity funds;
- (9) real estate funds;
- (10) fund of funds;
- (11) commodity funds;
- (12) equity funds;
- (13) fixed income funds;

(14) infrastructure funds.

Question 2.29: Is an arrangement whose activities are for non-business purposes covered?

No. Arrangements do not amount to an *AIF* if the predominant purpose of the arrangements is not to invest its capital for the benefit of its investors. So an undertaking is not an *AIF* if the predominant purpose of the undertaking is to enable the participants to share in the use or enjoyment of physical property or to make its use or enjoyment available gratuitously to others. The reason for this is that the purpose of the undertaking is not investment.

For example, a group of householders purchases a piece of neighbouring land to preserve or develop it as an amenity and prevent it from being used for housing or commercial exploitation. This should not be considered to be an *AIF*, since the capital raising and the investment are primarily undertaken for non-business purposes and are not intended to deliver an investment return or profit. Also, there will probably not be a commercial communication of the kind referred to in Question 2.10 (Meaning of capital raising).

However, the fact that a fund's investors are charities or not-for-profit organisations does not necessarily mean that the fund is not an *AIF*.

Question 2.30: Is a real estate investment trust (REIT) caught?

The meaning, substance and structure of REITs vary across European jurisdictions. So this answer looks at *UK* REITs.

A REIT is a concept used for tax purposes. So if a business is a REIT, there is no presumption either way as to whether or not it is a *CIU* or *AIF*.

Question 2.31: Is a timeshare scheme covered?

No. Arrangements do not amount to an *AIF* if the rights of the investors are rights under a timeshare contract or a long-term holiday product contract as defined in the Holiday Products, Resale and Exchange Contracts Regulations 2010, because these are already regulated.

Question 2.32: Is a pension scheme covered?

No. Neither an *occupational pension scheme* nor a *personal pension scheme* is covered. ■ PERG 16.6 (Exclusions) sets out the relevant exclusions. The breadth of the wording in recital (8) of *AIFMD* shows that these exclusions should be interpreted broadly so as to cover both sorts of scheme. In addition, a pension scheme is sufficiently well established as a category of investment to mean that if *AIFMD* intended to catch pension schemes it would have made that clear.

However, a scheme is not excluded from being an *AIF* just because all its investors are themselves pension schemes benefitting from an exclusion.

Question 2.33: Is a pension Common Investment Fund (CIF) covered?

This answer deals with a scheme under which separate *occupational pension schemes* run by companies within one group co-mingle their assets or part of their assets in another trust. Typically, the operators of the pension schemes

will be corporate trustees established by the employing companies, as will the trustee of the CIF. In such an arrangement, the *persons* participating in the CIF are the trustees of the *occupational pension schemes* and not the beneficiaries under the *occupational pension schemes*. Hence, the group exclusion described in ■ PERG 16.6 (Exclusions) should apply.

Question 2.34: Is an employee participation scheme covered?

No. Employee participation schemes and employee savings schemes are not covered. ■ PERG 16.6 (Exclusions) sets out the exclusion.

This exclusion covers schemes in which an employee invests in securities of the employer or in a company in the employee's group (or derivatives in relation to them such as options). As explained in the answer to Question 2.35 (Is an employee carried interest or co-investment vehicle caught?) it also covers other schemes.

In our view, the term employee is not limited to the technical definition in UK law. It would include personnel who work in the business of the undertaking concerned, contributing their skills and time, including partners, directors and consultants. Employee participation schemes generally allow participation by former employees and spouses/close relatives and this exclusion allows schemes that include such participants. Trustees of an employee's family trust may also participate.

The exclusion can apply however the scheme is structured and whether or not a trustee is involved in the scheme.

Question 2.35: Is an employee-carried interest or co-investment vehicle caught?

The carried interest participation of the employees of a private equity fund manager that manages private equity funds will typically be structured through one or more carried interest vehicles to receive the carried interest and in which employees of the manager will have a participation.

In our view, such vehicles will generally not be an AIF because the employee participation scheme exclusion will often apply. The exclusion applies because a scheme for carried interest participation allows the employees to benefit from the success of the AIF management undertaken by the employer.

Family members of an employee, or trustees of an employee's family trust, may also participate in the carried interest vehicle on this basis without that vehicle becoming an AIF.

Sometimes the manager may invest in the vehicle alongside the employees. This should not mean that the employee participation scheme exclusion is not available (see the answer to Question 2.52 (Is a co-investment vehicle caught?)).

Question 2.36: Is this is the only basis on which a carried interest vehicle can be excluded?

A carried interest vehicle may be excluded for another reason. As explained in the answer to Question 2.1 (What is the basic definition of an AIF?), part of the definition of an AIF is that it raises capital from a number of investors. If employees only invest a nominal amount of capital, the undertaking does

not meet this criterion because the employees are not investors. An employee is not investing his salary (by being remunerated in part by way of an interest in the vehicle) if it is a term of his employment that he would be remunerated with an interest in the vehicle.

Question 2.37: Is a securitisation vehicle covered?

No, as long as its sole purpose is to carry on:

- (1) a securitisation or securitisations; and
- (2) other activities which are appropriate to accomplish that purpose.

Securitisation has the meaning in Regulation (EC) No 24/2009 of the European Central Bank concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions. This says that securitisation means a transaction or scheme whereby:

- (3) an asset or pool of assets is transferred to an entity that is separate from the originator and is created for or serves the purpose of the securitisation; and/or
- (4) the credit risk of an asset or pool of assets, or part thereof, is transferred to the investors in the securities, securitisation fund units, other debt instruments and/or financial derivatives issued by an entity that is separate from the originator and is created for or serves the purpose of the securitisation.

In the case of transfer of credit risk, the transfer is achieved by either:

- (5) the economic transfer of the assets being securitised to an entity separate from the originator created for or serving the purpose of the securitisation (which is accomplished by the transfer of ownership of the securitised assets from the originator or through sub-participation); or
- (6) the use of credit derivatives, guarantees or any similar mechanism.

Where such securities, securitisation fund units, debt instruments and/or financial derivatives are issued, they should not represent the originator's payment obligations.

Question 2.38: Can a contract of insurance itself be an AIF?

No, as confirmed by recital (8) of the *AIFMD*.

Question 2.39: Are funeral plans caught?

No. A funeral plan contract is not caught. Neither is a contract which would be a funeral plan contract but for the proviso to article 59(2) of the RAO.

Question 2.40: Are individual investment management agreements caught?

In principle, No.

An *AIF* is an investment undertaking which pools together capital raised from investors to invest it on a collective basis. The management of a portfolio of investments or other property on an individual client-by-client basis is covered by *UK* provisions that implemented *MiFID* rather than the *AIFMD* regime in the *United Kingdom*.

The pooled return concept in the *ESMA AIFMD key concepts guidelines* (see the answer to Question 2.16 (What is a pooled return for these purposes?)) is particularly relevant here. One of the characteristics of an *AIF* is that there is pooling. An individual investment management arrangement falls outside the definition of an *AIF* as there is no pooling and thus no *CIU*. So, in principle, individual investment management arrangements do not give rise to an *AIF*.

However, an *AIF* can take any form. It may be that a scheme is set up with a separate individual investment management agreement for each investor but that the scheme is, in reality, a collective scheme. If the individual investment management agreements are being run on a common basis and as a single economic undertaking, then the arrangements may be considered as a single *CIU*. That means that the arrangements will be an *AIF* as long as the other elements of the definition are also met.

This is consistent with the pooled return concept in the *ESMA AIFMD key concepts guidelines*. Pooling for these purposes does not require that the underlying property is pooled. There must be pooling of capital, risk and return. If the capital is invested on a collective basis (in a way that creates pooled risk, for example by investment in a single project) there may be a single *CIU*.

A *firm* that manages the portfolios of a number of separate clients using the same investment strategy and taking advantage of economies of scale does not, for that reason, stop being an individual portfolio manager.

If the manager holds out his ability to provide bespoke investment management services but arranges a fair amount of bulk dealing for clients with similar investment objectives, that is compatible with individual portfolio management.

If an investment manager aggregates orders on behalf of multiple clients or accounts, which are then allocated back to the clients following execution, this does not mean that there are collective arrangements of the type that would suggest that an arrangement is a *CIU*.

The fact that the manager is obliged to protect the interests of the investors on an individual client-by-client basis points towards the arrangement being individual portfolio management, rather than a *CIU*.

However, if each separate investment management agreement provides that the manager will carry out investments and sales in a synchronised way so that the securities to which different investors are entitled are bought and sold at the same time, this may result in the scheme being a *CIU*. The same may apply if the scheme is marketed or held out as being operated in this way, for instance as a single fund.

Therefore, a scheme may be a *CIU* if it is part of the scheme's investment policy for investors' holdings to be managed as a single holding. For example, if the policy of the scheme is to take control of a company but each individual investor's stake is too small to achieve control, the scheme as a whole may be a *CIU*. The same may apply for other large stakes. If, for some reason, a scheme's investment policy relies on the manager exercising the voting or other rights of investors in the underlying companies as a single bloc, the scheme may also be a *CIU*.

Question 2.41: Is a stocks and shares ISA caught?

In principle, No.

A stocks and shares ISA takes the form of a scheme of investment managed by an account manager and under which the account investments are held in the beneficial ownership of the account holder. There is no pooling of the type described in section 235 of the *Act* (Collective investment schemes).

Some ISAs are run on a self-determined basis where investors decide what might be held in the ISA. In that case, there will be no collective element and no *AIF*.

In some cases, the parts of the property held in a particular ISA scheme are bought and sold at the same time as they are for other ISAs run by the same manager, except when a particular *person* becomes or ceases to be an investor in the plan. In that case, there is a collective element in the arrangements. However, in the light of the answer to Question 2.40 (Are individual investment management agreements caught?) this will not be enough on its own to mean that the ISA is an *AIF*.

Question 2.42: Is a child trust fund caught?

No.

As explained in the answer to Q53A in ■ PERG 13, the link between the underlying investment and the rights and interests acquired by the CTF account holder is too remote for the account holder to be considered as having acquired the underlying investment itself. Similarly, a child trust fund should not be seen as raising capital from the beneficiaries to invest it for their benefit.

In any case, it is also likely to be excluded for the reason described in the answer to Question 2.41 (Is a stocks and shares ISA caught?).

Question 2.43: Is an enterprise investment scheme (EIS) fund caught?

This answer deals with a fund set up in this way. When an investor subscribes to an EIS fund, it will appoint a manager to invest his subscriptions, on a discretionary basis, in qualifying companies. The investor in the EIS fund is the beneficial owner of the shares in which the fund invests for him. The investor is entitled to a whole number of shares in each company and not just a proportionate interest in all the shares in which the fund capital is invested. There is no pooling of the type in section 235 of the *Act* (Collective investment schemes).

It is likely that the property held in a particular EIS fund, to which the different fund investors are entitled, is not bought and sold separately, except where a *person* becomes or ceases to be an investor in the fund. It is likely that the manager will exercise the voting and other rights in the EIS fund shares as a bloc and hold the investments as nominee for the investor. These arrangements are likely to be formally documented. The EIS fund may be approved by HM Revenue and Customs but need not be.

The answer to Question 2.40 (Are individual investment management agreements caught?) is relevant here. In particular, it is useful to take into account the difference between conventional individual portfolio management arrangements (where an investor entrusts a manager with a sum of money, to be invested on a discretionary basis, based on the individual circumstances of the particular investor) and EIS funds, where the

manager would not be making investments on the basis of their suitability for any individual investor. Hence, it is likely that an EIS fund should be considered to be a *CIU* and an *AIF* (if all the other conditions of the *AIF* definition are met).

Question 2.44: Can an issue of debt securities be an AIF?

In general, No. The arrangements for an issue of debt securities by an ordinary commercial or financial company will not generally be an *AIF* or turn the issuer into one, although an *AIF* may invest in debt securities. In general, an issuer of debt securities does not invest the capital it raises for the benefit of the subscribers for the debt securities. In any case, for there to be an *AIF* there is still a need for the investors to expect to get the return from investment by the undertaking under a defined investment policy. If the return on the debt securities was simply set at a certain rate of interest and fixed premium, and the undertaking was liable to make those payments whether or not they were generated by management of the assets in line with the investment policy, this condition would not be met.

However, other cases may not be so straightforward. For example, say that an SPV is set up to invest in financial assets. It finances the purchase of those assets by an issue of debt securities. Profits and income from the assets are channelled back to the holders of the debt securities through interest on the debt securities and a payment on redemption. In principle, such a scheme could be a *CIU* if the investors invested through shares in the SPV. If the SPV has no equity shareholders (or no significant equity shareholders) and if all the profits and losses flow through to the investors via the return on their debt securities there is an argument that it should make no difference that the investors hold their interest through debt securities rather than through shares.

Given that the list of the main types of undertaking covered by *AIFMD* taken from the Commission impact assessment referred to in the answer to Question 2.28 (What are the commonest types of AIFs?) does not mention debt instruments of this kind, it seems likely that they were not meant to be caught. We shall assume that an SPV issuing debt securities in the way described in the answer to this question will not be an *AIF* if the arrangements meet the exclusion in paragraph 5 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (Debt securities).

We shall also assume that an issue of an *alternative debenture* is not an *AIF* on the same basis, although it may be clear for other reasons that it is not. For instance, in some cases the bond assets will include a promise from a substantial commercial entity to buy the other bond assets. In such a case the *alternative debenture* is essentially a credit obligation of that commercial entity. In addition, part of the definition of an *alternative debenture* is that the amount of any payments in addition to the principal amount does not exceed an amount which would, at the time at which the bond is issued, be a reasonable commercial return on a loan of the capital. The effect is that an *alternative debenture* of this type is, in substance, a form of unsecured debt obligation of an ordinary commercial company. Therefore, it is not an *AIF* any more than the arrangements for a conventional debt issue by an ordinary company are an *AIF*.

Debt securities in a securitisation special purpose vehicle are likely to be excluded, as explained in the answer to Question 2.37 (Is a securitisation vehicle covered?).

Question 2.45: Is an exchange traded fund (ETF) caught?

An ETF can take various forms. This answer focuses on a fund in the form of an undertaking that seeks to replicate or track movements in a chosen securities index by holding some or all of the underlying constituents of the index or entering into derivatives contracts that replicate their performance synthetically.

In practice, an ETF of this sort is likely to be an *AIF* unless it is a *UCITS*.

Question 2.46: Is a joint venture caught?

Not normally.

There is no exclusion for joint ventures in the *UK* provisions which implemented *AIFMD*. However, recital (8) of *AIFMD* confirms that they are not covered. Therefore, to decide what undertakings are excluded as joint ventures, one must identify the principles on which the recital appears to be based. Another reason for looking at the underlying principles is that the term 'joint venture' does not have a precise legal meaning.

The key part of the definition of *AIF* reads "collective investment undertakings which raise capital from a number of investors, with a view to investing it or the benefit of those investors". Two aspects of this are particularly relevant to joint ventures.

(1) Capital is invested on behalf of the investors, as opposed to the parties investing the capital for themselves. An *AIF* does not include an undertaking that is managed by its members jointly and that is not managed by a third party or by only some of the investors.

(2) A venture that does not raise external capital (see the answer to Question 2.50 (Are family investment vehicles *AIFs*?) for a discussion of external capital) is not an *AIF*. The clearest example of this is the family investment vehicle but it is relevant to joint ventures too.

This approach to joint ventures means that if an undertaking meets the definition of an *AIF* it will be an *AIF* even if it is referred to as, or intended to be, a joint venture. Similarly, just because something is set up as a joint venture but is not excluded on the grounds in this answer does not mean that it must be an *AIF*. In all cases it is necessary to apply the *AIF* definition to the specific undertaking.

Question 2.47: What factors are relevant to whether a joint venture is excluded on the basis that it is managed by its members?

The clearest example of a joint venture is when all the parties have day-to-day control (in the ordinary sense) over its activities. However, it is still possible to have a joint venture in which not all the parties have day-to-day control.

This point is made by the definition of day-to-day discretion or control in the *ESMA AIFMD key concepts guidelines*. They define it as a form of direct and ongoing power of decision - whether exercised or not - over operational

matters relating to the daily management of the undertakings' assets and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder representatives, the appointment of directors or auditors or the approval of annual accounts.

Joint ventures are often a marriage of equity and expertise, with one partner having the necessary experience to carry out the day-to-day management and the equity partner being involved in making more key, strategic decisions. The parties may also hire an outside *person* to manage the venture. These factors do not necessarily mean that the undertaking is an *AIF*. Such an undertaking may still be excluded as a joint venture if the strategic financial and operating decisions are under the control of all the parties. Each of the parties should have a continuous involvement in the overall strategic management of the undertaking.

For these purposes, a party does not manage the undertaking just because he is consulted or has the right to give directions.

No single party should be in a position to control the activity unilaterally. One factor to take into account is whether strategic decisions require the unanimous consent of the parties sharing control.

The requirement that all take part in strategic management also means that the number of parties should be sufficiently low for joint management to be practical.

If the parties carry on the venture through a corporate vehicle, an investor may exercise this control through a nominee it appoints to the board of the undertaking.

This approach to the exclusion of a joint venture is not based on a formal legal definition of a joint venture but on the application of the broad concepts included in the *AIF* definition. Therefore, in looking at control, it is necessary to take account of commercial substance as well as legal relationships.

For example, it is quite common for a joint venture in England and Wales to be structured as a limited partnership under the Limited Partnerships Act 1907 for reasons of commercial flexibility and tax transparency. To maintain the limited liability conferred by limited partner status, investors investing in the joint venture through limited partners must not take part in the management of the partnership business. Therefore, the business of the partnership is managed by a general partner, which is controlled (through the exercise of voting rights or the appointment of nominees to the board of directors) by the investors. In such a structure, each investor in the joint venture structure has economic participation (through its limited partner) and strategic management control (through the general partner) but those two roles are separated and carried on through different entities.

Notwithstanding that separation of roles, as a matter of commercial substance, that arrangement can still be an excluded joint venture. The investing organisations will exercise control through the general partner, as well as investing economically through their respective limited partners.

If an undertaking switches from one in which all parties have control to one in which some do not, that does not necessarily mean that it ceases to be a

joint venture. In particular, if at the time that it was set up and the capital was put in all parties had joint control, but later one retires but remains a party to the investment, it should not be transformed into an *AIF* merely by virtue of the retirement of that party.

If any of the investors are retail investors, it is unlikely that an undertaking will be excluded from the definition of an *AIF* on the ground that the venture is managed by its investors. This is because the requirement for joint control takes into account the practical ability to participate in joint decision-making (as well as the right to do so), including skills and bargaining power. It is unlikely that retail investors will have such ability as against professional investors or managers.

An example of where a retail investor might be able to take part in joint decision making would be if the investor is a member of the management team. A member of the management team may have the practical ability to participate in joint decision-making with the professional investors.

Question 2.48: What factors are relevant to whether a joint venture is excluded on the basis that it does not raise external capital?

The definition of *AIF* envisages a distinction between the undertaking that raises capital and the parties who invest capital. In some cases, there may be no such distinction. For instance, commercial parties may come together on their own joint initiative. There is no external capital because the *persons* raising and providing capital are the same. This is explained further in the answer to Question 2.50 (Are family investment vehicles *AIFs*?).

Question 2.49: Can you give me some practical factors to take into account when deciding whether a commercial venture is excluded as a joint venture?

(1) Whether the parties come together in the proposed project before the structure of the venture is determined and capital is raised.

(2) Whether the venture relates to a business the parties are already carrying on at the time it is set up. For example, the joint venture vehicle may merely be a legally convenient means by which joint venture parties combine their resources and skills to carry out a business activity. When looking at whether a party is already carrying on an activity, one looks at whether it has been doing so on its own account, rather than through investing in funds.

(3) Whether the parties have an existing relationship.

(4) Joint ventures are more likely to have a policy focussed on the achievement of the parties' commercial goals, as opposed to a defined investment policy.

The factors in (1) to (3) are based on the answer to Question 2.48 (What factors are relevant to whether a joint venture is excluded on the basis that it does not raise external capital?). The factor in (3) is also based on the answer to Question 2.47 (What factors are relevant to whether a joint venture is excluded on the basis that it is managed by its members?). An undertaking in (4) may fall outside the *AIF* definition on the grounds that to be an *AIF* there must be a defined investment policy.

In some cases, a joint venture may be set up between a single investor providing capital and an active participant providing the expertise to manage the business. The investor providing the capital may choose not to be involved in the running of the venture. One reason why such a venture

might not be an *AIF* is explained in the answer to Question 2.52 (Is a co-investment vehicle caught?).

Question 2.50: Are family investment vehicles AIFs?

No. There is no specific exclusion for family investment vehicles in the *UK* provisions which implemented *AIFMD*. Recital (7) of *AIFMD* says that a family office vehicle that invests the private wealth of investors without raising external capital is not an *AIF*. To decide what undertakings are excluded as family investment vehicles, one must identify the principles on which the recital appears to be based. The recital is making a distinction between external and internal capital. In our view this recital is based on the part of the *AIF* definition that requires capital to be raised. The recital explains that the *AIF* definition does not cover an arrangement in which the *persons* raising and providing capital are the same. Based on this, features of a family investment vehicle are likely to include:

- (1) a family relationship between the investors;
- (2) no raising of capital from investors outside the relationship.
- (3) the money or assets to be invested and the relationship between the investors pre-date the relationship between the investors and the vehicle. Even though the family should pre-date the relationship between the investors and the vehicle, that does not mean that a vehicle becomes an *AIF* if an individual joins the family later.

Family investment vehicles can be used by large extended families spanning a number of generations and those born, or joining the family, before and after investment arrangements are made. Civil partnership and marriage may be included. A family can include step and cohabitation relationships, as well as blood and other immediate family relationships, such as adoption. *Persons* or vehicles representing eligible family members (such as the trustees of a family trust holding money or assets beneficially for a family member) may also be included.

This is confirmed by the *ESMA AIFMD key concepts guidelines*. They say that when capital is invested in an undertaking by a member of a pre-existing group, for the investment of whose private wealth the undertaking has been exclusively established, this is not likely to be within the scope of raising capital.

The *ESMA AIFMD key concepts guidelines* define a pre-existing group as a group of family members, irrespective of the legal structure put in place to invest in an undertaking and provided that the sole ultimate beneficiaries are family members, where the existence of the group pre-dates the establishment of the undertaking. The guidelines say that this does not prevent family members joining the group after the undertaking has been established. The guidelines say that 'family members' means the spouse of an individual, the person who is living with an individual in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings, uncles, aunts, first cousins and the dependants of an individual.

Question 2.51: What happens if a family group invests alongside others investors?

The *ESMA AIFMD key concepts guidelines* say that the fact that a member of a pre-existing group invests alongside investors not being members of a pre-

existing group, should not have the consequence that the part of the *AIF* definition requiring the raising of capital is not fulfilled. Whenever such a situation does arise, all the investors should enjoy full rights under the *AIFMD* regime in the *United Kingdom*. If a family group invests in an undertaking alongside other investors and the undertaking meets the other parts of the *AIF* definition, that undertaking is an *AIF* and the family members are treated as investors with the same protections under the *AIFMD* regime in the *United Kingdom* as other investors. However, please also see the answer to Question 2.52 (Is a co-investment vehicle caught?).

A manager may establish a vehicle to invest the wealth of several families. Such a vehicle will not be excluded on the grounds in Question 2.50 (Are family investment vehicles AIFs?).

Question 2.52: Is a co-investment vehicle caught?

Co-investment vehicles come in many forms. This question refers to a case in which an institutional investor confers a substantial mandate on an investment manager and structures the mandate through an investment vehicle (the co-investment vehicle). The other investors are the manager itself and its employees, or a vehicle taking a carried interest for the benefit of employees of the manager. The manager and carried interest vehicle may make a nominal contribution for tax or other structuring reasons.

A similar issue can arise with family investment vehicles. The family vehicle may employ third-party professional investment managers, who have no family relationship, to manage the assets of the family. To align their interests with those of the family, the employees and managers invest in the co-investment vehicle alongside the family vehicle.

In our view, a co-investment vehicle of the type covered by this question should not be seen as an *AIF*. If the manager or employees only make a nominal investment, there is no *AIF* as nominal investments should be disregarded (see the answer to Question 2.11 (Is a fund that only allows a single investor caught?)). Even if the investment is more than nominal, the undertaking only raises capital from a single external investor, which is the institutional investor. Please see the answer to Question 2.50 (Are family investment vehicles AIFs?) as to why the *FCA* believes that the concept of an external investor is part of the *AIFMD* regime in the *United Kingdom*.

In addition, in our view, an investment by the manager should not normally change an undertaking into an *AIF*. The purpose of the *AIFMD* regime in the *United Kingdom* is to protect the investors from whom capital is raised as referred to in the answer to Question 2.1 (What is the basic definition of an AIF?) and Question 2.10 (You say that an undertaking needs to raise capital to be an AIF. What does capital raising involve?) by regulating, among others, the manager. In our view, this means that co-investment by the manager should not generally affect the status of an undertaking as an *AIF*.

The vehicle through which employees invest is not itself an *AIF* because of the exclusion for employee participation schemes (see Question 2.34).

Another type of co-investment vehicle is where the employees of a private equity fund manager invest alongside the manager in private equity funds managed by the manager. This is dealt with by Question 2.35 (Is an employee carried interest or co-investment vehicle caught?) and Question 2.36 (Is this is the only basis on which a carried interest vehicle can be excluded?).

Question 2.53: Is an acquisition vehicle for an AIF itself a separate AIF?

Sometimes, an *AIFM* establishes an *SPV* or acquisition vehicle as an administrative convenience, to facilitate a specific transaction(s) to be carried out by the *AIFM*.

Generally, the *SPV* should not be treated as a separate *AIF* for the purposes of *AIFMD*. The vehicle does not raise capital from investors. Rather, it would merely be a means of investing capital already raised by the *AIF*. It is merely part of the mechanical and administrative mechanisms for putting into operation a scheme of investment that has already been set up.

Question 2.54: Is an arrangement for multiple participation by a number of funds in a single investment, a single AIF?

Sometimes a manager may set up an arrangement under which a number of *AIFs* participate in a particular investment.

The question is then whether this creates a new *AIF* alongside the *AIFs* that invest in it or creates a single *AIF* made up of the participating *AIFs*.

As explained in the answer to Question 2.40 (Are individual investment management agreements caught?) the starting position is that a series of investments in parallel do not amount to a single *AIF*. The fact that each fund has different investors and its own arrangements between its investors is an additional factor that points towards there being separate funds.

It is also necessary to take into account the *UK* provisions which implemented article 26 of *AIFMD* (Obligations for *AIFMs* managing *AIFs* which acquire control of non-listed companies and issuers: Scope), which contemplates that several *AIFs* may agree jointly to acquire control of a non-listed company without that resulting in all the *AIFs* being considered as a single *AIF*.

This is consistent with the policy of *AIFMD*, because the investors will still have the protections given by national laws implementing *AIFMD*.

The factors relating to whether an undertaking is excluded as a joint venture are likely to be relevant (see the answer to Questions 2.46 to 2.49). For these purposes, it will normally only be necessary to consider the involvement of the *AIFs* themselves and not the individual investors in each *AIF*.

Question 2.55: Does it make a difference if there are co-investors?

Sometimes not all of the co-investors participating in an investment will themselves be *AIFs*. An acquisition vehicle may be set up for the *AIF* and the other co-investors. Such an arrangement might not be a separate *AIF*. Many of the points in the answer to Question 2.54 (Is an arrangement for multiple participation by a number of funds in a single investment, a single *AIF*?) apply here too. The factors relating to whether an undertaking is excluded as a joint venture are likely to be relevant (see the answers to Questions 2.46 to 2.49).

Question 2.56: Is a central counterparty in a clearing system an AIF?

No.

The undertaking is providing a service to members of the system in its role as central counterparty and not investing in the securities bought and sold for their benefit.

Question 2.57: Is a firm that deals in financial instruments on its own account caught?

As explained in the answer to Question 43 in ■ PERG 13.5 (Exemptions from MiFID), CIUs are specifically exempt from the UK provisions which implemented MiFID, as are their depositaries and managers. An AIF is a CIU and an AIFM is a manager.

However, that does not mean that a company that buys and sells financial instruments for its own account is covered by the UK's AIFMD regime rather than covered by the UK provisions which implemented MiFID, or rather than excluded from both.

The answer to Question 2.24 (What factors are relevant in the case of a financial business?) sets out the key factors in deciding whether a financial services company is an AIF.

Question 2.58: Is a bank or insurer caught?

An undertaking authorised under the UK provisions which implemented the *Solvency II Directive* or the CRD will not be an AIF.

Question 2.59: Is a depositary receipt caught?

In our view, certificates representing certain securities are unlikely to be units in an AIF. This is because they simply involve a method of investing in the underlying security without a collective investment element. However, the fact that units of an AIF are issued in the form of certificates representing certain securities does not mean that it stops being an AIF.

Question 2.60: Is a client account caught?

A solicitor's client account or a client money account which is ancillary to the true AIF are not themselves AIFs.

Investment compartments

Question 2.61: What is an investment compartment of an AIF?

An investment compartment is similar to, and corresponds with, the *Glossary* term *sub-fund*. It refers to an undertaking whose property is divided into separate pools, each of those pools being a compartment.

Question 2.62: How do I tell the difference between investment compartments of a wider fund and separate funds?

Sometimes it is necessary to decide whether investment pools that are linked in some way should be treated as being investment compartments of the same fund or as separate funds. A key factor is whether the investment pools are documented and operated as a single fund. This takes into account whether the investment pools are documented as separate funds and managed as a whole, and whether an investor in one pool is entitled to exchange his investment in that pool for an investment in another one. If a creditor has recourse to the assets of all the pools, that is likely to mean that

there is a single fund, but if a creditor does not have such recourse this is neutral as to whether the pools are separate funds or investment compartments of the same fund.

The fact that one fund invests all its assets in another does not make them into a single fund, as *AIFMD* recognises that feeder and master funds can remain separate funds.

Question 2.63: Is each investment compartment a separate AIF?

In our view, an investment compartment of an *AIF* should not be treated as a separate *AIF* for the purpose of the *general prohibition*. The phrase "including investment compartments of such an undertaking" in the definition of an *AIF* means that an investment compartment of an *AIF* is treated as being part of that *AIF*.

An alternative approach is that each compartment should be treated as a separate *AIF* but the overall fund should not. We do not agree with this interpretation because a compartment in its ordinary meaning is something that is part of something bigger. Also, potentially the role of manager of the overall fund is significant and it is unlikely that it would fall outside regulation altogether. This alternative approach would be inconsistent with the part of the *ESMA AIFMD key concepts guidelines* discussed in the answer to Question 2.65 (What if part of an undertaking meets the *AIF* definition and part does not?).

Another argument against this alternative approach is the requirement in the *UK* provisions which implemented article 5(1) of *AIFMD* that each *AIF* have a single *AIFM*. It would be difficult to meet that requirement if each compartment is subject to the management of the manager of the overall fund. It would also seem unlikely that the *UK* provisions which implemented *AIFMD* would get round that problem by implicitly prohibiting funds from having an overall manager.

Another interpretation is that the undertaking as a whole and each compartment are separate *AIFs*. We do not agree with that interpretation for similar reasons.

Hence, an investment compartment of an *AIF* should not be treated as a separate *AIF*. It is part of the overall *AIF*. The manager of the sub-fund is not *managing an AIF* whereas the manager of the overall fund is.

Question 2.64: How do Questions 2.62 and 2.63 apply to umbrellas?

This answer only relates to an *umbrella* as defined in the *Glossary*. Broadly, this defines an *umbrella* as a single scheme that provides for pooling of the type mentioned in section 235(3)(a) of the *Act* (Collective investment schemes) in relation to separate parts of the scheme property and whose Unitholders are entitled to exchange rights in one part for rights in another. These two factors are likely to mean that (assuming all the requirements of the *AIF* definition are met) the *umbrella* should be treated as a single *AIF* with each sub-fund being treated as an investment compartment of that *AIF*. If this is the case, the sub-funds will not be separate *AIFs* in their own right.

Question 2.65: What if part of an undertaking meets the AIF definition and part does not?

Under the *ESMA AIFMD key concepts guidelines*, where an investment compartment of an undertaking exhibits all the elements in the definition of

an *AIF* this should be sufficient to determine that the undertaking as a whole is an *AIF*.

Other general points

Question 2.66: Does the interpretation of a CIU in PERG 16 apply to MiFID?

■ PERG 16 is not intended to cover the meaning of a collective investment undertaking in *UK* provisions which implemented other *EU* Directives. This reflects the fact that the *ESMA AIFMD key concepts guidelines* do not apply to the *UK* provisions that implemented *MiFID*.

16.3 Managing an AIF

G **Question 3.1: What does managing an AIF mean?**

A *person* manages an *AIF* when the *person* performs:

- (1) risk management; or
- (2) portfolio management;

for the *AIF*.

Question 3.2: If a person performs only one of the activities listed in the answer to Question 3.1 does it manage an AIF?

Yes. However, an *AIFM* is not permitted to be authorised to manage an *AIF* on that basis (see ■ FUND 1.4.4 R (4)). An undertaking that is seeking *permission to manage an AIF* will not be given *permission* to provide portfolio management without also providing risk management or vice versa.

Question 3.3: Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an AIF?

No. If a *person* manages an *AIF* (within the meaning set out in the answer to Question 3.1), and also carries on:

- (1) one or more of the additional activities listed in the answer to Question 3.4); or
- (2) one or more other activities in connection with or for the purposes of the management of that *AIF*;

those activities are included in the *regulated activity of managing an AIF*.

Question 3.4: What are the additional activities referred to paragraph (1) of the answer to Question 3.3?

They are as follows:

- (1) administration:
 - (a) legal and fund management accounting services;
 - (b) *customer* inquiries;
 - (c) valuation and pricing (including tax returns);
 - (d) regulatory compliance monitoring;

- (e) maintenance of *unit / share* holder register;
- (f) distribution of income;
- (g) *unit* issues and redemptions;
- (h) contract settlements (including certificate dispatch) and;
- (i) record keeping;
- (2) *marketing*; and
- (3) activities related to the assets of *AIFs*, namely:
 - (a) services necessary to meet the fiduciary duties of the *AIFM*;
 - (b) facilities management;
 - (c) real estate administration activities;
 - (d) advice to *undertakings* on capital structure, industrial strategy and related matters;
 - (e) advice and services related to mergers and the purchase of *undertakings*; and
 - (f) other services connected to the management of the *AIF* and the companies and other assets in which it has invested.

Question 3.5: Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an AIF?

No. Those activities only involve *managing an AIF* for a particular *AIF* if the *person* doing them is carrying on, for that *AIF*, the part of the *regulated activity of managing an AIF* described in the answer to Question 3.1. If an *AIFM* carries on the activities listed in the answer to Question 3.4 in relation to a fund of which it is the *AIFM* those activities are included in the *regulated activity of managing an AIF*. But, if the activities listed in the answer to Question 3.4 are carried on by a third party, that third party will not be carrying on the *regulated activity of managing an AIF* for that *AIF*, although that third party may be carrying on other *regulated activities*, such as *arranging (bringing about) deals in investments or making arrangements with a view to transactions in investments*.

Question 3.6: Can an AIF manage itself?

Yes. An *AIFM* may be:

- (1) another *person* appointed by or on behalf of the *AIF* and which through that appointment is responsible for managing the *AIF* (an external *AIFM*); or
- (2) where the legal form of the *AIF* permits internal management and where the *AIF's governing body* chooses not to appoint an external *AIFM*, the *AIF* itself (an internal *AIFM*).

Question 3.7: What effect does delegation have?

An *AIFM* is permitted to appoint a delegate to provide portfolio management and/or risk management services for the *AIFM* (see ■ FUND 3.10 and regulation 26 of the *AIFMD UK Regulation*).

If the delegation relates to the additional services described in the answer to Question 3.4 (What are the additional activities referred to paragraph (1) of the answer to Question 3.3?) the delegate will not be *managing an AIF*, for

the reason in the answer to Question 3.5 (Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an AIF?).

In any case, under article 51ZC(3) of the RAO a *person* does not *manage an AIF* if the functions it performs for the *AIF* have been delegated to it by another *person*, provided that such other *person* is not an *AIFM* that has delegated such functions to the extent that it is a letter-box entity. So a *person* who has received a delegation of some of the *AIFM's* core functions (ie, the functions listed in the answer to Question 3.1 (What does managing an AIF mean?)) generally does not *manage an AIF*. Letter box entities are described in the answer to Question 3.8 (Does this mean that delegation can never affect who is doing the regulated activity of managing an AIF?).

This answer reflects the *AIFMD* regime in the *United Kingdom*, which envisages that generally an *AIFM* may delegate functions without the delegate becoming the *AIFM* in place of the original manager, or the delegate becoming the *AIFM* alongside the original manager, in breach of the requirement that there be only one *AIFM*.

Question 3.8: Does this mean that delegation can never affect who is doing the regulated activity of managing an AIF?

Delegation can sometimes affect who is *managing an AIF*.

Article 82 of the *AIFMD level 2 regulation* says that an *AIFM* shall be deemed a letter-box entity and shall no longer be considered to be the manager of the *AIF* at least in any of the situations set out in that article, which is reproduced in ■ FUND 3.10.9 EU.

This raises four questions. First, whether an *AIFM* that delegates in such a way as to make itself into a letter-box entity is still carrying on the *regulated activity of managing an AIF*. This is dealt with in Question 3.9. Secondly, whether the delegate is carrying on the *regulated activity of managing an AIF*. This is dealt with in Question 3.10. The third question is whether this only applies when the *UK* provisions which implemented article 20 of *AIFMD* (which contains the letter-box entity provisions elaborated by article 82) applies. This is dealt with by Question 3.12. The fourth question is what the test for a letter-box entity is. This is dealt with in Question 3.13.

Question 3.9: Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?

The fact that article 82 of the *AIFMD level 2 regulation* says that a letter-box entity shall no longer be considered to be the manager of the *AIF* would appear to mean that an *AIFM* that delegates in this way is no longer *managing an AIF*. However, in our view, an *AIFM* that delegates in such a way as to make itself into a letter-box entity is still carrying on the *regulated activity of managing an AIF*. The following points support this:

(1) Article 82 of the *AIFMD level 2 regulation* describes who is acting as the manager. The *regulated activity* does not refer to acting as an *AIFM*; it simply refers to managing an *AIF*. The *regulated activity* does not expressly incorporate article 82 as part of the definition.

(2) The RAO does not include the requirement in the *AIFM* definition that the *AIFM* be a legal *person*, which shows that the definition of *AIFM* is not fully aligned with the definition of *managing an AIF*.

(3) Regulation 4(3) of the *AIFMD UK Regulation* envisages that the *AIFM* will be appointed by or on behalf of the *AIF* or by its *governing body*. This is not reflected in the RAO either.

(4) The UK provisions which implemented article 20 of *AIFMD* (which contains the letter-box entity provisions elaborated by article 82) deal with regulating how an *AIFM* should manage its AIF.

(5) There is a good reason why an *AIFM* that has delegated its functions in a way that means it has become a letter-box entity should still be carrying on the *regulated activity of managing an AIF*. It is necessary to avoid the risk that a manager that delegates to this degree falls out of regulation, because it stops carrying on a *regulated activity*. One of the purposes of regulation is to stop a manager doing this and effective implementation of *AIFMD* requires us to be able to do so.

Question 3.10: Does delegation by the manager mean that the delegate is carrying on the regulated activity of managing an AIF?

The factors listed in the answer to Question 3.9 (Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?) support the view that a delegate of a letter-box entity does not *manage an AIF*. However, despite this, we believe that a delegation by the *AIFM* to a delegate can result in the delegate *managing an AIF* if the delegation results in the *AIFM* becoming a letter-box entity.

(1) Recital (9) of *AIFMD* confirms that the letter-box entity provision is an anti-avoidance provision preventing circumvention of the UK provisions which implemented *AIFMD* by means of turning the *AIFM* into a letter-box entity. A provision of this kind reflects a more general principle that rights originally given by the UK provisions which implemented European law (such as the right of a manager to delegate or the right of a delegate to carry on its business without being authorised as an *AIFM*) should not be abused. It is important to know who the real manager of an *AIF* is, so as to know whether an *overseas regulator* is responsible for its supervision or whether the *AIF* is managed from outside the *United Kingdom*. If the real manager is not *managing an AIF*, it may not be carrying on any *regulated activity* and may not fall under any financial services regulation, even though effective implementation of *AIFMD* would have required the situation to be regularised.

(2) Article 51ZC(3) of the RAO implies that a *person* that has accepted a delegation from a manager that results in the manager becoming a letter-box entity, can be *managing an AIF*.

(3) It is not unreasonable to say that, if the delegate is in practice carrying out the management activities described in the answer to Question 3.1 (What does managing an AIF mean?), it should be treated as carrying on the *regulated activity*.

Question 3.11: Does this mean that delegation that results in the manager being a letter-box entity always means that the delegate will be carrying on the regulated activity of managing an AIF?

No. In each case it is necessary to apply the tests set out in ■ PERG 16.3. If all the functions that have been delegated by the letter-box entity manager have been delegated to the same delegate, it is likely that that delegate is *managing an AIF*. However, if the delegation is to a number of delegates, it may be that none of those delegates is *managing an AIF*.

Question 3.12: Do the answers to Questions 3.7 to 3.11 apply just to delegation by a full-scope UK AIFM?

No. For example, they would be relevant to whether a delegate in the *UK is managing an AIF* if it accepts a delegation from an overseas manager. We take this approach for the following reasons.

(1) The arguments in Question 3.10 (Does delegation by the manager mean that the delegate is carrying on the regulated activity of managing an AIF?) are also in favour of the view that the effect of delegation on a delegate should not be confined to delegation by an authorised *AIFM*. In any case, it would be anomalous for delegation to affect who is *managing an AIF* only when the UK provisions which implemented article 20 of *AIFMD* apply, particularly given that article 82 is, in our view, an anti-avoidance provision (see the answer to Question 3.10).

(2) Article 51ZC(3) of the RAO is not specifically limited to circumstances in which article 20 applies. It applies in any situation in which it is necessary to decide whether a *person is managing an AIF* for the purpose of the *general prohibition*.

Question 3.13: What is the test for a letter-box entity?

In our view, the test of whether delegation results in the delegate *managing an AIF* is decided by article 82 of the *AIFMD level 2 regulation* in circumstances when article 82 and the *UK provisions* which implemented article 20 of *AIFMD* apply to the delegating *AIFM*.

When the *UK provisions* which implemented article 20 do not apply we look at whether the delegation is to such a degree that the manager can no longer be considered to be carrying out the activities in the answer to Question 3.1 (What does managing an AIF mean?). We take the various factors elaborated in article 82 into account but they will not necessarily decide the matter because article 82 is, on its face, linked to article 20 and article 51ZC(3) of the RAO does not specifically refer to article 20 or 82.

If a manager to which article 82 does not apply can nevertheless satisfy all the conditions set out in that article to demonstrate that it has not become a letter-box entity, any delegation by it will not result in the delegate *managing an AIF*.

However, we do not necessarily require that delegate to demonstrate to us that every condition of article 82 is satisfied, to conclude that the manager is not a letter-box entity and that the delegate is not *managing an AIF*. The importance of the tasks carried out by the manager is a key consideration, taking particular account of the right and ability of the manager to exercise oversight and control and the degree to which these rights are exercised. In our view, these factors reflect the fact that we are applying a broad anti-avoidance approach to a letter-box entity rather than the detailed requirements of article 82.

Question 3.14: Is the material in PERG 16.3 about delegation relevant to delegation between branches of the same firm?

No. Please see Question 8.4 (Is the material in PERG 16.3 about delegation of management functions from one firm to another relevant to delegation from one branch to another?).

Question 3.15: If a person is not eligible to be appointed as an AIFM because it is not a legal person but is appointed to manage an AIF, does that mean that it cannot carry on the regulated activity of managing an AIF?

No. The fact that it is not eligible to be appointed as an *AIFM* does not mean that it is not *managing an AIF*. That means that an *unauthorised person* may breach the *general prohibition* by carrying on the *regulated activity of managing an AIF*, even though the *person* does not qualify for a *Part 4A permission* because that *person* is not a *legal person*.

Article 6(1) of *AIFMD* provides that no *AIFMs* should manage *AIFs* unless they are authorised in accordance with that Directive. An *AIFM* must be a *legal person*. So it appears that the *regulated activity of managing an AIF* cannot apply to someone who is not a *legal person*. However, in our view, this is not the case. As explained in the answer to Question 3.9 (Does delegation by the manager mean that it is no longer carrying on the regulated activity of managing an AIF?), the definition of an *AIFM* is not fully aligned with the definition of *managing an AIF*. In particular, the *regulated activity* does not refer to acting as an *AIFM* (the definition of *AIFM* in the *AIFMD UK Regulation* includes the *legal person* requirement), it simply refers to managing an *AIF*. There is a good policy reason for this. It is not the intention of the legislation to allow someone who is not a *legal person* to manage an *AIF* without being authorised, but to stop an *AIF* being managed by someone who is not a *legal person*.

Question 3.16: Can an AIF in the form of a limited partnership under the Limited Partnerships Act 1907 appoint its general partner as the AIFM?

Yes. If the general partner is the *AIFM* it will be an external *AIFM*.

Strictly speaking this question is not relevant to the definition of *managing an AIF* but this is a convenient place to discuss the point.

On the face of it the answer should be No. The starting position is that if an *AIF* is managed by the body that has responsibility for governing it under the legislation under which the *AIF* is formed, the *AIF* is internally managed, particularly if there is no *governing body* that appoints and supervises the manager and the manager is a member of that *AIF*. A general partner is a partner and there will usually be no *governing body* separate from the general partner. Under this approach, a limited partnership would be internally managed, which would be contrary to the *AIFMD* regime in the *United Kingdom*, as an *AIFM* must be a *legal person* and an English and Welsh limited partnership is not a *legal person*.

However, in our view, the roles of the limited and general partners are sufficiently distinct for one to be able to say that the limited partnership does not manage itself. The distinction between the two roles does not stem from the fact that the general partner manages the partnership, but from the facts that:

- (1) the roles of general and limited partner are provided for by the legislation under which limited partnerships are formed; and
- (2) the legislation, in practice, prevents the limited partners from managing the partnership (because for as long as a limited partner takes part in the management of the partnership business, it is liable for the partnership's debts as though it were a general partner).

In principle, the same should apply for jurisdictions outside England and Wales with legislation drafted in the same way. We understand that this is the case with a Scottish limited partnership (which has legal personality) and

so if its general partner is appointed as its *AIFM* it will also be an external *AIFM*.

16.4 Acting as a depositary of an AIF

G Question 4.1: What does acting as a depositary of an AIF involve?

Acting as:

- (1) the depositary of an *AIF* managed by a full-scope UK AIFM; or
 - (2) the depositary of a UK *AIF* managed by an EEA AIFM; or
 - (3) the depositary of any other *AIF*, if the *FCA* or an authority in another *EEA State* has permitted a *person* with its registered office or a branch in the *UK* to be appointed as a depositary of that *AIF* under article 61.5 of *AIFMD*; or
 - (4) the *trustee* of an *AIF* that is an *authorised unit trust scheme* but is not an *AIF* to which (1) to (3) apply; or
 - (5) the depositary of an *AIF* that is an *open-ended investment company* or *authorised contractual scheme* but is not an *AIF* to which (1) to (3) apply.
- (3) only applies until 22 July 2017.

Question 4.2: What does depositary mean?

For the purposes of paragraphs (1) to (3) of the answer to Question 4.1, depositary means:

- (1) a *person* appointed in compliance with the requirement for the *AIFM* to appoint a depositary in the *UK* provisions which implemented article 21.1 of *AIFMD*; or
- (2) an Article 36 custodian as defined in regulation 57(5)(a) of the *AIFMD UK Regulation*.

For the purpose of paragraph (5) of the answer to Question 4.1, depositary has the meaning in section 237 of the *Act*.

Question 4.3: The *AIFMD* allows the depositary to delegate some functions to a third party. Is that third party acting as the depositary of an *AIF*?

No. The *UK* provisions which implemented article 21 of *AIFMD* envisage that a *depositary* remains the sole depositary even if, in accordance with that article, it delegates certain of its functions.

16.5 How AIFMD affects other regulated activities

G Overlap with the collective investment scheme definition

Question 5.1: Do the definitions of collective investment scheme and AIF overlap?

Yes. The definition of a *collective investment scheme* does not exclude an *AIF*. The two definitions sit alongside each other and overlap extensively. Many *AIFs* will also be *collective investment schemes*. Therefore, it is possible that an *unauthorised person* who operates a fund will be *establishing, operating or winding up a collective investment scheme* and *managing an AIF*.

However, not every *AIF* is a *collective investment scheme*. The main example of an *AIF* that is not a *collective investment scheme* is an *AIF* in the form of a body corporate other than an *open-ended investment company*. Therefore, the existing case law on the definition of a *collective investment scheme* does not decide whether an undertaking is an *AIF* or *CIU* and the material in ■ PERG 16 about the definition of an *AIF* and *CIU* does not determine whether an undertaking is a *collective investment scheme*.

Question 5.2: Won't the overlap between collective investment schemes and AIFs mean that an AIFM will need unnecessarily overlapping permissions?

No. There are two important exclusions.

(1) If a *person* has a *Part 4A permission to manage an AIF*, activities carried on by that *person* in connection with or for the purposes of *managing an AIF* are excluded from all other *regulated activities*.

(2) A *person* (A) does not carry on the *regulated activity of establishing, operating or winding up a collective investment scheme* if A carries on that activity in relation to an *AIF*, and:

(a) at the time A carries on the activity, the *AIF* is managed by:

(i) a *person* with a *Part 4A permission to manage an AIF* (who may be a third party or A itself); or

(ii) a *person* registered as a *small registered UK AIFM* because the conditions in regulation 10(4) of the *AIFMD UK Regulation* are met in respect of that *AIF*; or

(b) no more than 30 days have passed since the *AIF* was managed by a *person* with that *permission* or registration.

The 30-day period in (b) can be extended in certain circumstances, as set out in article 51ZG(2) of the RAO.

Overlap between the depositary and custody activities

Question 5.3: Does the depositary of an AIF also need permission for safeguarding and administering investments?

No. A *person* does not safeguard and administer investments if the *person* carries on the activity in relation to an *AIF* and the *person* has a *Part 4A permission* to act as a depositary of an *AIF* in respect of that *AIF*.

Interests in an AIF as specified investments

Question 5.4: How do the advising and intermediary activities relate to an AIF?

Although an interest in an *AIF* is not separately specified by the RAO as a type of *security* or relevant investment in its own right it will normally fall within one of the other categories of *security* or relevant investment, such as a *share* or *unit*. That means that the *regulated activities* of:

- (1) *dealing in investments as agent*;
- (2) *arranging (bringing about) deals in investments*;
- (3) *making arrangements with a view to transactions in investments*; and
- (4) *advising on investments*;

will apply in the same way as they do to other investments of the relevant type. Therefore, for example, a *firm* that advises on investing in an *AIF* that is a *collective investment scheme* will be advising on *units*.

Examples

Question 5.5: Please give me some examples of how the regulated activities specific to AIFs interact with other regulated activities.

Please see the following table. All the examples involve *UK persons* and activities carried on in the *UK*. It is assumed that any manager delegating functions is not a letter-box entity.

Part 1: Examples of how the <i>regulated activities</i> specific to <i>AIFMs</i> interact with other <i>regulated activities</i>	
Example	Explanation of interaction with other <i>regulated activities</i>
(1) A <i>firm</i> (A) with <i>permission to manage an AIF</i> , manages an <i>AIF</i> that is also a <i>collective investment scheme</i>	A does not need <i>permission to establish, operate or wind up a collective investment scheme</i> . The <i>CIS exclusion</i> applies.
(2) A <i>firm</i> (A) with <i>permission to establish, operate or wind up a collective investment scheme</i> wants to <i>manage an AIF</i>	A needs to vary its <i>permission to cover managing an AIF</i>
(3) An <i>unauthorised person</i> (A) manages an <i>AIF</i> that is also a <i>collective investment scheme</i> and also oper-	A will be <i>establishing, operating or winding up a collective investment scheme</i> and <i>managing an AIF</i> . The ef-

ates it. No authorised AIFM is in place.

(4) A firm (A) with permission to manage a UK UCITS wishes to act as an AIFM

(5) A firm (A) with permission to manage an AIF delegates the management of some of the AIF's securities portfolios to B.

(6) Same as (5). B's Part 4A permission covers managing an AIF or managing a UK UCITS.

(7) A has permission to manage an AIF. The AIF has several investment compartments. A appoints B to manage the securities portfolio which makes up one of these compartments.

(8) A firm (A) with permission to manage an AIF delegates risk management to a UK firm, B.

fect on *unauthorised persons* of the overlap between the definitions of *AIF* and *collective investment schemes* is different to the effect on *authorised persons*. The CIS exclusion does not apply as A is not an *authorised person*.

A needs to vary its *permission* to cover managing an AIF.

B does not *manage an AIF* for the reasons described in the part of the answer to Question 3.7 (What effect does delegation have?) dealing with the delegation of core functions. However, B *manages investments*. See article 78 of the *AIFMD level 2 regulation* (Delegation of portfolio or risk management) on the ability of an *AIFM* to delegate portfolio management or risk management to a *person* authorised or registered for the purpose of asset management.

Even if B's activity could otherwise be *establishing, operating or winding up a collective investment scheme*, it will not be in this case because A's role means that the CIS exclusion is available to B.

Same answer. B's *Part 4A permission* should be amended to cover *managing investments*.

The answer in (5) applies here too. The investment compartment is not treated as a separate *AIF* (see Question 2.63 (Is each investment compartment a separate AIF?)). This arrangement is not contrary to the requirement in article 5(1) of *AIFMD* that each *AIF* have only one *AIFM*, as that requirement operates at the level of the *AIF* and not each separate investment compartment.

B does not *manage an AIF*. If the fund is also a *collective investment scheme*, B does not need *permission to establish, operate or wind up a collective investment scheme*. (5) explains the reasons for this.

If B's functions involve *managing investments* it will need *permission* for that (see (5)).

Even if B's activities are not *regulated activities*, A will not be able to delegate to B unless B has *permission to manage investments, manage an AIF or manage a UK UCITS*

(9) A carries out portfolio and risk management of an *AIF*. B runs the rest of the scheme.

(10) A is *managing an AIF* (and has *permission* to do so). B is in charge of administering the scheme.

(11) Same as (10). Then A resigns as manager.

(12) A is *managing an AIF* (and has *permission* to do so) and is responsible for issuing and selling *units* or *shares* in the *AIF*.

(13) A *firm* (A) with *permission* to *manage an AIF* sets up an *AIF* that is also a *collective investment scheme*. A intends to manage it.

(14) A (acting by way of business) sets up an *AIF* that is also a *collective investment scheme*. A does not intend to manage it. B has been appointed as *AIFM*. B has *permission* to *manage an AIF*.

(15) A (acting by way of business) sets up an *AIF* that is also a *collective investment scheme*. A does not intend to manage it. A has lined up a *firm* (B) with *permission* to man-

because of article 78 of the *AIFMD level 2 regulation* (Delegation of portfolio or risk management).

A is *managing an AIF*. The difference from (5) is that B has not delegated portfolio management to A.

B is not *establishing, operating or winding up a collective investment scheme* because of the CIS exclusion. B is not *managing an AIF* for the reasons described in the answer to Question 3.5 (Does anyone carrying on only the activities listed in the answer to Question 3.4 carry on the regulated activity of managing an *AIF*?).

Same answer as (10). B may carry on its activities for 30 days while a new *AIFM* is put in place. That 30-day period may be extended in certain circumstances.

Selling *shares* or *units* often involves dealing in investments as principal or dealing in investments as agent. However, A does not need these *permissions* as the activities are covered by the extended definition of *managing an AIF* described in the answer to Question 3.4 (What are the additional activities referred to paragraph (1) of the answer to Question 3.3?) and hence the connected purposes exclusion applies.

The fact that A is establishing a *collective investment scheme* does not mean A needs *permission* to *establish, operate or wind up a collective investment scheme*. In our view, taking preliminary steps towards the carrying on of a *regulated activity* is itself carrying on that activity. A manager who is setting up a scheme is taking preliminary steps of that kind to *manage an AIF*. Hence, the connected purposes and CIS exclusions apply.

As explained in (13), taking preparatory steps towards carrying on a *regulated activity* is itself a *regulated activity*. On this approach, as B has started *managing an AIF*, the CIS exclusion comes into play and A does not need *permission* for establishing a *collective investment scheme*.

A will require *permission* to *establish, operate or wind up a collective investment scheme* as B has not begun to *manage an AIF*.

age an AIF to be the *AIFM* but B has not been appointed yet.

(16) A firm (A) with *permission to manage an AIF* manages an AIF and carries out portfolio and risk management for the AIF. A also is in charge of marketing and issuing units in the AIF. As part of that process A gives investment advice to potential investors.

A does not need *permission for advising on investments*. Instead the advisory activity is included within *managing an AIF*. The reasons are similar to those in (12). Marketing and issuing units in the AIF is part of the extended managing activity (see Question 3.4). The advising is carried on by A in connection with, or for the purposes of, marketing and issuing. As explained in paragraph (2) of the answer to Question 3.3 (Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an AIF?), this means that the advising is included in *managing an AIF*. Therefore, the connected purposes exclusion excludes it from *advising on investments*.

(17) Same as (16). However, (leaving aside the RAO provisions explained in PERG 16.3 and PERG 16.5) the advisory activity would not have involved *advising on investments*.

For the reason in (16) the advisory activity is still a *regulated activity*, as part of *managing an AIF*.

References to the "connected purposes exclusion" are to the exclusion described in paragraph (1) of the answer to Question 5.2 (Won't the overlap between collective investment schemes and AIFs mean that an AIFM will need unnecessarily overlapping permissions?). References to the "CIS exclusion" are to the exclusion described in paragraph (2) of the answer to Question 5.2.

Part 2: Examples of how the *regulated activities* specific to depositaries interact with other *regulated activities*

Example

Explanation of interaction with other regulated activities

(1) A is the depositary of an AIF and its *permission* covers this activity

A acts as a depositary of an AIF. A does not *safeguard and administer investments*.

(2) A is the depositary of an AIF and its *permission* covers this activity. A delegates some of the custody activities to B.

For A, the result is the same as under (1). B does not act as a depositary of an AIF but instead *safeguards and administers investments*.

(3) A is depositary of an AIF. A carry vehicle or co-investment scheme invests alongside the AIF. That vehicle is a *collective investment scheme* and A is its custodian. The schemes invest in financial assets.

A's role in relation to the AIF means that its *permission* should cover acting as a depositary of an AIF. A's role in relation to the carry or co-investment vehicle means that its *permission* should cover *safeguarding and administering investments*. The exclusion described in the answer to Question 5.3 (Does the depositary of an AIF also need permission for safeguarding and administering investments?) does not apply in relation to the carry or co-investment vehicle.



16.6 Exclusions

G Question 6.1: What exclusions from the regulated activities specific to AIFs are there?

The following table lists the exclusions. Some exclusions are relevant to the definition of an *AIF*, some to the definition of an *AIFM* and some to both.

Table: Exclusions		
Entities that are not <i>AIFs</i>	<i>Persons</i> excluded from the definition of <i>managing an AIF</i>	Where further <i>Handbook</i> material can be found
An institution for occupational retirement provision which is an occupational pension scheme, within the meaning of section 1(1) of the Pension Schemes Act 1993	An institution for occupational retirement provision which is an occupational pension scheme, within the meaning of section 1(1) of the Pension Schemes Act 1993	Question 2.32
	A national, regional or local government or body or other institution which manages funds supporting social security and pension systems	
An employee participation scheme or employee savings scheme	An employee participation scheme or employee savings scheme	Question 2.34
A securitisation special purpose entity	A securitisation special purpose entity	Question 2.37
A holding company	A holding company	Questions 6.2 to 6.5
	<i>A small registered UK AIFM</i> , in respect of the <i>AIFs</i> managed by it by virtue of which it is entitled to be registered as a <i>small registered UK AIFM</i> (but not in respect of any other <i>AIFs</i> managed by it)	FUND 1
	An <i>AIFM</i> that manages a group <i>AIF</i>	Question 6.6
	A national central bank	None

The European Central Bank, the European Investment Bank, the European Investment Fund, a bilateral development bank, the World Bank, the International Monetary Fund, any other supranational institution or similar international organisation, or a European Development Finance Institution, in the event that such institution or organisation manages *AIFs* and in so far as those *AIFs* act in the public interest

None

An *AIFM*, the registered office of which is not in the *United Kingdom*

Question 8.3

Note 1: All references are to this chapter of *PERG* unless otherwise stated

Note 2: In general the meaning of *AIF* in the RAO is the one in the *AIFMD UK Regulation*. The exclusions from the *AIF* definition noted in this table come from the *AIFMD UK Regulation*.

Question 6.2: Is a holding company subject to the AIFMD regime in the United Kingdom?

No. There is a specific exclusion for a holding company.

For these purposes, a holding company means a company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy(s) through its subsidiaries, associated companies or participations in order to contribute to their long-term value and which is either a company:

(1) operating on its own account and whose shares are admitted to trading on a regulated market in the *United Kingdom*; or

(2) not established for the main purpose of generating returns for its investors by means of divestment of its subsidiaries or associated companies, as evidenced in its annual report or other official documents.

In our view, this exclusion is at least in part by way of clarification. In some circumstances, compliance with the conditions of the exclusion will mean that there is no *AIF* in the first place.

Question 6.3 How wide does the holding company exclusion go?

Broadly speaking, therefore, an undertaking will be able to use the holding company exclusion if:

(1) it carries out a commercial business strategy through its participations by contributing to their long-term value; and

(2) it does not generate its returns for its investors by means of divestment of its participations.

The question then is what else the exclusion covers.

Recital (8) of *AIFMD* says that managers of private equity funds or *AIFMs* managing *AIFs* whose shares are admitted to trading on a regulated market should not be excluded from its scope.

However, the exclusion envisages that an undertaking, whose main purpose is generating returns for its investors by means of divestment of its subsidiaries or associated companies, may still be excluded from the *AIFMD* regime in the *United Kingdom* if its shares are listed.

The question then is how the recital and the exclusion are to be reconciled.

There is guidance on this on the *AIFMD* section of the European Commission's webpages "Questions on Single Market Legislation". The answer to Question ID 1146 says that the definition has to be read as a whole and jointly with recital (8). Consequently, private equity as such should not be deemed to be a holding company. The concept of "operating on its own account" should also be interpreted in the context of the requirement that the shares of such holding company are admitted to trading on regulated market in the *United Kingdom*. Hence, says the guidance, this means that a holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares. Such business is done on the own account of the holding company and not on behalf of a third party. The answer says that the exemption is meant to cover "large corporates such as Siemens or Shell".

In theory, there is no distinction between a company whose returns are for itself and one whose returns are for its investors, as the returns of any company are generated for its investors as they change over time. However, in our view, this distinction is pointing towards the factors that distinguish a typical fund from a commercial company.

This does not completely explain the part of the exclusion that refers to shares being admitted to trading (see paragraph (1) of the answer to Question 6.2 (Is a holding company subject to *AIFMD*?)). In our view, this part of the exclusion is limited to internally managed *undertakings*. Therefore, this part of the exclusion applies to a business if:

- (3) it carries out a commercial business strategy through its participations by contributing to their long-term value;
- (4) the *AIF* is self-managed;
- (5) it is not clearly acting as a fund taking into account the factors in the answers to Question 2.20 (Are there any other factors to take into account?) and Question 2.21 (Please give some further examples of factors to take into account when deciding whether an undertaking is set up like a fund); and
- (6) the *AIF's* shares are admitted to trading on a regulated market in the *United Kingdom*.

Paragraphs (3) to (6) do not apply to an undertaking that meets the criteria in paragraphs (1) and (2).

Question 6.4: Is the holding company exclusion always available where the fund holds controlling stakes in the businesses in which it invests so that the businesses are its subsidiaries?

No. It is important to remember that the exclusion is only available if the company carries out a business strategy(s) through its subsidiaries. The company should act in the same way that a conventional holding company of an industrial group would act. This means that the holding company must be responsible (with the subsidiaries) for the overall strategy of the subsidiaries. So, if the manager's subsidiaries are manufacturers, the manager must be responsible, with the subsidiaries themselves, for the manufacturing strategy of the subsidiaries.

The European Commission's Q&A about *AIFMD* say (Question ID 1146) that it is inherent in the concept of a holding company that all operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. In our view, the exemption is available only to the extent that the undertaking is acting as a holding company. It does not matter if the undertaking carries out other activities but any such activities will not get the benefit of the holding company exclusion. Those activities should be entirely ancillary to its role as a holding company or otherwise outside the scope of the *AIFMD* regime in the *United Kingdom*. Thus, for example, a holding company may also provide services to other members of the group such as raising capital through the capital markets, treasury functions and human resources services.

If a holding company manages an *AIF* as well as acting as a holding company, its activities in managing that *AIF* are not excluded. The exclusion applies only in so far as it acts as a holding company. For example, if a holding company manages a conventional unit trust scheme it would not be excluded for that activity.

Question 6.5: What does company mean in the holding company exclusion?

As explained in the answer to Question 2.25 (What is the justification for the approach in the answers to Questions 2.15 to 2.23?), the basic distinction in *AIFMD* is between investment activities and commercial/industrial activities. The holding company exclusion is an illustration of this basic approach. For that reason, we believe that the term 'company' should be broadly interpreted to cover any undertaking such as, for example, a *limited liability partnership*.

Question 6.6: What does the group AIF exclusion involve?

An *AIFM* in so far as it manages one or more *AIFs* whose only investors are:

- (1) the *AIFM*; or
- (2) the *parent undertakings* of the *AIFM*; or
- (3) the *subsidiary undertakings* of the *AIFM*; or
- (4) other *subsidiary undertakings* of those *parent undertakings*;

is excluded from the *regulated activity of managing an AIF* provided that none of the investors is an *AIF*.



16.7 By way of business

G **Question 7.1: Must the AIFMD regulated activities be carried on by way of business for authorisation to be required?**

Yes. Under section 22 of the *Act* (Regulated activities), for any activity to be a *regulated activity* it must be carried on by way of business.

Question 7.2: What is the test for whether activities are carried on by way of business?

The test for whether the *regulated activities of managing an AIF* and acting as a depositary of an AIF are carried on by way of business is the one described in ■ PERG 2.3.2G (2).

16.8 Territorial scope

G Question 8.1: What is the territorial scope of the AIFMD regulated activities?

■ PERG 2.4 (Link between activities and the United Kingdom) describes the general principles.

Section 418 of the *Act* (Carrying on regulated activities in the United Kingdom) describes the circumstances in which an activity is treated as carried on in the *UK* in circumstances in which it would not otherwise be, as described by ■ PERG 2.4.3 G.

Leaving aside section 418, generally speaking the activities of *managing an AIF* and acting as a depositary of an AIF are carried on where the place of business of the *AIFM* or depositary from which those activities are carried out is located.

If one of these activities is carried on from a number of locations, some in the *UK* and some not, the activity is treated as being carried on in the *UK* if there is some continuity or regularity of provision within the *UK* of activities which are a significant part of the activity of *managing an AIF* or acting as a depositary of an AIF.

Question 8.2: Are the additional activities described in the answer to Question 3.3 relevant?

Yes. When deciding whether a company is *managing an AIF* in the *UK* if it splits the work between an office in the *UK* and one outside, one should take into account any of the additional activities described in the answer to Question 3.3 (Are the activities mentioned in the answer to Question 3.1 the only activities included in managing an AIF?) if the manager is performing risk management or portfolio management, even if all the risk management and portfolio management is carried on outside the *UK*.

Question 8.3: Can the AIF activities be carried on by an overseas firm?

As explained in the answer to Question 6.1 (What exclusions from the regulated activities specific to AIFs are there?), the *regulated activity* of *managing an AIF* does not apply to an *AIFM* whose registered office is not in the *United Kingdom*. Regulation 81 of the *AIFMD UK Regulation* restricts the scope of this exclusion from the date that HM Treasury brings in certain further legislation relating to non-*UK AIFs* and *AIFMs*.

The *regulated activity* of acting as a depositary of an AIF can apply to a *person* whose registered or head office is outside the *UK*.

Question 8.4: Is the material in PERG 16.3 about delegation of management functions from one firm to another relevant to delegation from one branch to another?

This question is about the branch in one country of an undertaking being appointed as an *AIFM* and then delegating some or all of its tasks to another branch of the same undertaking. The question is whether any of the material in ■ PERG 16.3 about the effect of delegation on who *manages an AIF* is relevant to whether that undertaking is carrying on those activities in the *UK* if one of those branches is in the *UK* and the other is not.

The answer is that it is not relevant. The two branches are part of the same legal entity. The relevant factors are the ones in the answer to Question 8.1 (What is the territorial scope of the AIFMD regulated activities?).

Chapter 17

Consumer credit debt counselling

17.1 Introduction

17.1

G

Q1.1 What is the purpose of the questions and answers in this chapter?

The purpose is to consider the scope of the *regulated activities* specifically relating to consumer credit debt counselling.

Q1.2 What are the regulated activities specifically relating to consumer credit debt counselling?

The *regulated activities* that specifically relate to consumer credit debt counselling are both to be found in article 39E of the *Regulated Activities Order*. They are:

- (1) giving advice to a *borrower* about the liquidation of a debt due under a *credit agreement*; and
- (2) giving advice to a *hirer* about the liquidation of a debt due under a *consumer hire agreement*.

Q1.3 What is the scope of this chapter?

This chapter is not a complete discussion of the *regulated activities* relating to consumer credit. It just concentrates on the things that are specific to *debt counselling*. In particular, it does not discuss the meaning of *borrower*, *credit agreement*, *consumer hire agreement* or *hirer*.

Q1.4 Are there transitional arrangements?

Yes, but they are outside the scope of this chapter.



17.2 The basic elements of debt counselling

17.2

Q2.1 What is the basic definition of debt counselling?

It involves the following elements:

(1) It is advice given to:

(a) a *borrower* about the liquidation of a debt due under a *credit agreement*; or

(b) a *hirer* about the liquidation of a debt due under a *consumer hire agreement*;

(see ■ PERG 17.3 for more about what the advice must be about).

(2) The advice must relate to a particular debt and debtor (see ■ PERG 17.4).

(3) It covers the giving of advice. It does not cover just giving mere information. This is explained in ■ PERG 17.5.

(4) If an exclusion applies, the activity is not a *regulated activity* (see ■ PERG 17.6).

Q2.2 Can you give some examples of what is and is not debt counselling?

Yes. There are examples in ■ PERG 17.7.

Q2.3 What other factors are relevant to whether authorisation is needed?

(1) Whether the activity is carried on by way of business (see ■ PERG 2.3).

(2) Whether an exemption is available (see ■ PERG 2.11).

(3) Whether the *person* can carry on the activity without *authorisation* (see ■ PERG 2.10.12 G to ■ PERG 2.10.16 G).

17.3 What the advice must be about

17.3

Q3.1 What does liquidation of a debt mean?

It has a wide meaning. For example, it would cover the following:

- paying off the debt in full and in time;
- agreeing a rescheduling or a temporary halt to paying off the debt;
- the debtor being released from the debt;
- agreeing a reduced repayment amount (including the creditor agreeing to accept token repayments);
- a third party taking over the debtor's obligation to discharge the debt;
- discharging the debt or making it irrecoverable through personal insolvency procedures such as bankruptcy, a voluntary arrangement or a debt relief order.

Q3.2 What does due mean?

As described in the answer to Q2.1 (What is the basic definition of debt counselling?), *debt counselling* relates to debts that are due under a *credit agreement* or a *consumer hire agreement*. As the regulation of *debt counselling* is a consumer protection measure the "due" should in the FCA's view be interpreted fairly broadly and should not be limited to debts that are immediately payable (for example, where the debtor is in default). Therefore, for instance, it would cover present obligations to make payments in the future.

Debt counselling is not limited to debts that are overdue. It also covers debts that are not overdue.

Q3.3 Does it matter if the advice also covers debts that are not due under a credit agreement or a consumer hire agreement?

No. If advice is given to a debtor about his debts, some of which are not payable under a *credit agreement* or a *consumer hire agreement*, that advice is regulated as long as some of the debts are due under a *credit agreement* or a *consumer hire agreement*. There is nothing in the definition of *debt counselling* or in the policy for regulating it that restricts *debt counselling* to a situation in which all the debts are consumer credit ones. Where advice covers both the consumer credit debt and the other debt, the advice on both types of debt is likely to be *debt counselling* as what is done about non-consumer credit debt is likely to affect consumer credit debt, particularly if the advice does not distinguish between the two types of debt. This is similar to the position for the advisory *regulated activities* in relation to transactions in regulated investments, which cover not only advice on the transaction in the regulated investment itself but also any advice with a view to, or in connection with, that transaction and advice as to any associated or ancillary matter.

For the same reason other kinds of advice that would not otherwise be treated as *debt counselling* will be included if that other kind of advice is given with a view to or in connection with the liquidation of consumer credit debts. See example (11) in the table in the answer to Q7.1 for an example of this.

17.4 Advice must relate to a particular debt and debtor

17.4

Q4.1 Does debt counselling cover advice given to the public in general rather than to a particular debtor?

Debt counselling covers giving advice about "a" debt. This means that the advice must relate to the debts of a particular debtor or debtors. Advice will normally not be covered if it is not given to any particular debtor. So for example, it would not generally cover advice in a newspaper, periodical publication, journal, magazine, publication or a radio or television broadcast. General advice open to everyone on a website is unlikely to be *debt counselling* for the same reason. On the other hand advice given to a particular debtor over the Internet may be regulated. Please see Q5.5 about whether decision trees involve *debt counselling*.

Q4.2 Must advice be given to a borrower?

Yes. *Debt counselling* means giving advice to a *borrower* under a *credit agreement* or a *hirer* under a *consumer hire agreement*. So for example it does not cover advice given to *persons* who receive it as:

- a lender under a *credit agreement* or the owner under a *consumer hire agreement*; or
- an adviser who will only use it to inform advice given by him to others (but see Q4.3); or
- a journalist or broadcaster who will use it only for journalistic purposes.

Q4.3 What about advice that is passed on through an intermediary?

This question covers advice prepared by A which is then passed on to the debtor by B.

If the debtor knows of this arrangement and knows that B does not exercise any judgement but just acts as a conduit, it is likely that A is *debt counselling* and B is not.



17.5 The meaning of advice

17.5

Q5.1 Broadly speaking, what is advice?

Advice means giving an opinion as a guide to action to be taken, in this case the liquidation of debts. It either explicitly or implicitly steers the customer to a particular course of action.

A key question is whether an impartial observer, having due regard to the regulatory regime and *guidance*, context, timing and what passed between the parties, would conclude that advice had been given. One should look at whether what the adviser says could reasonably have been understood by the client as being advice which would help him make up his mind.

The concept of advice is broad enough to include any communication with the debtor which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the debtor's decision whether or not to undertake the course of action in question.

Any course of action does not have to be identified in any detail. For example advice to opt for one of a number of identified possible debt solutions without advising which one of those the client should adopt may, depending on the circumstances, be *debt counselling*.

Q5.2 Does advice include a recommendation?

Yes, a recommendation to carry out a specific course of action to liquidate a relevant debt is likely to be *debt counselling*. However, something falling short of an explicit recommendation can be regulated too. Any element of evaluation, value judgment or persuasion is likely to mean that advice is being given.

Q5.3 Is giving information advice?

In the FCA's view, advice requires an element of opinion on the part of the adviser or something that might be taken by the debtor, expressly or by implication, to suggest or influence a course of action. Information, on the other hand, involves statements of facts or figures.

In general terms, simply giving balanced and neutral information without making any comment or value judgement on its relevance to decisions which a debtor may make is not advice. The provision of purely factual information does not become regulated advice merely because it feeds into the debtor's own decision-making process and is taken into account by him.

Therefore, a neutral and balanced explanation of the implications of entering into different debt solutions need not, itself, involve *debt counselling*.

In the *FCA's* opinion, however, such information is likely take on the nature of advice if the circumstances in which it is provided give it, expressly or by implication, the force of a recommendation.

For example the adviser may provide information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of the debtor. This may arise where the adviser offers to provide information about certain ways of liquidating the debtor's debts that contain features specified by the debtor. The adviser may then exercise discretion as to which course of action to highlight.

A key to the question whether advice is given is whether that information is either accompanied by a comment or value judgment on the relevance of that information to the client's decision, or is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision of the recipient. In both these scenarios, the information acquires the character of a recommendation.

One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If a debtor asks for a recommendation, any response is likely to be regarded as advice.

On the other hand, if a debtor makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that it does not give advice or whether the adviser runs a *debt counselling* business.

Q5.4 PERG says a lot about generic advice in relation to other sorts of regulated advice. Is the idea of generic advice relevant to debt counselling?

Generic advice is a term the *FCA* uses to refer to something that is advice rather than mere information but which is not regulated because, although it relates to investments, it is not about the merits of buying or selling a particular investment.

The concept of generic advice is potentially relevant to *debt counselling*. As explained in the answer to Q1.2 (What are the regulated activities specifically relating to consumer credit debt counselling?) and Q4.1 (Does debt counselling cover advice given to the public in general rather than to a particular debtor?) *debt counselling* relates to the particular debts of a debtor. Advice that does not relate to particular debts in this way is likely to be generic advice.

However, as explained in the answer to Q5.1, advice may be *debt counselling* even though the advice does not identify a course of action with any precision. This narrows the types of advice that will be excluded from being *debt counselling* on the grounds of being generic advice. Another reason for generic advice being less relevant to *debt counselling* is that other types of regulated advice relate to a very specific activity, such as buying or selling investments, while the range of activities covered by *debt counselling* is wide.

See example (5) in the table in Q7.1 for an example of where generic advice is relevant to *debt counselling*.

Q5.5 Does a decision tree involve debt counselling?

Scripted questioning involves using any form of sequenced questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a method of liquidating his debts under a *credit agreement* or a *consumer hire agreement*. A decision tree is an example of scripted questioning. The process of going through the questions will usually narrow down the range of options that are available. Scripted questions must be prepared in advance of their actual use.

Undertaking the process of scripted questioning gives rise to particular issues concerning *debt counselling*. Whether or not scripted questioning in any particular case is *debt counselling* will depend on all the circumstances. If the process involves identifying one or more particular courses of action then, in the FCA's view, to avoid *debt counselling*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the debtor as, assisting the debtor to make his own choice of how to liquidate his debts. The questioner will need to avoid making any judgement on the suitability of one or more courses of action for the debtor.

The potential for variation in the form, content and manner of scripted questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, the nature and size of the debts). There are various possible scenarios, including the following:

- (1) The questioner may go on to identify several courses of action which match features identified by the scripted questioning; provided these are presented in a balanced and neutral way (for example, they identify all the possible courses of action, without making a recommendation as to a particular one) this need not, of itself, involve *debt counselling*.
- (2) The questioner may go on to advise the debtor on the merits of one particular course of action over another. This would be *debt counselling*.
- (3) The questioner may, before or during the course of the scripted questioning, give information that considered on its own would not involve *debt counselling* and, following the scripted questioning, identify one or more particular courses of action. The factors described in the answer to Q5.6 are relevant to deciding whether there is *debt counselling*.

The second type of scripted questioning involves providing questions and answers incorporating opinion, judgement or recommendations. This will involve advice not just information. There are various possible scenarios, including the following:

- (4) The scripted questioning may not lead to the identification of any particular course of action; in this case, the questioner has provided advice, but it is generic advice and does not amount to *debt counselling*. As explained in the answer to Q5.4 (generic advice) this will be an uncommon scenario.
- (5) The scripted questioning may lead to the identification of one or more particular courses of action. This is likely to be *debt counselling*.

Q5.6 What are the factors mentioned in paragraph (3) of the answer to Q5.5?

The FCA considers that it is necessary to look at the process and outcome of scripted questioning as a whole. Factors that may be relevant in deciding whether the process involves *debt counselling* include the following:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the role played by any questioner who guides a *person* through the scripted questions;
- (4) the outcome of the questioning (how many courses of action are highlighted, how precise they are, whether the questioner will help the debtor to carry out the course of action, whether the questioner identifies any third party who might help the debtor to carry out the course of action and the relationship between the questioner and that third party and so on); and
- (5) whether the scripted questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party (for example, the FCA), and all that the questioner has done is help the debtor understand what the questions or options are and how to determine which option applies to his particular circumstances.

Q5.7 Does the medium used to give advice matter?

The medium used to give advice should make no material difference to whether or not the advice is *debt counselling*. Advice can be provided in many ways including:

- face to face;
- orally to a group;
- by telephone;
- by correspondence (including e-mail and text messaging);
- through the provision of an interactive software system.

However advice given in a publication, broadcast or website raises different issues (see the answer to Q4.1 (Does debt counselling cover advice given to the public in general rather than to a particular debtor?)).



17.6 Exclusions

17.6

Q6.1 What exclusions are available?

There are a number of exclusions that apply to *debt counselling*. The following table lists them and says where further information on them can be found in *PERG*.

Exclusions that apply to debt counselling		
What the exclusion covers	RAO article	Where summarised in <i>PERG</i>
Activities where person has a connection to the agreement	Article 39H	PERG 2.8.7CG (1)
Activities carried on by certain energy suppliers	Article 39I	PERG 2.8.7CG (3)
Activities carried on in relation to a <i>regulated mortgage contract</i> or a <i>home purchase plan</i>	Article 39J	PERG 2.8.7CG (4) and examples (17) and (18) in the table in the answer to Question 7.1.
Activities carried on by members of the legal profession etc.	Article 39K	PERG 2.8.7CG (5)
Information society services	Article 72A	PERG 2.9.18 G
Local authorities	Article 72G	PERG 2.9.23 G to PERG 2.9.24 G
Insolvency practitioners	Article 72H	PERG 2.9.25 G to PERG 2.9.27 G

17.7 Examples

17.7

Q7.1 Please give me some examples of what is and is not debt counselling

Please see the following table. All the examples assume that the advice or information relates to debts under a *credit agreement* or a *consumer hire agreement* or to a group of debts that include such debts.

Examples of what is and is not <i>debt counselling</i>	
Example	Explanation
(1) Adviser: "I recommend you enter into a debt management plan"	This is <i>debt counselling</i> . This is advice which steers the debtor in the direction of a debt solution which the debtor could enter into as a means of liquidating his debts.
(2) Adviser: "I recommend you do not enter into a debt management plan"	This is <i>debt counselling</i> . This is advice which steers the debtor away from a particular debt solution which the debtor could have entered into as a means of liquidating his debts.
(3) Adviser: "I suggest you change (or do not change) from a debt management plan to a debt arrangement scheme"	This is <i>debt counselling</i> . This is advice that steers the debtor in the direction of a different debt solution from the one that he has already entered into as an alternative means of liquidating his debts.
A debt arrangement scheme refers to a debt payment programme under the Scottish debt arrangement scheme (DAS).	
(4) Adviser: "I recommend you do not borrow more than you can comfortably afford"	This is not <i>debt counselling</i> as it is about incurring debts, not liquidating them.
(5) Adviser: "I would recommend that you explore the pros and cons of all the different debt solutions that may be available to you"	This is not <i>debt counselling</i> . It is unregulated generic advice because it does not steer the debtor to any particular course of action in liquidating his debts.
(6) Adviser: "I think that reaching an informal agreement with your creditors about repaying your debts may not be the best option available to you given your circumstances."	This is likely to be <i>debt counselling</i> . It does not recommend a precise course of action but, as described in the answer to Q5.1 (Broadly speaking, what is advice?), this does

I will set out the pros and cons of various other debt solutions that may be more appropriate to your circumstances ? but ultimately the option you choose will be a matter for you.”

(7) The adviser gives an explanation of the way that various types of debt solution work.

(8) The adviser gives a comparison of the features and benefits of one type of debt solution with another and the implications of entering into the two different types of debt solutions.

(9) An adviser advises on uncertain questions about a debt management plan.

(10) A *person* distributes leaflets or illustrations that help debtors to decide how they will liquidate their debts

(11) A *person* explains how to fill in a form for entering into an IVA

not necessarily matter. The adviser is making a value judgement and giving an opinion and is steering the debtor towards certain courses of action and away from others. In particular, the adviser has recommended that the debtor does not deal with his debts by way of an informal agreement.

If this is given in a balanced and neutral way it is likely not to be *debt counselling* as it is just factual information.

Same as the answer to (7).

The element of uncertainty is likely to mean that the advice has a strong element of opinion and hence is likely to be advice, rather than mere information. It is likely to be *debt counselling* as long as it steers the debtor towards a course of action in liquidating his debts.

If the advice is given by a lawyer it is likely to be excluded from *debt counselling* by the exclusion in article 39K of the RAO (Activities carried on by members of the legal profession etc.) referred to in the answer to Q6.1.

This is not *debt counselling* as it is advice given to the general public. See the answer to Q4.1 (Does debt counselling cover advice given to the public in general rather than to a particular debtor?) for more about this.

It is unlikely that a *person* would provide this advice on its own by way of business.

If a *person* provides this help in the course of carrying on some other unregulated activities he will not be *debt counselling* as it should be seen as providing information not advice.

If though he provides this help in the course of a wider *debt counselling* business it will be included as part of that *debt counselling* activity.

(12) A person uses direct marketing and other forms of advertising (for example, on websites promoted on search engines) and cold calling, to gather personal information from debtors, which is then sold on to providers of debt advice.

(13) A person recommends that a debtor obtains advice from a particular *debt counselling firm*, ABC Debt Management.

(13A) A person recommends that a debtor obtains advice from a particular insolvency practitioner or their *firm*.

If the explanation is given by the insolvency practitioner the exclusion in article 72H of the RAO (Insolvency practitioners) is likely to be available (see Q6.1 (What exclusions are available?)).

It is not *debt counselling* as it does not involve advice to debtors about the liquidation of debts due.

However, a person providing such referrals will be *debt counselling* if during the course of communicating with a debtor he makes a recommendation to the debtor as to how he might liquidate his consumer credit debt.

Taken on its own it is not *debt counselling* because the adviser is advising the debtor to obtain advice from another adviser.

However, if ABC Debt Management only offers one debt solution (e.g. a debt management plan), the referral could constitute a recommendation intended implicitly to steer the debtor in the direction of that particular debt solution and, therefore, could be advice (in which case it would be *debt counselling*).

Consequently, whether or not *debt counselling* is involved will depend on the individual circumstances in each case and is likely to involve a consideration of the process as a whole.

Taken on its own it is not *debt counselling* because the adviser is advising the debtor to obtain advice from another adviser.

However, where the insolvency practitioner or their *firm* only offers advice in relation to a particular *debt solution* (e.g. an individual voluntary arrangement or a protected trust deed), the referral could constitute a recommendation intended to implicitly steer the debtor in the direction of that particular *debt solution* and, therefore, could be advice (in which case it would be *debt counselling*).

Consequently, whether or not *debt counselling* is involved will depend on the individual circumstances in each case and is likely to involve a consideration of the process as a whole.

(14) Adviser: "I recommend you prioritise the repayment of your electricity bill over all other debts"

This is likely to constitute *debt counselling* if, having considered all of a debtor's outstanding debts, an adviser advises the debtor to prioritise the repayment of a utility bill (e.g. an electricity bill) over his other outstanding debts (including debts arising under *credit agreements* or *consumer hire agreements*). This constitutes advising on the liquidation of debts due, since there is an implied recommendation that the debtor should postpone repaying his consumer credit related debts until he has repaid another debt or debts.

(15) A person (for example, a money adviser) helps a debtor to draw up a budget, e.g. providing a budget planner to see how much disposable income the client has each month or how long the client's money could last over a particular period.

This is not *debt counselling* if all the adviser does is to provide a debtor with information about his budget and the process is limited to, and likely to be perceived by the debtor as, assisting him to make his own choice as to a course of action he might take in liquidating his consumer credit-related debts.

It may not be advice at all, in that it just puts into a convenient form information that the consumer has himself supplied.

Even if it goes beyond just organising information supplied by the debtor, as long as the adviser gives the information in a balanced and neutral way, the adviser should be seen as providing information rather than advice. The adviser is supplying material that could be used for the purposes of deciding how to liquidate debts but not advising on liquidating them.

(16) An adviser gives budgetary advice

This is *debt counselling* if the adviser goes beyond the services in example (15) and advises the debtor on how to match income and debts. For example, the adviser may advise the debtor to reduce discretionary spending to a set amount each month to enable him to pay off a certain amount of a large credit card bill each month.

It does not matter if the result of the advice is that the debtor should pay off his debts in full, rather than by instalments over a period of time or by entering into some sort of repayment plan, as *debt counselling* is not limited to advice about being released from paying the debt in full or rescheduling.

(17) Mortgage adviser: "I advise you to consolidate your unsecured consumer credit debts into this *regulated mortgage contract*"

This is unlikely to be *debt counselling*.

Leaving aside the exclusions, this would be *debt counselling* as the mortgage adviser is proposing that the debtor should consolidate a number of his consumer credit debts into a single (potentially more manageable) debt with a view to the debtor being better able to liquidate all of his debts.

However, the exclusion in article 39J of the RAO (Activities carried on in relation to a *regulated mortgage contract* or a *home purchase plan*) is likely to apply. So far as applicable to this example, the exclusion works like this:

(a) The advice must relate to a *regulated mortgage contract*.

This condition is satisfied.

Example (18) illustrates the issues that would arise if the adviser did not advise on specific *regulated mortgage contracts*.

(b) Giving the advice must be a *regulated activity*. If the only *regulated activity* involved in giving the advice is *debt adjusting*, that is not enough. Another *regulated activity* must apply too. However, the exclusion can still apply if the advice involves *debt adjusting* in addition to another *regulated activity*.

This condition is met because the adviser is *advising on regulated mortgage contracts*.

Note: Technically this condition (giving the advice must be a *regulated activity*) would not be satisfied if the only *regulated activity* carried on by the adviser is *debt adjusting*, *debt collecting* or *debt administration*. However, this example only mentions *debt adjusting* as, if any of these three *regulated activities* apply, it is likely only to be *debt adjusting*.

(c) When the mortgage lender enters into the mortgage it will be carrying on the *regulated activity* of *entering into a regulated mortgage contract*.

(18) Mortgage adviser: "I advise you to consolidate your unsecured consumer credit debts into a single *regulated mortgage contract*. However, I can't advise you what mortgage contract you should enter into or which mortgage lender you should use."

(19) A person operating a peer-to-peer lending platform advises a debtor on the liquidation of a debt due under a consumer credit agreement entered into with a lender or lenders (via the platform). In this example, the platform operator is carrying on the *regulated activity of operating an electronic system in relation to lending*.

PERG 4.7 explains when *entering into a regulated mortgage contract* applies.

This is *debt counselling*. The exclusion in article 39J of the RAO (Activities carried on in relation to a *regulated mortgage contract* or a *home purchase plan*) does not apply.

The difference between this example and example (17) is that the advice in this example does not relate to a particular *regulated mortgage contract* (or several different *regulated mortgage contracts*). As explained in more detail in PERG 4.6.5 G this means that the adviser is not *advising on regulated mortgage contracts*. The exclusion in article 39J does not apply because the adviser is not carrying on another *regulated activity*, which means that one of the conditions for article 39J to apply is not met.

See example (17) for an explanation of the conditions that must be satisfied if the article 39J exclusion is to apply.

This is *debt counselling* as long as the loan agreement is a *credit agreement*.

The *regulated activity of operating an electronic system in relation to lending* covers agreements that are called article 36H agreements, which covers more than just *credit agreements*. If the consumer credit agreement is an article 36H agreement but not a *credit agreement* the advice will not be *debt counselling*.

