Chapter 8

Financial promotion and related activities

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).

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(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 |G| 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 |G| 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 |G| 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.

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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*.