

## Chapter 7

Periodical publications, news services and broadcasts: applications for certification

## 7.1 Application and purpose

### Application

- 7.1.1 **G** This chapter applies to anyone involved in publishing periodicals, or in providing news services or broadcasts, who gives (or proposes to give) advice about *securities, structured deposits, relevant investments, P2P agreements, home finance transactions* or certain pension transfers or conversions and who wishes to determine whether he will be carrying on the *regulated activities* of *advising on investments, advising on regulated credit agreements for the acquisition of land or advising on a home finance transaction or advising on conversion or transfer of pension benefits*.

### Purpose

- 7.1.2 **G** The purpose of this chapter is to provide *guidance* as to:
- (1) when a *person* involved in publishing periodicals, or in providing news services or broadcasts, requires *authorisation* to carry on the *regulated activities* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* (see ■ PERG 7.3 (Does the activity require authorisation));
  - (2) if he does, whether he qualifies for the exclusion from those activities that applies to a periodical publication, a regularly updated news or information service or a television or radio service (see ■ PERG 7.4 (Does the article 54 exclusion apply));
  - (3) if he does, whether his circumstances are an appropriate case for a certificate given by the *FCA* as conclusive evidence that he does qualify (see ■ PERG 7.5 (When is it appropriate to apply for a certificate));
  - (4) how to apply for a certificate (see ■ PERG 7.6.1 G to ■ PERG 7.6.5 G); and
  - (5) how the *FCA* will use its power to give certificates (see ■ PERG 7.6.6 G to ■ PERG 7.6.10 G).

- 7.1.3 **G** This *guidance* is issued under section 139A of the *Act*. The *guidance* represents the *FCA*'s views and does not bind the courts, for example in relation to an action for damages brought by a *private person* for breach of a *rule* (see section 138D of the *Act* (Actions for damages)), or in relation to the enforceability of a contract where there has been a breach of section 19 (The general prohibition) of the *Act* (see section 26 of the *Act* (Enforceability of agreements)). Although the *guidance* does not bind the courts, it may be of persuasive effect for a court considering whether it would be just and

equitable to allow a contract to be enforced (see section 28(3) of the *Act*). Anyone reading this *guidance* should refer to the *Act* and to the Financial Services and Markets Act 2000 (Regulated activities) Order 2001 (SI 2001/544) (the *Regulated activities Order*) to find out the precise scope and effect of any particular provision referred to in the *guidance* and should consider seeking legal advice if doubt remains. If a *person* acts in accordance with the *guidance* in the circumstances contemplated by it, then the *FCA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

## 7.2 Introduction

### Exclusion for advice given in certain publications and services

**7.2.1** **G** Advice is excluded by article 54 of the *Regulated Activities Order* from the *regulated activities* of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, *advising on a home finance transaction* and *advising on conversion or transfer of pension benefits* if:

- (1) the advice is given in a publication or service that is in one of three formats (see ■ PERG 7.4.3 G and ■ PERG 7.4.4 G); and
- (2) the principal purpose of the particular format is neither to give certain advice nor to lead to (or enable) certain transactions to be carried out (see ■ PERG 7.4.5 G and ■ PERG 7.4.10 G).

### Certificate that the exclusion applies

**7.2.2** **G** If a *person* would, but for the exclusion, be carrying on the *regulated activities* of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, *advising on a home finance transaction* or *advising on conversion or transfer of pension benefits*, or any or each of them, and will be doing so as a business in the *United Kingdom* (see ■ PERG 7.3), he may wish to apply to the *FCA* for a certificate that the exclusion applies (see ■ PERG 7.6). However, a *person* does not need a certificate to get the benefit of the exclusion. In many cases it will be clear that the exclusion in article 54 applies and a certificate is not called for. A certificate may be appropriate, however, where the exclusion appears to apply but there may be an element of doubt. The granting of a certificate would remove any such doubt.

### Certificates under the Financial Services Act 1986

**7.2.3** **G** Certificates given under paragraph 25 of Schedule 1 to the *Financial Services Act 1986* (Exclusion for periodical publications giving investment advice) ceased to have effect on 1 December 2001. Holders of such certificates must consider their position under the terms of the new exclusion. If a *person* considers that a certificate might be appropriate, a new application must be made.



## 7.3 Does the activity require authorisation?

### Regulated advice

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7.3.1

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- (1) Article 53(1) of the *Regulated Activities Order* (Advising on investments) deals with giving advice in relation to a *security*, a *structured deposit* or a *relevant investment*.
- (2) A summary can be found in ■ PERG 8.24 (Advising on investments). ■ PERG 8.25 to ■ PERG 8.30B give more detail.
- (3) As described in ■ PERG 8.24, for certain *firms*, the *regulated activity* only covers giving *personal recommendations*.

7.3.1-A

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Under article 53(2) of the *Regulated Activities Order* (Advising on investments), advising a *person* is a specified kind of activity if:

- (1) the advice is given to the *person* in their capacity as a *lender* or potential *lender* under a relevant article 36H agreement (defined in article 53(4) of the *Regulated Activities Order*) or as an agent for a *lender* or potential *lender* under such an agreement; and
- (2) it is advice on the merits of their doing any of the following (whether as principal or agent):
  - (a) entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law; or
  - (b) providing instructions to a *P2P platform operator* with a view to entering into a relevant article 36H agreement as a *lender* or assuming the rights of a *lender* under such an agreement by *assignment* or operation of law, where the instructions involve:
    - (i) accepting particular parameters for the terms of the agreement presented by a *P2P platform operator*; or
    - (ii) choosing between options governing the parameters of the terms of the agreement presented by a *P2P platform operator*; or
    - (iii) specifying the parameters of the terms of the agreement by other means; or
  - (c) enforcing or exercising the *lender's* rights under a relevant article 36H agreement; or
  - (d) assigning rights under a relevant article 36H agreement.

- 7.3.1A** **G** Under article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a borrower or potential borrower; and
  - (2) it is advice on the merits of his doing any of the following:
    - (a) entering into a particular *regulated mortgage contract*; or
    - (b) varying the terms of a *regulated mortgage contract* entered into by him after mortgage day in such a way as to vary his obligations under that contract.
- 7.3.1B** **G** Under article 53B of the *Regulated Activities Order* (Advising on regulated home reversion plans), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a *reversion occupier* or reversion provider or as a potential *reversion occupier* or reversion provider; and
  - (2) it is advice on the merits of his doing any of the following:
    - (a) entering into a particular *home reversion plan*; or
    - (b) varying the terms of a *home reversion plan* entered into by him as *reversion occupier* or as reversion provider (but only where the plan was originally entered into on or after 6 April 2007) in such a way as to vary his obligations under that plan.
- 7.3.1C** **G** Under article 53C of the *Regulated Activities Order* (Advising on regulated home purchase plans), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as a *home purchaser* or potential *home purchaser*; and
  - (2) it is advice on the merits of his doing any of the following:
    - (a) entering into a particular *home purchase plan*; or
    - (b) varying the terms of a *home purchase plan* entered into by him on or after 6 April 2007 in such a way as to vary his obligations under that plan.
  - (3) Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:

- 7.3.1CA** **G** Under article 53D of the Regulated Activities Order (Advising on regulated sale and rent back agreements), advising a person is a specified kind of activity if:
- 7.3.1D** **G** Under article 53D of the *Regulated Activities Order* (Advising on regulated sale and rent back agreements), advising a *person* is a specified kind of activity if:
- (1) the advice is given to the *person* in his capacity as an *SRB agreement seller* or *SRB agreement provider* or as a potential *SRB agreement seller* or *SRB agreement provider*; and
  - (2) it is advice on the merits of his doing any of the following:
    - (a) entering into a particular *regulated sale and rent back agreement*; or
    - (b) varying the terms of a *regulated sale and rent back agreement* entered into by him on or after 1 July 2009 in such a way so as to vary his obligations under that agreement.
- 7.3.1DA** **G** Under article 53DA of the *Regulated Activities Order* (Advising on regulated credit agreements for the acquisition of land), advising a *person* ("P") is a specified kind of activity if:
- (1) the advice is given to P in P's capacity as a recipient of credit, or potential recipient of credit, under a *regulated credit agreement*;
  - (2) P intends to use the credit to acquire or retain property rights in *land* or in an existing or projected building; and
  - (3) the advice consists of the provision of personal recommendations to P in respect of one or more transactions relating to *regulated credit agreements*.
- 7.3.1E** **G** Under article 53E of the *Regulated Activities Order* (Advising on conversion or transfer of pension benefits), advising a *person* ("P") is a specified kind of activity if the advice:
- (1) is given to P in their capacity as:
    - (a) a *member of a pension scheme*; or
    - (b) a *survivor of a member of a pension scheme*;where P has *subsisting rights* in respect of any *safeguarded benefits*; and
  - (2)
    - (a) convert any of the *safeguarded benefits* into different benefits that are *flexible benefits* under the scheme; or
    - (b) make a transfer payment in respect of any of the *safeguarded benefits* with a view to acquiring a right or entitlement to *flexible benefits* for P under another pension scheme; or
    - (c) pay a lump sum that would be an *uncrystallised funds pension lump sum* in respect of any of the *safeguarded benefits*.

**7.3.2** **G** Articles 53, 53A, 53B, 53C, 53D 53DA and 53E of the *Regulated Activities Order* contain a number of elements, all of which must be present before a *person* will require *authorisation*. For *guidance* on whether a *person* is carrying on these *regulated activities*, see ■ PERG 8 (Financial promotion and related activities), ■ PERG 4 (Guidance on regulated activities connected with mortgages), ■ PERG 12.6 (Advising on conversion or transfer of pension benefits), , ■ PERG 14.3, ■ PERG 14.4 and ■ PERG 14.4A (Guidance on home reversion, home purchase and regulated sale and rent back agreement activities). Guidance on the activity in article 53DA (*advising on regulated credit agreements for the acquisition of land*) of the *Regulated Activities Order* is in ■ PERG 2.7.16F G.

**Advice in publications and broadcasts and MiFID**

**7.3.2A** **G** Advice about *financial instruments* in a newspaper, journal, magazine, publication, internet communication or radio or television broadcast should not normally be a *personal recommendation* under *MiFID* (see ■ PERG 13, Q18 to Q21).

**Carrying on the regulated activity by way of business**

**7.3.3** **G** Under section 22 of the *Act* (Regulated activities), for an activity to be a *regulated activity* it must be carried on 'by way of business'. There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. It has exercised this power (through the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177) (the Business Order), as amended from time to time.

**7.3.3A** **G** The result of the amendments made to the meaning of the business test in section 22 of the *Act* is that the test differs depending on the activity in question. Where the *regulated activities* of *advising on investments* and *advising on a home finance transaction* are concerned, the business test is not to be regarded as satisfied unless a *person* carries on the business of engaging in those activities. This is a narrower test than that of carrying on *regulated activities* by way of business (as required by section 22 of the *Act*), as it requires the *regulated activities* to represent the carrying on of a business in their own right. Where the advice relates to a *contract of insurance*, the business test is not to be regarded as satisfied unless the *person* carrying on the activity of giving the advice is taking up or pursuing the activity for remuneration. ■ PERG 2.3 (The Business element) and ■ PERG 2.4 (Link between activities and the United Kingdom) together with ■ PERG 5.4 (The business test) provide further detail on this.

**7.3.4** **G** In the *FCA's* view, for a *person* to be carrying on the business of *advising on investments* or *advising on a home finance transaction* he will usually need to be doing so with a degree of regularity and for commercial purposes – that is to say, he will normally be expecting to gain some kind of a direct or indirect financial benefit. But, in the *FCA's* view it is not necessarily the case that advice provided free of charge will not amount to a business. Advice is



often given 'free' by a journalist or presenter, or in a publication or website, in the sense that no charge is made or commission received. For example, a newspaper may reply to readers' letters to generate goodwill or to generate a supply of further material that it can publish or a website that is 'free' to the user will be sponsored or paid for by advertising. In such cases, if advice on *securities, structured deposits, relevant investments, P2P agreements or home finance transactions* is given, then, in the FCA's view, the business of *advising on investments or advising on a home finance transaction* is being carried on. In addition, non-commercial motives may be relevant in determining whether a *person* can be said to be carrying on the business of giving advice. For example, an investigative journal or journalist may occasionally feel that it is necessary to warn investors against the purchase of a particular *investment* because there are suspicions of fraud in connection with that *investment*. The FCA takes the view that, in such circumstances, the journal or journalist would not be regarded as carrying on the business of *advising on investments or advising on a home finance transaction* as he would be acting to prevent crime rather than in the carrying on of a business.

- 7.3.4A G For persons carrying on *advising on regulated credit agreements for the acquisition of land* the by the way of business test is set out in ■ PERG 2.3.2G (4)

**Carrying on the regulated activity in the United Kingdom**.....

- 7.3.5 G Advice given in periodicals published from an establishment in the *United Kingdom* is regarded by the FCA as given in the *United Kingdom*. A similar approach is taken to advice given in, or by way of, a service provided from such an establishment.

- 7.3.6 G In other circumstances, advice issued remotely may still be given in the *United Kingdom*. For example, the FCA considers that advice is given in the *United Kingdom* if:

- (1) it is contained in a non-UK periodical that is posted in hard copy to *persons* in the *United Kingdom*;
- (2) it is contained in a non-UK periodical (or given in or by way of a service) which is made available electronically to such *persons*.

- 7.3.7 G But even if advice is given in the *United Kingdom*, the *general prohibition* will not be contravened if the giving of advice does not amount to the carrying on, in the *United Kingdom*, of the business of *advising on investments, advising on regulated credit agreements for the acquisition of land, or advising on conversion or transfer of pension benefits advising on a home finance transaction* . Also, the *general prohibition* will not be contravened if the exclusion for *overseas persons* in article 72 of the *Regulated Activities Order* (*Overseas persons*) applies. That exclusion applies in relation to the giving of advice on *securities, structured deposits or relevant investments* by an *overseas person* as a result of a 'legitimate approach' (defined in article 72(7)). In many cases where publications or services are provided from outside the *United Kingdom* it is likely that they will fall within the terms of this exclusion. For example, this will exclude any advice in a publication or service from being a *regulated activity* if it is given

in response to an approach that has not been solicited in any way. It should be noted, however, that the exclusions in article 72 do not apply to the regulated activities that involve *advising on a home finance transaction, advising on regulated credit agreements for the acquisition of land or advising on conversion or transfer of pension benefits*. The effect of this is that, where the principal purpose of an overseas periodical publication is to offer advice on *securities, structured deposits, relevant investments, P2P agreements, home finance transactions* and certain pension transfers or conversions, the exclusion for an *overseas person* who provides advice to *persons* in the *United Kingdom* as a result of a legitimate approach will not apply to the advice concerning *home finance transactions* or pension transfers or conversions.

### Exclusions and exempt persons

7.3.8

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If a person is carrying on the business of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* in the *United Kingdom*, he will not require *authorisation* if:

- (1) he is able to rely on an exclusion; in addition to the exclusions already mentioned (in articles 54 and 72 of the *Regulated Activities Order*), other exclusions that may be relevant are in Chapter XVII of Part II of the *Regulated Activities Order*; or
- (2) he is an *exempt person* (see ■ PERG 2.11 (What to do now?)); since *persons* are exempt only in relation to specified *regulated activities*, his exemption must apply to the *regulated activity* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* as the case may be.

### Which person is required to be authorised?

7.3.9

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Many people may be involved in the production of a periodical publication, news service or broadcast. But if the *regulated activity* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* is being carried on so that *authorisation* is required, the *FCA's* view is that the *person* carrying on the activity (and who will require *authorisation*) is the *person* whose business it is to have the editorial control over the content. In the case of a periodical publication, this will often be the proprietor. But particular circumstances may vary so that the responsibility for content and editorial control rests with a freelance journalist rather than with the proprietor. In such cases it may well be that the journalist may properly be viewed as carrying on his own business, using the periodical publication as the vehicle for doing so – in which case it is likely to be the journalist alone who needs the *authorisation*.

7.3.10

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Similar principles apply to news services and broadcasts.

**7.4 Does the article 54 exclusion apply?**

**The formats**

**7.4.1**

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The exclusion applies to advice given in one of the following formats:

- (1) advice in writing or other legible form which is contained in a newspaper, journal, magazine, or other periodical publication;
- (2) advice in writing or other legible form which is given by way of a service comprising regularly updated news or information;
- (3) advice given in any service consisting of the broadcast or transmission of a television or radio programme.

**7.4.2**

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But the exclusion applies only if the principal purpose of the publication or service is not:

- (1) to advise on *securities* or *structured deposits* or *relevant investments* or *P2P agreements* or *home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
- (2) to lead or enable *persons*:
  - (a) to *buy, sell*, subscribe for or underwrite *securities, structured deposits* or *relevant investments*; or
  - (aa) to enter into a relevant article 36H agreement (within the meaning of article 53(4) of the *Regulated Activities Order*) as a *lender*, to assume the rights of a *lender* under such an agreement by *assignment* or operation of law, or to assign rights under such an agreement; or
  - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by them as borrower on or after 31 October 2004 or the terms of *legacy CCA mortgage contracts* entered into by them as borrower; or
  - (c) to enter as *reversion occupier* or reversion provider into *home reversion plans* or to vary the terms of *home reversion plans* entered into by them as *reversion occupier* or as reversion provider where the plan was originally established on or after 6 April 2007;
  - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007; or

- (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009; or
- (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building.
- (g) to do any of the following in the context of *advising on conversion or transfer of pension benefits*:
  - (i) convert *safeguarded benefits* into different benefits that are *flexible benefits* under the scheme; or
  - (ii) make a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to *flexible benefits* under another pension scheme; or
  - (iii) pay a lump sum that would be an *uncrystallised funds pension lump sum* in respect of any of the benefits.

#### Formats in writing or other legible form

##### 7.4.3

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- (1) There are two specified formats for advice appearing in writing or other legible form.
- (2) The first is that of a newspaper, journal, magazine or other periodical publication. For these purposes it does not matter what form the periodical publication takes as long as it can be read. This will include, for example, a newspaper appearing as a hard copy or electronically on a website. It will also include any periodical published on an intranet site.
- (3) The second is that of a regularly updated news or information service. As with periodical publications, it does not matter how the service is accessed by, or delivered to, the user as long as it can be read. This will include, for example, a service provided through teletext, a fax retrieval system or a website (including websites that are used through handheld devices). The fact that it must be a 'regularly updated' service means that the provision of up-to-date news or information must be a primary feature of the service (for example, where it is likely to be of commercial value to the recipient). But, in the FCA's view, a news or information 'service' is not restricted only to the giving of news or information since this would not generally constitute the *regulated activity* of *advising on investments* (see ■ PERG 8.28 (Advice or information)), *advising on regulated mortgage contracts* (see ■ PERG 4.6.13 G to ■ PERG 4.6.16 G (Advice or information)), *advising on regulated credit agreements for the acquisition of land* (see ■ PERG 4.10A.20 G), *advising on conversion or transfer of pension benefits* (see ■ PERG 12.6), *advising on a home reversion plan*, *advising on a home purchase plan* or *advising on regulated sale and rent back agreements*. So the exclusion applies to services providing material in addition to news or information, such as comment or advice.

**Television and Radio**

7.4.4

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The third specified format is for advice in any service consisting of the broadcast or transmission of television or radio programmes. This will encompass the transmission through cable of interactive television programmes. In the FCA's view, 'service' in this context goes beyond any particular series of programmes broadcast or transmitted through a given medium. It refers instead to the administrative system (usually aimed at a particular audience) through which a range of different programmes is provided, for example any particular TV or radio channel. In the FCA's view, it is unlikely that a TV or radio service will have one of the *principal* purposes that would prevent its being able to rely on the exclusion unless the complete service is designed to focus on financial or *investment* matters.

**The principal purpose test**

7.4.5

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The exclusion applies only if the principal purpose of the publication or service is not:

- (1) to give advice on *securities, structured deposits, relevant investments, P2P agreements or home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
- (2) to lead or enable *persons*:
  - (a) to *buy, sell*, subscribe for or underwrite *securities, structured deposits or relevant investments*; or
  - (aa) to enter into a relevant article 36H agreement (within the meaning of article 53(4) of the *Regulated Activities Order*) as a *lender*, to assume the rights of a *lender* under such an agreement by *assignment* or operation of law, or to assign rights under such an agreement; or
  - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by them as borrower on or after 31 October 2004 or the terms of *legacy CCA mortgage contracts* entered into by them as borrower; or
  - (c) to enter as *reversion occupier* or reversion provider into *home reversion plans* or to vary the terms of *home reversion plans* entered into by them as *reversion occupier* or as reversion provider where the plan was originally established on or after 6 April 2007;
  - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007;
  - (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009;
  - (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building; or
  - (g) to do any of the things listed in ■ PERG 7.4.2G(2)(g).

References to leading or enabling *persons* to do the things mentioned in (2)(a) or (b) are abbreviated in ■ PERG 7.4.9 G and ■ PERG 7.4.11 G as leading or enabling *persons* 'to engage in a relevant transaction'.

7.4.6

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Any assessment of the principal purpose of a periodical publication, news service or broadcast needs to be carried out against the background that:

- (1) they all share the characteristic of being available over a sustained period and, within that period, appearing from time to time with a different content;
- (2) the same periodical publication will have many different editions;
- (3) the regular updating of the news or information service will produce differences in the material provided, comparing the content of the service as it appears at any one time with its content as it appears at any other; and
- (4) the programmes in a TV or radio service are bound to have a different content from each other.

7.4.7

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To address this feature of variation in content, article 54 requires that the principal purpose of a publication or service is to be assessed by looking at the publication or service taken as a whole and including any advertisements or other promotional material contained in it. This requirement of an overall assessment of purpose or purposes goes beyond the content of any particular example of the publication or service (such as a particular edition or programme). It fixes instead on the characteristic content of the publication or service looked at over time. This judgment depends on the overall impression of content. One way of approaching this is to consider what an average consumer of a publication or service might expect to find when making a decision whether to buy a particular edition or to use the service.

7.4.8

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Looking at the first disqualifying purpose set out in the exclusion, all the matters relevant to whether the *regulated activities* of *advising on investments*, *advising on regulated credit agreements for the acquisition of land*, *advising on a home finance transaction* or *advising on conversion or transfer of pension benefits* are being carried on must be taken into account (see ■ PERG 8.24 (Advising on investments)). If the principal purpose of a publication or service is to give to *persons*, in their capacity as investors (or potential investors), as borrowers, as *reversion occupiers* or reversion providers or as *home purchasers* or as *SRB agreement sellers* or *SRB agreement providers* (as the case may be), advice as referred to in ■ PERG 7.4.5G (1), then the publication or service will not be able to benefit from this exclusion.

7.4.9

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For the second disqualifying purpose, the focus switches to assessing whether the principal purpose of a publication or service is to lead a *person* to engage in a relevant transaction or enable him to do so. This disqualifying purpose is an alternative to the first. So it extends to material not covered by the first. In this respect:

- (1) material in a publication or service that invites or seeks to procure *persons* to engage in a relevant transaction can be said to "lead" to those transactions even if it would not constitute the *regulated activities* of *advising on investments, advising on regulated credit agreements for the acquisition of land, advising on a home finance transaction or advising on conversion or transfer of pension benefits* ; this includes, for example, material that consists of generic *buy or sell* recommendations, corporate brochures or invitations to invest in particular products or with a particular broker or fund manager; and
- (2) material enables *persons* to engage in a relevant transaction if it facilitates the transactions, for example by giving a user the forms that enable him to carry out relevant transactions; so this limb of the second disqualifying purpose would apply to the material providing an online dealing facility on an interactive website or to facilities for on-screen dealing through digital television.

In the *FCA's* view, material will not lead or enable a *person* to engage in a relevant transaction where the material is intended merely to raise people's awareness of matters relating to *securities, structured deposits, relevant investments, P2P agreements, home finance transactions* or pension scheme transfers.

- 7.4.10 **G** The test for determining the principal purpose of any publication that appears on a website, or of any news or information service on a website, is no different from any other medium. An overall view will need to be taken of all the contents of the publication or service, including any features such as chatrooms, advertisements or other promotional material.
- 7.4.11 **G** In the context of the second disqualifying purpose, whether or not the presence of a hypertext link to another website indicates that the purposes of a publication or service include leading to relevant transactions (or enabling them to be entered into) will depend on all the circumstances. It will, in particular, be necessary to consider the form of the link and the content of the destination website. In the *FCA's* view, the presence on a host publication or service of a hypertext link which is only the name or logo of another website is unlikely itself to indicate that a purpose of the host website is to lead to relevant transactions (or enable them to be entered into). But if more sophisticated links, such as banners or changeable text, contain promotional material inviting or seeking to procure *persons* to enter into relevant transactions, those links will have to be weighed in the balance in determining the principal purpose of the publication or service hosting the link. The same applies if the host publication or service hosting the link itself contains material inviting *persons* to activate the link with a view to entering into relevant transactions.
- 7.4.12 **G** In reaching a view of the principal purpose of the publication or service as a whole, all the material that falls within either the first or second disqualifying purpose must be considered together.

**Personal recommendations**

7.4.12A

G

(1) The exclusion does not apply to *advising on investments (except P2P agreements)* when the definition of that *regulated activity* is restricted to giving *personal recommendations*.

[**Note:** For these *personal recommendations*, see ■ PERG 7.3.1G(3).]

(2) In practice, advice given as described in ■ PERG 7.4.1G is unlikely to be a *personal recommendation* in the first place, for the reasons set out in ■ PERG 8.30B.2G(4) and ■ PERG 8.30B.22G to ■ PERG 8.30B.24G (Recommendation to the public).

**Who can benefit from the exclusion?**

7.4.13

G

The *persons* who directly benefit from the exclusion will be the *persons* who would otherwise require *authorisation* (see ■ PERG 7.3.9 G), that is, the *person* whose business it is to have editorial control over the content of the publication or service. The exclusion will apply regardless of the legal form of the *person* giving the advice so, for example, it will extend to advice given by a *company* through its employees.





## **7.5 When is it appropriate to apply for a certificate?**

- 7.5.1** **G** To decide whether the exclusion in article 54 applies, three assessments need to be made:
- (1) first, an assessment whether the vehicle for giving the advice is a newspaper, journal, magazine or other periodical publication, a service comprising regularly updated news or information or a service consisting of the broadcast or transmission of television or radio programmes;
  - (2) second, an assessment of the purpose or purposes of any particular publication or service; and
  - (3) third, an assessment of the relative significance of each purpose compared with any others.
- 7.5.2** **G** Because opinions may differ in circumstances close to the borderline, giving rise to doubt as to whether or not the exclusion applies, the *Regulated Activities Order* makes provision for a certification process. The purpose of this process is not to provide certification for every publication or service to which the exclusion in article 54 applies.
- 7.5.3** **G** In many cases it will be clear whether or not a publication or service benefits from the exclusion. A publication or service may provide reports on such a wide range of matters that it is not possible to say that it has any purpose other than to provide coverage of a wide range of matters. Alternatively, it may be clear that the principal purpose of a publication or service is something other than those specified in the article 54 exclusion. Examples of cases where, in the *FCA's* view, the exclusion is capable of applying include:
- (1) national or local newspapers providing the normal range of non-financial news and coverage of other matters (such as sports, arts and leisure) and which simply contain financial journalism (such as reports on particular *investments* or markets) as one element of their all-round coverage;
  - (2) weekly or monthly journals aimed at a particular subject (such as computing or sport) but which have some coverage of, or promotional material relating to, *investments* and financial matters;
  - (3) websites which provide financial news or information;

- (4) closed user group communication systems specialising in financial or *investment* matters; and
- (5) television or radio channels dedicated to consumer affairs which devote a small number of programmes to financial planning.

**7.5.4**

**G**

It is only where there are grounds to think that there is a significant doubt as to the principal purpose of a publication or service that the question of whether or not to apply to the *FCA* for a certificate under article 54 of the *Regulated Activities Order* is expected to arise. For example, this may happen where a publication or service has several significant purposes and one of them is a disqualifying purpose referred to in the exclusion in article 54. It may on occasion be difficult to assess the relative importance of the purposes compared with each other, particularly given that over time there will be a variation in the content of the publication or service. In such cases, an application for a certificate would be appropriate.



## **7.6 Applications for a certificate**

### **Pre-application contact**

- 7.6.1** **G** A person considering applying for a certificate should, before sending in any application, contact the Perimeter Enquiries Team of the FCA (email: firm.queries@fca.org.uk , Tel 0800 111 6768) to discuss whether a certificate may be appropriate.

### **Form of application**

- 7.6.2** **G**
- (1) An application should be made by the proprietor of the relevant publication or service using the appropriate form, accessible from our website (see Forms/ Perimeter Guidance manual forms). The form asks for general information about the applicant and gives *guidance* notes on completion and other details of how the FCA can help.
  - (2) An applicant will be asked to state his own view of the principal purpose of the publication or service. This should include an explanation why the applicant believes that he qualifies for the exclusion and why he believes that a certificate may be called for.
  - (3) The applicant will be asked to define the extent of the publication or service for which he is seeking a certificate.
  - (4) The applicant will be asked to supply material to demonstrate the content of the publication or service or, in the case of a new publication or service, its proposed content. For an existing publication or service, past samples should be supplied in the form most appropriate to the medium for which certification is sought. The samples should be chosen on the basis that they are representative of the publication or service as a whole and as it appears from time to time. The applicant will be asked to justify the selection of the particular samples as being representative. For a new publication or service, samples of proposed content should be supplied. These should be as comprehensive as possible.
  - (5) The applicant will be asked to supply material to demonstrate that the principal purpose is not liable to change over the foreseeable future. This may, for example, include business plans, a statement of editorial policy and marketing literature.
  - (6) The application must be accompanied by the application fee (see ■ PERG 7.6.5 G).

**Requests for further information**

- 7.6.3 **G** After an application is sent in, the *FCA* may, on occasion, need to obtain additional information from the applicant or elsewhere to enable it to process the application.

**Time for processing applications**

- 7.6.4 **G** The *Act* does not specify a time limit for processing the application but the *FCA* intends to deal with an application as quickly as possible. The more complete and relevant the information provided by an applicant, the more quickly a decision can be expected. But on occasion it may be necessary to allow time in which the *FCA* can monitor the content of the service. This might happen where, for example, a service is in a form that makes record keeping difficult (such as a large website with a number of hypertext links).

**Application Fee**

- 7.6.5 **G** The fee for an application for a certificate under article 54 of the *Regulated Activities Order* is £2,000.

**The FSA's approach to considering applications**

- 7.6.6 **G** The *FCA* will consider any application for a certificate on its merits.
- 7.6.7 **G** Before it gives a certificate, the *FCA* must be satisfied that the principal purpose of the publication or service is neither of the purposes referred to in the exclusion (see ■ PERG 7.4.5 G). If there is insufficient evidence, a certificate cannot be given.
- 7.6.8 **G** The *FCA* will form an overall view as to the purpose (or purposes) underlying the publication or service. It will then determine whether the principal purpose is neither of those referred to in article 54 of the *Regulated Activities Order*. Because the possible range of subject matter covered by different publications or services is very wide it is not possible to apply standard tests. The *FCA* will form a judgment as to the overall impression created by the publication or service. For example, the proportion of advice, compared with other material in the publication or service, will be relevant in determining the principal purpose of the publication or service. But this will not necessarily be conclusive one way or the other. The purpose of a publication or service may still be to give advice even if only a small proportion of the space is devoted to advice as such. This might happen if, for example, a publication were marketed primarily on the basis that it contains advice on *investments*.
- 7.6.9 **G** In reaching a view, the *FCA* will take into account both editorial and promotional material in the publication or service. It will also have regard to the stated purpose of the publication or service and to any other material relevant to its purpose.
- 7.6.10 **G** Other factors relevant to an assessment of purpose or content of the publication or service may vary depending on the nature of the publication or service. For example, if a service is provided by a website, consideration of

the content of the publication or service will take account of hypertext links and other features such as e-mail addresses, bulletin boards and chat rooms.

**Grant of application**

7.6.11

G

If the *FCA* decides to grant the application it will issue a certificate. The certificate will normally be granted for an indefinite period. It will state what it is that the *FCA* considers constitutes the periodical or service in relation to which the *FCA* is satisfied that the exclusion in article 54 of the *Regulated Activities Order* applies. In many cases this will be self-evident. But it may sometimes be necessary to include further details in the certificate indicating what the certificate covers. For example, in the case of a large website, a distinct publication or service may form part of the website. In such a case a certificate may be given for that part only.

**Refusal of application**

7.6.12

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An application may be refused on the grounds that the *FCA* is not satisfied that the principal purpose of the publication or service is neither of those mentioned in article 54(1)(a) or (b) of the *Regulated Activities Order* (see ■ PERG 7.4.5 G). An application may also be refused on the grounds that the *FCA* considers that the vehicle through which advice is to be given is not a newspaper, journal, magazine or other periodical publication, a regularly updated news or information service or a service consisting of the broadcast or transmission of television or radio programmes. Where an application is refused, the *FCA* will issue a notice which will give a statement of the reasons for the refusal in that case. If the application is refused, the applicant, if he is an *unauthorised person*, will need to consider whether it is appropriate to continue to publish the periodical or provide the service without *authorisation* or exemption.

## 7.7 Post-certification issues

### Ongoing monitoring

- 7.7.1 **G** If a certificate is granted then, until it is revoked, it is conclusive evidence that the exclusion under article 54 of the *Regulated Activities Order* applies. A *person* to whom a certificate is given should notify the *FCA* of any significant changes to the purpose or nature of the content of the relevant publication or service. The *FCA* will need to keep the content of the publication or service in question under review.
- 7.7.2 **G** An annual fee of £1,000 will be charged to meet the costs of ongoing monitoring (see ■ SUP 20 Annex 3 R).

### Revocation of certificate

- 7.7.3 **G** The *FCA* may revoke a certificate at the request of its holder or on the *FCA*'s own initiative if the *FCA* considers that it is no longer justified. If the *FCA* revokes a certificate on its own initiative, it would normally expect to give advance notice to the holder of the certificate together with a statement of the reasons for the proposed revocation, and give the holder of the certificate an opportunity to make representations. Where a certificate is revoked, the holder of the certificate, if he is an *unauthorised person*, will need to consider whether it is appropriate to continue to publish the periodical or provide the service without *authorisation* or exemption.

### Publication of details of certificate holders

- 7.7.4 **G** The fact of a *person* holding a certificate granted under article 54(3) is information which may be of relevance to other *persons* (including investors or potential investors). For this reason, the *FCA* considers it appropriate that details of certificates granted under article 54(3) should be included in a list on the public record which the *FCA* is required to maintain under section 347 of the *Act* (The record of authorised persons, etc).

### Further information

- 7.7.5 **G** For further information contact the Perimeter Enquiries Team of the *FCA* (email: [authorisationenquiries@fca.org.uk](mailto:authorisationenquiries@fca.org.uk) , Tel 020 7066 0082).