

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

Issuing rights under a stakeholder or personal pension scheme to members	None - the rights are not MiFID financial instruments	empt under article 2.1(i) as manager or depositary (or both) of a pension fund MiFID does not apply
Pension scheme service provider:		
a. dealing in scheme assets as agent for the trustees	a. Execution of orders on behalf of clients b. Receiving and transmitting orders	MiFID will potentially apply where the investments are MiFID financial instruments (such as shares, debt securities or units) However, many pension schemes will be employee participation schemes, the administration of which is exempt under article 2.1(f)
b. arranging deals in scheme assets as agent for the trustees	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	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
c. arranging for persons to join the scheme or to switch or dispose of, or to acquire further, rights under the scheme		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 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

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 ad-
ministration of an em-
ployee 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?

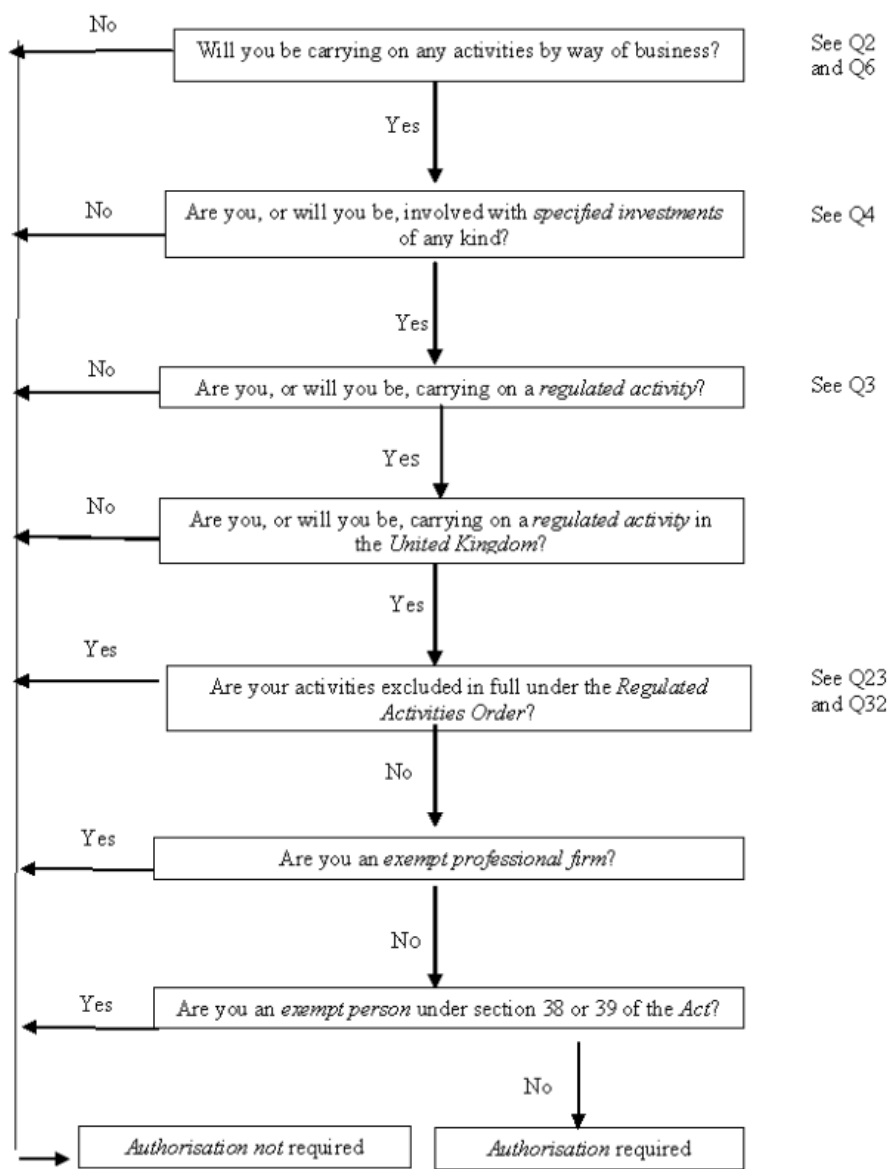
There are a few exemptions that may be relevant. For example:

- 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

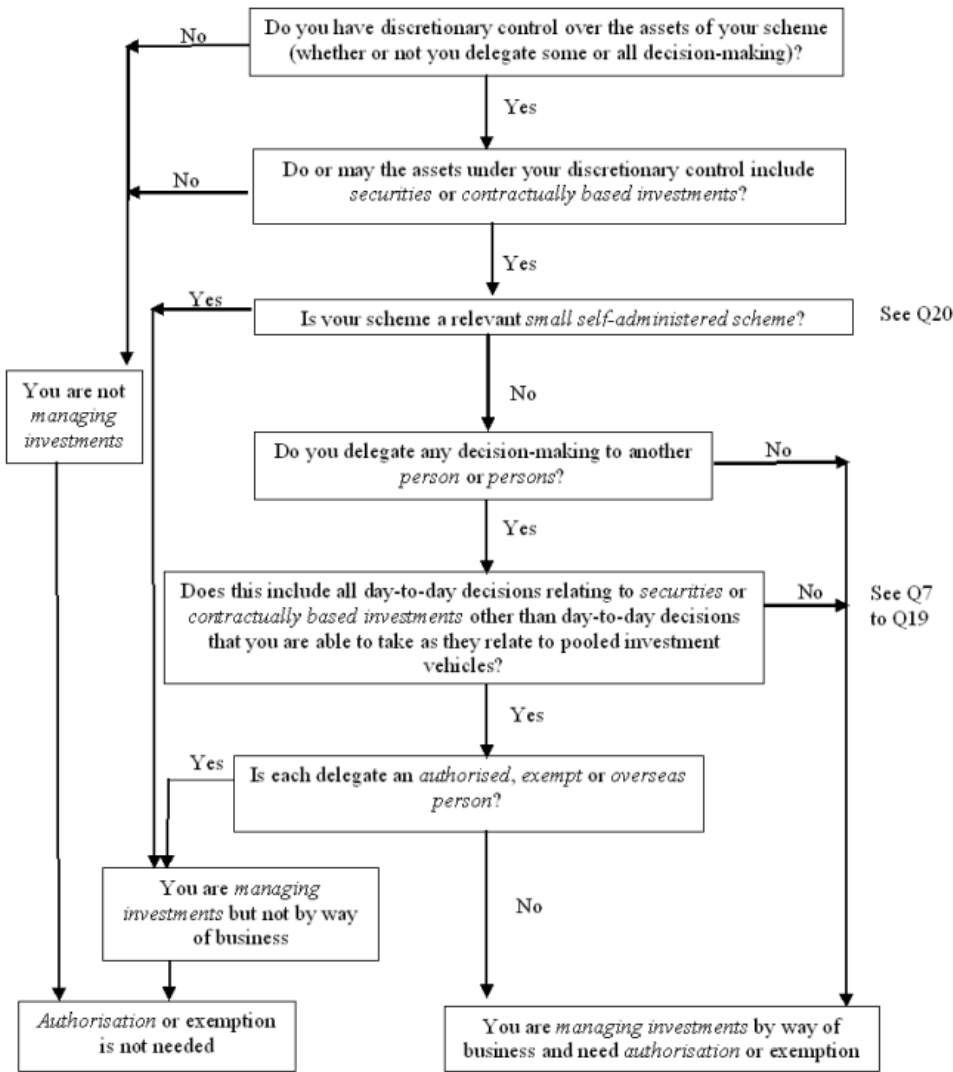


Table summarising regulatory position of pension scheme trustees and service providers

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 <i>Regulated Activities Order</i> (see Q23(1)).
<i>Dealing in investments as agent</i> (article 21 of the <i>Regulated Activities Order</i>)	<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 <i>Regulated Activities Order</i> 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 <i>Regulated Activities Order</i> 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 <i>Regulated Activities Order</i> 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 <i>Regulated Activities Order</i>)	<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>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> <ul 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>
Managing investments (article 37 of the Regulated Activities Order)	<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?
<i>Assisting in the administration and performance of a contract of insurance</i> (article 39A of the Regulated Activities Order)	<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> for a third party and so does not require to be authorised or exempt (see Q35).</p>
<i>Safeguarding and administering investments or arranging safeguarding and administration of assets</i> (article 40 of the Regulated Activities Order).	<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 (article 52 of the Regulated Activities Order)</i></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) (article 53(1) of the Regulated Activities Order)</i></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
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>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>
Acting as trustee of a trust-based stakeholder pension scheme.	<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>
Arranging for employees to participate in an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme.	<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>
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>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>
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>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
or manager of a pension scheme to convert, transfer or cash out safeguarded benefits.	
Assisting in the administration of an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme.	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).
Providing in-house administration services to the trustee of the employer's OPS and safekeeping services for documents of title such as bearer certificates.	This may amount to <i>safeguarding and administering investments</i> if the employer undertakes both activities. 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).

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.