

Chapter 8

Financial promotion and related activities

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.