

## Chapter 12

# Guidance for persons running or advising on personal pension schemes

## 12.1 Background

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

These Q&As are aimed at, and should be read by, *persons* involved in the running of a *personal pension scheme* and those who give advice about or provide services to such schemes. They are intended to help such persons understand whether they will be carrying on a *regulated activity* and need *authorisation* or exemption under section 19 of the Financial Services and Markets Act 2000 following the changes to pension legislation that took effect on 6 April 2007 and on 6 April 2015. The Q&As complement the general *guidance* on regulated activities which is in Chapter 2 of our Perimeter Guidance manual ('PERG') and the general guidance about pensions-related activities which is in Chapter 10 of PERG.

The Q&As are set out under five sections:

- *establishing, operating or winding up a personal pension scheme* (■ PERG 12.2);
- *rights under a personal pension scheme* (■ PERG 12.3);
- *the application of EU Directives* (■ PERG 12.4); and
- *financial promotion issues* (■ PERG 12.5); and
- *advising on conversion or transfer of pension benefits* (■ PERG 12.6).

## 12.2 Establishing, operating or winding up a personal pension scheme

### Q2. What is a personal pension scheme for the purposes of this regulated activity?

The term is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) as any scheme other than an *occupational pension scheme* (OPS) or a *stakeholder pension scheme* that is to provide benefits for people:

- (1) on retirement; or
- (2) on reaching a particular age; or
- (3) on termination of service in an employment.

Although the definition does not expressly say so, it is, in the FCA's view, clear from the context in which the term is applied, that such a scheme will be one the sole or principal purpose of which is to provide benefits to members of the scheme upon their reaching a pensionable age. This will typically include pension schemes that are intended to be registered with The Pensions Regulator and to be eligible for tax relief relating to pension schemes. It will also include other types of pension schemes such as qualifying recognised overseas pension schemes (QROPSs) that are not occupational pension schemes.

This will include *self-invested personal pension schemes* ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers, contractual scheme managers or deposit takers (including free-standing voluntary contribution schemes).

To determine whether a pension scheme is a personal pension scheme it is first necessary to determine whether it is an OPS. An OPS is defined in the Regulated Activities Order by reference to an OPS as defined in section 1 of the Pensions Schemes Act 1993 but without including paragraph (b) of that section. This means that a pension scheme is an OPS if, broadly speaking, it is a pension scheme:

- that is established:
  - for the purpose of providing benefits to, or in respect of, people with service in employments of a description; or
  - for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

by persons who are, or who include, employees of that kind or their employers, or persons representing the interests of either, at the time the scheme is established; or

- that is prescribed or is of a prescribed description (such as a scheme that is prescribed under the Pension Schemes (Categories) Regulations 2005 (SI 2005/2401)).

The effect of omitting paragraph (b) from the Pensions Schemes Act definition of an OPS is that a pension scheme that would otherwise be an OPS but for the fact that its main administration takes place in another *EEA State* will be an OPS for the purposes of the Regulated Activities Order and this guidance.

**Q3. What is involved in establishing a personal pension scheme?**

The establisher of a *personal pension scheme* is the *person* responsible for putting in place the arrangements founding the scheme. With a trust-based scheme, this will usually be the person who executes the trust as provider. In a scheme established by deed poll, it will be the person who enters into the deed poll. There will usually only be one person who establishes the scheme. Any professional firms that they may employ to act as their agent (such as solicitors) would not be establishing the scheme. The establisher may also be the operator but need not be. An employer will not be establishing a personal pension scheme (such as a *group personal pension scheme*) purely as a result of them having chosen such a scheme to offer to their employees.

The activity of establishing a personal pension scheme ceases once the scheme is established. This means that persons who have established schemes prior to 6 April 2007 will not require authorisation for establishing a personal pension scheme unless they intend to establish a new scheme after that date.

**Q4. What is involved in operating a personal pension scheme?**

The 'operator' is the *person* responsible to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In trust-based schemes, the trustees may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person to be responsible to the members for carrying out all the operator's functions as scheme administrator or as trustee, or both as the case may be. But a person to whom activities may be outsourced by the operator will not, thereby, become an operator of the scheme (see further guidance in Q6).

The fact that a member of a SIPP has the right to direct which investments are to be held for his benefit does not mean that he is to be regarded as operating the scheme as a result of exercising that right.

**Q5. What is involved in winding up a personal pension scheme?**

The *person* who winds-up a *personal pension scheme* will be the person who is responsible for putting in place the arrangements for bringing the scheme

to an end in a way that complies with the relevant provisions of the instrument that established the scheme and any relevant rules under pensions or tax legislation. This will, more often than not, be the operator of the scheme.

**Q6. What is my position as an operator of a personal pension scheme if I delegate day-to-day functions such as administration of the scheme or the management or custody of the scheme assets to another person?**

As explained in Q4, the operator of a *personal pension scheme* is the person who is responsible to the members of the scheme for ensuring that the scheme is operated in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. Provided he remains responsible to the members for such matters, he will remain the operator even though he may delegate or out-source the day-to-day carrying out of his functions as operator to another person. That other person will not become an operator of the scheme purely as a result of carrying out such functions on behalf of the operator. However, he may be carrying on other regulated activities in performing his delegated or out-sourced tasks (such as *arranging or managing investments*) in which case he will be subject to regulation for those activities.

Chapter 10.4 of PERG has general guidance about the circumstances in which persons who administer pension schemes on behalf of the operator or trustees may be carrying on a regulated activity including an *insurance distribution activity*.

**Q7. As the operator of a personal pension scheme, is my position affected by whether the underlying property of the scheme is comprised of physical assets such as commercial property rather than investments such as shares or life policies?**

No. It is the establishment, operation and winding up of the scheme that is regulated under the new activity - regardless of the type of assets the scheme will hold.

**Q8. Will I need to be authorised for managing the assets of a personal pension scheme which is invested solely in physical assets such as commercial property on behalf of the operator?**

No. Such assets will not become *designated investments*. However, the operator of the scheme will remain responsible for the management and administration of the assets as these are part of the regulated activity of operating the scheme.

**Q9. Will I satisfy the 'by-way-of-business' test that is necessary for authorisation to be required?**

The application of the by-way-of-business test to any particular *person* will always depend on that person's individual circumstances. A number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular *regulated activity* that is carried on.

In very broad terms, it is likely that any corporate body (including corporate trustees) that operates a *personal pension scheme* would be carrying on that activity by way of business. Chapter 10.5 of PERG has specific guidance about the limited circumstances in which employers may be likely to satisfy the by-way-of-business test when advising on or arranging pension benefits for their employees.

**Q10. Can there be more than one person who operates a personal pension scheme?**

Yes. For example, the *person* establishing a scheme may appoint a trustee and an administrator to operate the scheme jointly (see Q4). In this case, both the trustee and the administrator will need to be *authorised*. Or there could be two or more trustees who are jointly responsible for operating the scheme, in which case each will need to be *authorised* if they are doing so by way of business.

**Q11. I am a trustee operating a self-invested personal pension scheme ('SIPP'). Can I rely on the various exclusions available to trustees for other regulated activities such as dealing in investments, managing investments and safeguarding and administering investments?**

Yes, provided you are able to satisfy the conditions applicable to the exclusions. No changes were made to any of the exclusions as a result of the changes in regulatory scope that took effect on 6 April 2007. Guidance on the exclusions is given in Chapter 10 (Q23) of PERG.

**Q12. Do the same principles apply to establishing, operating or winding up a stakeholder pension scheme?**

Yes. In principle, the answers given to other questions apply equally to *stakeholder pension schemes*. Establishing, operating and winding up a stakeholder pension scheme are already regulated activities. Guidance on these activities is given in Chapter 10 (Q24 to Q28) of PERG.

**Q13. Does the regulated activity of establishing, operating or winding-up a personal pension scheme have any effect on occupational pension schemes?**

No. But the establishment, operation and winding up of *occupational pension schemes* that are *stakeholder pension schemes* are regulated activities in their own right.

**Q14. I intend to operate a personal pension scheme under which members will acquire benefits derived from the management of a pool of assets. Will the scheme become a collective investment scheme or an AIF?**

No. *Personal pension schemes* (along with *stakeholder pension schemes*) are specifically exempted from being *collective investment schemes*. In the FCA's view a *personal pension scheme* also does not amount to an *AIF* (see ■ PERG 16.2 question 2.32). However, where a *personal pension scheme* invests in a pooled investment vehicle of some kind, that vehicle may itself be a *collective investment scheme* or an *AIF* unless another exemption applies to it.

## 12.3 Rights under a personal pension scheme

**Q15. I am a financial intermediary dealing with pensions. Am I affected by the fact that rights under a personal pension scheme are a specified investment?**

Yes. The *specified investment* of rights under a *personal pension scheme* is a *security*. This means that the following regulated activities apply in relation to such rights:

- *dealing*;
- *arranging*;
- *managing investments*;
- *safeguarding and administering investments*; and
- *advising on investments*.

In addition, rights or interests under a pension scheme which provides *safeguarded benefits* is a specified investment in respect of *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6).

**Q16. What are the rights under a personal pension scheme that are specified investments and securities?**

These are all the rights that membership of the scheme confers on a member. This may vary (for example, where the scheme is a SIPP) but is likely to include some or all of the following rights:

- to make payments to the scheme;
- to withdraw sums from the scheme in certain circumstances;
- to transfer value to another pension scheme;
- to receive benefits arising from the capital value of or income derived from particular assets or from the performance of a unitised fund;
- to place certain types of property (for example, commercial property) in the scheme;
- to instruct the operator which assets to buy or sell for the purposes of the scheme;
- to instruct the operator to switch funds from one managed or unitised fund to another;
- to appoint a *person* to manage the assets or to give instructions to the operator about which assets to buy or sell on behalf of the member; and
- to instruct the operator to borrow money to purchase assets (for example, to take out a mortgage on a commercial property).

**Q17. Regulated activities such as dealing and arranging deals in, and advising on, investments relate to transactions involving the buying or selling of certain specified investments including securities. When will rights under a personal pension scheme be bought or sold so as to trigger these regulated activities?**

The terms 'bought' and 'sold' are given a wide meaning and include any acquisition or disposal for valuable consideration. The term disposal is also given a wide meaning and, in relation to an investment comprising rights under a contract, includes surrendering, assigning or converting such rights. Taking these facts into account, the circumstances in which rights under a *personal pension scheme* may be bought or sold include:

- when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights);
- when the member makes regular or occasional additional payments to the scheme (since he has bought further rights being rights to an increased entitlement to benefits);
- when income withdrawals are made or benefits are transferred to another scheme or benefits are released to permit the purchase of an annuity (since the rights giving entitlement to benefits represented by the sums moved out of the scheme are surrendered and so sold);
- where the member or his agent instructs the operator to buy assets of any kind either from existing cash holdings or from the proceeds of selling existing assets (since, in switching the assets, the member is converting his rights from an entitlement to benefits from the performance of certain assets to an entitlement to benefits from the performance of other assets - the former rights are sold and the latter are bought); and

[*Editor's note:* The Court of Appeal (in the case of *Russell David Edward Adams v Options UK Personal Pensions LLP* (formerly *Options SIPP UK LLP* and *Carey Pensions UK LLP*) and the FCA (as intervenor) ([2020] EWHC 1229 (Ch)) held to be incorrect the view in the preceding paragraph that rights under a pension scheme are being sold and bought if assets held within the scheme are disposed of in order to reinvest in another asset to be held within the scheme. The FCA is considering what changes to PERG are needed to reflect this decision.]

- where the member exercises his right to switch between managed or unitised funds (since, in switching funds, the member is converting his rights from an entitlement to benefits from the performance of one fund to an entitlement to benefits from the performance of another fund - again, the former rights are sold and the latter are bought).

The operator of a personal pension scheme will also be selling rights when he grants rights to a member.

**Q18. The members of the personal pension scheme that I operate acquire rights to or interests in specified investments such as units or life policies. Such rights or interests are usually specified investments in their own right and arranging or advising on them is a regulated activity. Does the fact that rights under the personal pension scheme are themselves a specified investment affect this?**

In certain circumstances this may be the case, but, in practice, the effect will be largely academic. Where the rights or interests would form part of the rights under a *personal pension scheme*, they will fall under that category of specified investment and will not be a specified investment in their own right. But where, for example, advice is being given on the merits of acquiring rights to or interests in specified investments for the purpose of their being held under a personal pension scheme but not any one particular scheme, the rights or interests will remain specified investments in their own right. This is because there are no rights under a personal pension scheme at that stage.



This will only affect the rights that the member obtains. It does not alter the nature of any asset that is held by or on behalf of the operator for the purpose of providing benefits to the scheme member. So, any person who arranges for the scheme operator (or trustee as the case may be) to acquire assets is likely to be carrying on the regulated activity of *arranging* where those assets are *securities* or *relevant investments* but not where they involve other property such as real estate. This contrasts with a person who is arranging for scheme members to acquire rights under the scheme which will be a regulated activity regardless of the nature of the underlying property.

**Q19. For advice to be regulated, it needs to relate to the merits of buying or selling a particular investment. When do rights under a personal pension scheme become 'particular' rights and so particular investments?**

It is the rights under a *personal pension scheme* that must be a particular investment. This means that the rights must arise under a particular personal pension scheme. So, provided the rights on which advice is given relate to rights conferred, or to be conferred, by a particular scheme, they will be particular rights and advice on the merits of buying or selling them is likely to be regulated. This is the case, whatever the nature of the rights or of the underlying assets or prospective underlying assets. Conversely, if there is no particular personal pension scheme, there cannot be any particular rights.

As for advice to a prospective member on the merits of buying particular assets at a stage where there are no particular rights under a personal pension scheme, such advice is likely to be regulated where the assets are *securities* or *relevant investments* (as being advice on the merits of buying rights to or interests in those investments). But such advice will not be regulated where the assets are not investments of that kind (such as commercial property).

A person may be asked to advise a client on the merits of his acquiring a commercial property for holding it under a SIPP in circumstances where the client has an existing SIPP of which the adviser may or may not be aware. Provided the adviser has not been asked to, and it is reasonable for him to believe that he would not be expected to, advise his client on the merits of his holding the property under the particular SIPP, the advice may remain generic as respects rights under a personal pension scheme and so would not be subject to regulation.

In addition, it should be noted that advising a client P in their capacity as *member of a pension scheme* who has *subsisting rights* in respect of any *safeguarded benefits* on the merits of P requiring the trustee or manager of the pension scheme to:

- (a) convert any of the *safeguarded benefits* into different benefits that are flexible benefits under the scheme; or
- (b) make a transfer payment in respect of any of the *safeguarded benefits* with a view to acquiring a right or entitlement to flexible benefits for P under another pension scheme; or
- (c) pay a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the *safeguarded benefits*;

is a regulated activity on its own and would require the person carrying it out to be authorised for *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6).

**Q20. Can you provide examples of when the regulated activities of advising on and arranging deals in investments are likely to arise in typical situations involving rights under a personal pension scheme?**

Yes. The following table indicates whether certain typical scenarios are likely to involve regulated advising or arranging activities.

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
his joining a <i>personal pension scheme</i> (PPS) either generally or of a particular kind (such as a <i>self-invested personal pension scheme</i> (SIPP))	No - this would be generic advice	N/A
his joining a particular PPS that is already established	Yes - the rights are particular rights as the PPS already exists and offers specific rights	Yes - rights are being bought
establishing a PPS (typically a SIPP) intended solely for the prospective member's benefit	Yes - because the advice will concern establishing a particular scheme which will offer the investor particular rights (such as the right to make payments and direct investment)	Yes - rights are being bought
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, physical property of a particular description (such as commercial property) or particular physical property	No - there are no particular rights under a PPS at that stage, so the advice is generic as respects the acquiring of such rights	No
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, <i>securities or relevant investments</i> of a particular description or particular investments of that kind	Yes, where the advice relates to acquiring particular investments of that kind - whilst the rights under the PPS may remain generic, the advice relates to acquiring rights to or interests in particular securities or relevant investments. Those rights or interests are themselves a particular investment  No, where the advice only relates to acquir	Yes - rights to or interests in specified investments are being bought

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
acquiring a particular property for the purpose of holding it in a particular SIPP but where the advice to be given is limited to the tax or legal consequences of doing so	ing a particular type of investment - both the rights under the PPS and the investment remain generic  No. Although the advice relates to the merits of buying particular rights, provided the advice may reasonably be regarded as a necessary part of the service of providing tax or legal advice it should be excluded from the scope of regulation (see Q21)	No, provided the arranging is undertaken as a necessary part of providing tax or legal services. This may be more likely to arise in practice where, for example, a legal adviser goes on to arrange the conveyancing of the property as a necessary part of legal services. There may be limited circumstances in which it would be necessary for a tax adviser to go on to arrange for the client to acquire the rights under the PPS having given tax advice on the merits of doing so.
making additional payments into a particular PPS, either for investment in line with pre-existing arrangements or in accordance with instructions to be given to the operator, or of not making such additional payments	Yes - the advice relates to the merits of acquiring further particular rights	Yes - rights are to be bought
appointing a fund manager to manage the PPS assets on behalf of the member(s) or changing an existing fund manager	No - the advice is about the merits of exercising rights but not for the purpose of buying or selling particular investments - and no rights are being bought or sold	No, where the assets do not include <i>securities</i> or <i>relevant investments</i>  Possibly, where the assets do include investments of that kind (because the arrangements are made with a view to the fund manager buying and selling, and possibly safeguarding and administering, investments)
changing the investment objectives with which the fund man-	No - the advice is about the merits of exercising rights but not	No

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
<p>ager appointed to manage the PPS assets on behalf of the member(s) is instructed to comply</p>	<p>for the purpose of buying or selling particular specified investments - and no rights are being bought or sold</p>	
<p>placing particular assets or assets of a particular description, into a particular PPS, or of instructing the operator to purchase such assets, either:</p> <ul style="list-style-type: none"> <li>• by means of funds to be made available by selling existing assets or of existing cash holdings within the PPS; or</li> <li>• from new funds to be provided by the member</li> </ul>	<p>Yes - the advice relates to either:</p> <ul style="list-style-type: none"> <li>• disposing of particular rights and acquiring new particular rights;</li> <li>or</li> <li>• acquiring new particular rights</li> </ul>	<p>Yes - rights are being bought or sold or both</p>
<p>instructing the operator to dispose of particular assets or assets of a particular description, to raise funds for purchasing other assets of any kind or to form a cash holding</p>	<p>Yes - the advice relates to disposing of particular rights as well as acquiring new particular rights</p>	<p>Yes - rights are being bought and sold</p>
<p>instructing the operator to realise an investment in a managed or unitised fund and re-invest the sums in another such fund</p>	<p>Yes - the advice relates to disposing of particular rights and acquiring new particular rights</p>	<p>Yes - rights are being bought and sold</p>
<p>withdrawing cash sums (income withdrawal)</p>	<p>Yes - the advice relates to disposing of particular rights</p>	<p>Yes - rights are being sold</p>
<p>transferring existing assets of any kind or their cash value to another PPS</p>	<p>Yes - the advice relates to disposing of particular rights</p> <p>There may also be regulated advice on the merits of acquiring rights under the new PPS</p>	<p>Yes - rights are being sold and rights in the new PPS are being bought</p>
<p>instructing the operator/trustee to obtain a mortgage to purchase a particular commercial</p>	<p>Yes - the advice relates to acquiring new rights under the PPS in the form of the borrowed</p>	<p>Yes - rights are being bought</p> <p>Arranging for a personal pension scheme</p>

Scenario - advice given to a member or prospective member of a personal pension scheme on the merits of...	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated (subject to any exclusion applying)?
property to be held under the PPS	<p>money or the property to be acquired with it</p> <p>But the advice given to the member on the mortgage itself is not regulated as the mortgage would not be a <i>regulated mortgage contract</i> (because, under tax rules, a member of a PPS cannot hold property under the scheme if he intends to make personal use of it).</p>	trustee to take out a mortgage will not be regulated as it will not be a <i>regulated mortgage contract</i>
<p>[Editor's Note: The answers to some of the scenarios in this table may be affected by the Adams decision noted in the answer to Q.17]</p>		

**Q21. What exclusions may be available for advising on investments in connection with acquiring or disposing of rights under a personal pension scheme?**

The usual exclusions for *advising on investments* and *advising on conversion or transfer of pension benefits* will potentially be available. In particular, article 67 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*):

- may permit firms such as solicitors or licensed conveyancers to advise on the implications of transferring title to real property to the operator of a particular *personal pension scheme*;
- may permit tax advisers or solicitors to advise their clients on the tax or legal consequences of holding property of any description, or of acquiring or exercising rights, under a particular personal pension scheme; and
- may permit firms such as surveyors or estate agents to advise on the merits of acquiring commercial property which is intended to be held under a particular personal pension scheme.

This is, in each case, so long as it may reasonably be regarded as necessary for them to provide the advice in order to provide their professional services and they are not remunerated for *advising on investments* separately from any remuneration they receive for providing their professional services.

If the rights relate to a contract of insurance, the adviser can still make use of the exclusion so long as A is not carrying on an activity that requires him to be regulated under the *IDD*. And that is only likely to be the case if the advice relates to the merits of A's client directly acquiring rights under a contract of insurance (for example, because the client is also a trustee of the scheme). Advice about acquiring a beneficial interest in a contract of insurance held under trust will not be subject to regulation under the Directive.

**Q22. What exclusions may be available for arranging deals in investments in connection with acquiring or disposing of rights under a personal pension scheme?**

The usual exclusions for *arranging* will potentially be available. The following exclusions may be particularly relevant.

Article 29 of the *Regulated Activities Order* will apply where the arranging is done with or through an *authorised person* and, broadly speaking, the arranger:

- is an *unauthorised person*;
- does not advise on the merits of the member or prospective member entering into the transaction; and
- is not rewarded other than by their client (the member).

This exclusion should mean that many firms providing professional services to members of the scheme (such as estate agents, surveyors, property developers and experts on valuing or appraising the particular type of asset that is to be acquired for the personal pension scheme) would be able to arrange for the property to be held under the scheme without needing *authorisation* or exemption. This is because the operator of the scheme will be an *authorised person* and the firm is likely to be paid by its client and not by the scheme operator.

Article 29 does not apply where the arrangements relate to a contract of insurance. But this will only affect the availability of the exclusion as it applies to personal pension schemes where either:

- the member is himself directly acquiring rights under the contract of insurance (for example, because the member is also a trustee of the scheme); or
- the rights which the member is acquiring (or disposing of) relate directly to rights under a contract of insurance that is or is to be held by or on behalf of the operator for the purpose of providing benefits to that member.

Article 33 of the *Regulated Activities Order* will allow *persons* such as estate agents, surveyors or property developers (whether or not they are *authorised*) to refer clients to an *authorised* or *exempt person* for independent advice on the merits of their placing a commercial property in a particular personal pension scheme. Article 33 may also apply where a person arranges for an independent fund manager to be appointed to manage the assets of a personal pension scheme or for members or potential members to obtain independent advice in relation to their rights under the scheme. As with article 29, the article 33 exclusion does not apply where the introductions relate to a contract of insurance.

Article 67 of the *Regulated Activities Order* may permit firms such as solicitors and licensed conveyancers to arrange for the title to property to be transferred to the operator of the personal pension scheme. The exclusion could also apply to firms such as surveyors or estate agents arranging the transfer of title to commercial property. This is so long as it is necessary for them to arrange the transaction in order to provide their professional services and they are not separately remunerated for doing it.

**Q23. I am an exempt professional firm. Will I be able to advise on, and arrange deals in, rights under personal pension schemes without needing FCA authorisation?**

Rights under a personal pension scheme will be securities. This means that, subject to your being able to satisfy the general requirements of Part XX of the FSMA:

- you will be limited in your ability to give advice without authorisation; but

- you will be able to arrange deals in such rights without authorisation.

The limitation on your being able to give advice, as an exempt professional firm, to a member of a personal pension scheme will be, in broad terms, that:

- the advice must not consist of a recommendation to acquire or dispose of rights (unless it endorses a corresponding recommendation that has been given to the member by a suitably authorised or exempt person); and
- if, in addition, the advice relates to a contract of insurance, you must be a firm that is included in the Financial Services Register of Exempt Professional Firms.

## 12.4 The application of requirements which implemented EU directives

**Do the changes in the scope of regulated activities concerning pension schemes that took effect on 6 April 2007 have any implications for pension scheme trustees or service providers under the UK provisions which implemented the Investment Services Directive or the UK provisions which implemented the Markets in Financial Instruments Directive or the Insurance Distribution Directive?**

In general terms, if a pension scheme trustee or service provider did not need to be authorised under the *Investment Services Directive* prior to 6 April 2007 he should not need to be authorised for carrying on the same activities after that date. This is because rights under a personal pension scheme are not a financial instrument under that Directive and establishing, operating or winding up a personal pension scheme is not an investment service under the Directive. This is also the case under the Markets in Financial Instruments Directive which replaced the Investment Services Directive in late 2007. Guidance on the scope of *MIFID* as implemented into UK law can be found in ■ PERG 13.

Similarly, a pension scheme trustee or service provider who was not subject to regulation under the *Insurance Mediation Directive* prior to 6 April 2007 will not become subject to regulation purely as result of the changes in regulatory scope that took effect on 6 April 2007. Detailed guidance on the application of that Directive (as replaced by the Insurance Distribution Directive) to pension scheme trustees and service providers is in Chapters 10.4 and 10.4A of PERG.



## 12.5 Financial promotion issues

**Q25. Will the financial promotion restriction in section 21 of the Financial Services and Markets Act 2000 apply to promotions that invite or induce persons to become members of a personal pension scheme?**

Yes, because they will be inviting or inducing persons to buy an investment in the form of the rights under the scheme that they would acquire by becoming a member.

**Q26. Will the financial promotion restriction apply to a promotion of commercial property that is held out as being suitable for holding under a SIPP (but not any particular SIPP)?**

Yes, if the promotion is an inducement to acquire the right to receive benefits derived from the performance of that property when it is held under a *personal pension scheme*. However, provided the promotion does not identify any particular scheme or scheme provider or person who can arrange or advise on the placing of the property into the scheme, the promotion should be exempt as a generic promotion under article 17 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the *Financial Promotion Order*).

**Q27. Will any of the other exemptions in the Financial Promotion Order apply to promotions of a personal pension scheme?**

Yes. All the usual exemptions that apply to the promotion of *securities* generally will apply. This includes the exemption for promotions made by an employer to their employees about a *group personal pension scheme* to which they are to contribute (article 72 of the *Financial Promotion Order*).

**Q28. Can I find out more about the financial promotion restriction?**

Yes. Chapter 8 of PERG has detailed guidance about the scope of the financial promotion restriction and the exemptions that are available.

## 12.6 Advising on conversion or transfer of pension benefits

### 12.6

Q29. What is the background to this *regulated activity*?

The effect of the Pension Schemes Act 2015 is that trustees or managers must ensure that a *member of a pension scheme* or a *survivor* has taken appropriate independent advice before converting or transferring pension benefits, where the conversion or transfer is of *safeguarded benefits* to *flexible benefits*.

The *Regulated Activities Order* was amended so that the appropriate independent advice to be sought by a *member of a pension scheme* or a *survivor* is regulated.

Q30. Does this mean that there is an overlap between “advising on conversion or transfer of pension benefits” and “advising on investments”?

Yes, there is an overlap between both activities. Under the *Regulated Activities Order* rights under a *stakeholder pension scheme* and under a personal pension scheme fall within the definition of *security*. This means that advising on any of these investments would fall under *advising on investments*.

Where a *pension scheme* provides *safeguarded benefits* then a person who is *advising on investments* may also be *advising on conversion or transfer of pension benefits* at the same time.

In practice, we expect that a person *advising on conversion or transfer of pension benefits* will also carry on *advising on investments*.

Q31. What is the difference between both advising activities?

The regulated activity of *advising on conversion or transfer of pension benefits* applies to any *pension scheme* that has *safeguarded benefits*. This means it includes advising on transfers between *occupational pension schemes* where the transfer payment is in respect of *safeguarded benefits* with a view to acquiring a right or entitlement to *flexible benefits*.

In the context of pension schemes, *advising on investments* in respect of rights under a *personal pension scheme* or a *stakeholder pension scheme* is limited to these types of schemes and would not include occupational pension schemes.

Q32. Does a person who advises on the conversion or transfer of flexible benefits need to seek authorisation?

When the conversion or transfer of *flexible benefits* involves advising on the merits of *buying, selling, subscribing for rights in a personal pension scheme*

or in a *stakeholder pension scheme* or exercising any of these rights, either as the ceding scheme or the receiving scheme or both, then that would amount to *advising on investments* and authorisation is required. This is because the *regulated activity of advising on investments* applies in relation to rights under a *personal pension scheme* or rights under a *stakeholder pension scheme*.

When the conversion or transfer of *flexible benefits* involves *occupational pension schemes* only and is not in respect of *safeguarded benefits*, then no regulated activity is being carried on.

For example, advice on the switching of *flexible benefits* between *defined contribution occupational pension schemes*. Similarly, advice on an *uncrystallised funds pension lump sum* payment out of a *defined contribution occupational pension scheme* is not regulated.

Q33. Does a *guaranteed annuity rate (GAR)* mean that a pension policy has a *safeguarded benefit*?

In our opinion, a pension policy with a GAR has a *safeguarded benefit* and a person advising on it may be *advising on conversion or transfer of pension benefits*.

Q34. Can advising on conversion or transfer of pension benefits be carried on in respect of any other *specified investments*?

No, the only *specified investment* relevant for *advising on conversion or transfer of pension benefits* is rights or interests under a pension scheme which provides *safeguarded benefits*.

It should be noted that rights or interests under a pension scheme which provides *safeguarded benefits* is a *specified investment* exclusively in respect of *advising on conversion or transfer of pension benefits* and not any other *regulated activity*.

Q35. When does a *firm* advise on conversion or transfer of pension benefits when it provides triage services?

The table in ■ PERG 12 Annex 1G includes examples of when a *firm* is and is not *advising on conversion or transfer of pension benefits* when it has an initial "triage" conversation with a potential customer. The purpose of triage is to give the customer sufficient information about *safeguarded benefits* and *flexible benefits* to enable them to make a decision about whether to take *advice on conversion or transfer of pension benefits*.



**Examples of what is and is not advising on conversion or transfer of pension benefits**

Example	Is this advising on conversion or transfer of pension benefits?
<p><i>Firm A</i> has a triage conversation with customers. It gives them factual information about <i>safe-guarded benefits</i> and <i>flexible benefits</i> and describes the requirement to take <i>advice on conversion or transfer of pension benefits</i> and the cost of transfer. In addition the <i>firm</i> explains the features of pension schemes with <i>flexible benefits</i> and pension schemes with <i>safeguarded benefits</i> that make them more or less suitable for general groups of people. The <i>firm</i> also explains the cash equivalent transfer value.</p>	
<p>(1) During the triage conversation the customer's circumstances are covered. Based on these specific circumstances, the <i>firm</i> tells the customer that they should not take advice.</p>	<p>Yes. This is advice because it is effectively advice to stay in the occupational pension scheme and advice not to transfer.</p>
<p>(2) Same circumstances as example (1) but the <i>firm</i> tells the customer that they would be unlikely to recommend a transfer if the customer took advice.</p>	<p>Yes. This is likely to be an implicit recommendation not to transfer.</p>
<p>(3) After giving the factual information set out at the start of this table and taking into account the customer's specific circumstances, the <i>firm</i> tells the customer it will not provide them with <i>advice on conversion or transfer of pension benefits</i>.</p>	<p>The <i>firm</i> will not give regulated advice in these circumstances if it tells the customer that it will not give them advice. The <i>FCA</i> thinks that <i>firms</i> should be able to turn down business they do not want to carry out without this being interpreted as <i>advising on conversion or transfer of pension benefits</i>. Refusing to do business with someone is not consistent with having an advisory relationship with them. (A similar issue arises under the <i>regulated activity</i> of <i>advising on investments</i> - see example F(12) at PERG 8 Annex 1G.)</p>
<p>(4) After giving the factual information set out at the start of the table, the <i>firm</i> signposts sources of information on them, including an option to take advice.  The <i>firm</i> leaves it to the customer to decide whether or not to take advice.</p>	<p>No. The general context of the information provided and the neutral way in which it is presented should not involve advice.  A <i>firm</i> may give advice if it provides an opinion on whether the customer should go on to take advice or if it uses language which may be perceived as influencing a customer's decision to take advice.</p>
<p>(5) After giving the factual information set out at the start of the table, the <i>firm</i> provides the customer with the transfer value comparator (TVC) prepared in accordance with COBS 19.1.3AR.</p>	<p>A <i>firm</i> does not necessarily give advice by bringing obviously relevant facts to the attention of a customer who wants to transfer, even if those facts show that a transfer would be a poor decision.  Yes. This is likely to be advice as the TVC is prepared using personal information and is objectively likely to influence the customer's decision to transfer or remain in the scheme.  Occupational schemes and employers providing the TVC to scheme members should consider</p>

Example	Is this advising on conversion or transfer of pension benefits?
<p>(6) Before or during the course of the triage conversation with customers, the <i>firm</i> uses a form of pre-purchase questioning (such as decision trees and RAG-rated questionnaires) as set out in PERG 8.30A.</p> <p>The <i>firm</i> leaves it to the customer to decide whether or not to take advice.</p>	<p>whether they are providing the TVC by way of business (PERG 2.3) and require authorisation.</p> <p>Yes. This is likely to be advice as the pre-purchasing questioning process accumulates personalised information tailored to individual customers, which is presented in such a way that is objectively likely to influence the customer's decision to transfer or convert their <i>safeguarded benefits</i>.</p>