

Chapter 8

Financial promotion and related activities

8.1 Application and purpose

Application

- 8.1.1 **G** This chapter applies to *persons* who need to know whether their communications are subject to or comply with the *Act*. It also helps them decide whether their activities in making or helping others to make *financial promotions* are *regulated activities*.
- 8.1.1A **G** This chapter also applies to *persons* who need to know whether they are *marketing* an *AIF*.

Purpose of guidance

- 8.1.2 **G** The purpose of this *guidance* is three-fold:
- (1) to outline the restriction on financial promotion under section 21 of the *Act* (Restrictions on financial promotion) and the main exemptions from this restriction; and
 - (2) to outline the main circumstances in which *persons* who are primarily involved in making or helping others to make *financial promotions* may be conducting *regulated activities* requiring *authorisation* or exemption themselves; this part of the *guidance* may also be of more general relevance to *persons* who may be concerned whether or not they are carrying on the *regulated activities* of *advising on investments* or *making arrangements with a view to transactions in investments*; and
 - (3) to provide *guidance* in relation to *marketing* an *AIF*.
- 8.1.3 **G** In particular, this *guidance* covers:
- (1) invitations and inducements (see ■ PERG 8.4);
 - (2) meaning of 'in the course of business' (see ■ PERG 8.5);
 - (3) meaning of '*communicate*' (see ■ PERG 8.6);
 - (4) meaning of '*engage in investment activity*' (see ■ PERG 8.7);
 - (5) meaning of 'having an effect in the *United Kingdom*' (see ■ PERG 8.8);
 - (6) circumstances where the restriction in section 21 does not apply (see ■ PERG 8.9);

- (7) types of *financial promotion*, including:
 - (a) meaning of '*real time financial promotion*' (see ■ PERG 8.10.2 G); and
 - (b) meaning of '*unsolicited real time financial promotion*' (see ■ PERG 8.10.8 G);
- (8) types of exemption under the *Financial Promotion Order*, including:
 - (a) exemption for certain one-off promotions (see ■ PERG 8.14.3 G);
 - (b) exemption for *financial promotions* not directed at the *United Kingdom* (see ■ PERG 8.12.2 G);
 - (c) exemptions for *financial promotions* by journalists and in broadcasts (see ■ PERG 8.12.23 G);
- (9) *financial promotions* concerning *deposits* and *contracts of insurance* other than *life policies* (see ■ PERG 8.13);
- (10) *financial promotions* concerning promotions by members of the professions (see ■ PERG 8.15);
- (11) *financial promotions* concerning funeral plans (see ■ PERG 8.16);
- (12) *financial promotions* concerning the Lloyd's market (see ■ PERG 8.18);
- (13) additional restrictions on the promotion of:
 - (a) *life policies* (see ■ PERG 8.19);
 - (b) *collective investment schemes* (see ■ PERG 8.20);
- (14) *company* statements, announcements and briefings (see ■ PERG 8.21);
- (15) *financial promotions* made on the Internet (see ■ PERG 8.22);
- (16) *regulated activities*:
 - (a) *advising on investments* (see ■ PERG 8.24);
 - (b) *making arrangements with a view to transactions in investments* (see ■ PERG 8.32);
- (17) the business test for *regulated activities* (see ■ PERG 8.34); and
- (18) the *marketing* of an *AIF* (see ■ PERG 8.37).

8.1.4

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This *guidance* is issued under section 139A of the *Act*. It represents the *FCA's* views and does not bind the courts. For example, it would not bind the courts in 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 sections 19 (The general prohibition) or 21 (Restrictions on financial promotion) of the *Act* (see sections 26 to 30 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 sections 28(3) and 30(4) of the *Act*). Anyone reading this *guidance* should refer to the *Act* and to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/

1529) (the *Financial Promotion Order*) and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (as amended) (the *Regulated Activities Order*). These should be used to find out the precise scope and effect of any particular provision referred to in the *guidance* and any reader should consider seeking legal advice if doubt remains. If a *person* acts in line with the *guidance* in the circumstances mentioned by it, the *FCA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.



8.2 Introduction

- 8.2.1** **G** The effect of section 21 of the *Act* (Restrictions on financial promotion) is that in the course of business, an *unauthorised person* must not *communicate* an invitation or inducement to *engage in investment activity* unless either the content of the communication is *approved* for the purposes of section 21 by an *authorised person* or it is exempt. Under section 25 of the *Act* (Contravention of section 21), a *person* commits a criminal offence if he carries on activities in breach of the restriction in section 21 of the *Act*. A *person* who commits this criminal offence is subject to a maximum of two years imprisonment and an unlimited fine. However, it is a defence for a *person* to show that he took all reasonable precautions and used all due diligence to avoid committing the offence.
- 8.2.2** **G** Another consequence of a breach of section 21 of the *Act* is that certain agreements could be unenforceable (see section 30 of the *Act* (Enforceability of agreements resulting from unlawful communications)). This applies to agreements entered into by a *person* as a customer as a consequence of a communication made in breach of section 21.
- 8.2.3** **G** An *authorised person* will not breach section 21 when *communicating a financial promotion*. Nevertheless, this *guidance* may be relevant where an *authorised person* needs to know whether the *financial promotion rules* apply to a particular communication.
- 8.2.4** **G** A *person* who is concerned to know whether his communications will require *approval* or, if he is an *authorised person*, whether the appropriate *financial promotion rules* will apply to his communications will need to consider the following:
- (1) am I making a communication or causing a communication to be made? (see ■ PERG 8.6);
 - (2) if so, is it an invitation or inducement? (see ■ PERG 8.4);
 - (3) if so, does the invitation or inducement relate to a *controlled investment*? (see ■ PERG 8.7);
 - (4) if so, is the invitation or inducement to *engage in investment activity*? (see ■ PERG 8.7);
 - (5) if so, is it made in the course of business? (see ■ PERG 8.5);

- (6) if so, and the *financial promotion* originates outside the *United Kingdom*, is it capable of having an effect in the *United Kingdom*? (see ■ PERG 8.8);
- (7) if so, or if the answer to (5) is yes and the *financial promotion* was made in the *United Kingdom*, is the promotion exempt? (see ■ PERG 8.12 to ■ PERG 8.15 and ■ PERG 8.21);
- (8) if not, am I an *authorised person*?

8.2.5 **G** If the answer to ■ PERG 8.2.4G (8) is yes then the appropriate *financial promotion rules* will potentially apply (subject to the application provisions in ■ COBS 1 and ■ COBS 4). If the answer is no, then the promotion must be approved by an *authorised person* if it is a *non-real time financial promotion*. *Authorised persons* are not allowed to approve *real time financial promotions* (see ■ COBS 4.10.4 R). ■ PERG 8.36.1G contains a flowchart explaining these steps.

8.2.6 **G** [deleted]

8.2.7 **G** The restriction in section 21 applies to all forms of communication such as advertising, broadcasts, websites, e-mails and all other forms of written or oral communication whether sent to one *person* or many. However, the restrictions only apply to a communication made in the course of business and not, for example, to personal communications between individuals.

8.2.8 **G** There are extensive exemptions in the *Financial Promotion Order*. This is explained in greater detail in ■ PERG 8.11 to ■ PERG 8.15 and ■ PERG 8.21.

8.3 Financial promotion

- 8.3.1** **G** The basic restriction on the *communication of financial promotions* is in section 21(1) of the *Act*. Sections 21(2) and (5) disapply the restriction in certain circumstances. Their combined effect is that a *person* must not, in the course of business, *communicate* an invitation or inducement to *engage in investment activity* unless:
- (1) he is an *authorised person*; or
 - (2) the content of the communication is *approved* for the purposes of section 21 by an *authorised person*; or
 - (3) the communication is exempt under an order made by the Treasury under section 21(5) – the *Financial Promotion Order* (as amended).
- 8.3.2** **G** Section 21 of the *Act* does not itself (other than in its heading and side-note) refer to a '*financial promotion*' but rather to the *communication of 'an invitation or inducement to engage in investment activity'*. References in this *guidance* to a *financial promotion* mean an invitation or inducement to *engage in investment activity*.
- 8.3.3** **G** Section 21 of the *Act* contains a number of key expressions or phrases which will determine whether or not it will apply. These are:
- (1) '*invitation or inducement*' (see ■ PERG 8.4);
 - (2) '*in the course of business*' (see ■ PERG 8.5);
 - (3) '*communicate*' (see ■ PERG 8.6);
 - (4) '*engage in investment activity*' (see ■ PERG 8.7); and
 - (5) '*having an effect in the United Kingdom*' (see ■ PERG 8.8).
- 8.3.4** **G** The *FCA's* views as to the meaning of these are explained in ■ PERG 8.4 to ■ PERG 8.8.
- 8.3.5** **G** In addition, this *guidance* deals with other factors such as when the exemptions in the *Financial Promotion Order* can be applied, including the exemptions relating to territorial scope and one-off *financial promotions*.

8.4 Invitation or inducement

Promotional element

- 8.4.1 **G** The *Act* does not contain any definition of the expressions 'invitation' or 'inducement', leaving them to their natural meaning. The ordinary dictionary entries for 'invitation' and 'inducement' offer several possible meanings to the expressions. An 'invitation' is capable of meanings ranging from merely asking graciously or making a request to encouraging or soliciting. The expression 'inducement' is given meanings ranging from merely bringing about to prevailing upon or persuading. In the *FCA's* view it is appropriate, in interpreting the expressions, to take due account of the context in which they are being used and their purpose.
- 8.4.2 **G** The Treasury, responding to consultation on the draft *Financial Promotion Order*, stated its intention that only communications containing a degree of incitement would amount to 'inducements' and that communications of purely factual information would not. This is provided the facts are presented in such a way that they do not also amount to an invitation or inducement. This was made clear both in the Treasury's consultation document on financial promotion and during the passage of the *Act* through Parliament. Under questioning, the Minister confirmed that the government's policy was "to capture promotional communications only. The Minister also stated that 'inducement', in its Bill usage, already incorporates an element of design or purpose on the part of the person making the communication and that "design or purpose" is implicit in this context (Hansard HL, 18 May 2000 cols 387 and 388). In the same debate, the Minister stated that the restriction would not apply to such things as "public announcements, exchange of draft share purchase agreements in corporate finance transactions or cases in which the recipient of a communication simply misunderstands its contents and engages in investment activity as a result."
- 8.4.3 **G** The *FCA* recognises that the matter cannot be without doubt. However, it is the *FCA* view that the context in which the expressions 'invitation' or 'inducement' are used clearly suggests that the purpose of section 21 is to regulate communications which have a promotional element. This is because they are used as restrictions on the making of financial promotions which are intended to have a similar effect to restrictions on advertising and unsolicited personal communications in earlier legislation. Such communications may be distinguished from those which seek merely to inform or educate about the mechanics or risks of investment. In this respect, the *FCA* supports the views expressed by Ministers as referred to in ■ PERG 8.4.2 G. To the extent that doubt may remain as to the true meaning of 'invitation' or 'inducement' when used in section 21, it is the opinion of

the *FCA* that the courts are likely to take account of the ministerial statements under the judgement in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

8.4.4

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The *FCA* considers that it is appropriate to apply an objective test to decide whether a communication is an invitation or an inducement. In the *FCA*'s view, the essential elements of an invitation or an inducement under section 21 are that it must both have the purpose or intent of leading a *person* to *engage in investment activity* and be promotional in nature. So it must seek, on its face, to persuade or incite the recipient to *engage in investment activity*. The objective test may be summarised as follows. Would a reasonable observer, taking account of all the circumstances at the time the communication was made:

- (1) consider that the communicator intended the communication to persuade or incite the recipient to *engage in investment activity* or that that was its purpose; and
- (2) regard the communication as seeking to persuade or incite the recipient to *engage in investment activity*.

It follows that a communication which does not have any element of persuasion or incitement will not be an invitation or inducement under section 21.

Invitations

8.4.5

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An invitation is something which directly invites a *person* to take a step which will result in his *engaging in investment activity*. It follows that the invitation must cause the *engaging in investment activity*. Examples of an invitation include:

- (1) *direct offer financial promotions*;
- (2) a prospectus with application forms; and
- (3) Internet promotions by brokers where the response by the recipient will initiate the activity (such as 'register with us now and begin dealing online').

A communication may contain a statement that it is not an invitation. Such statements may be regarded as evidence that the communication is not an invitation unless its contents indicate otherwise.

8.4.6

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Merely asking a *person* if they wish to enter into an agreement with no element of persuasion or incitement will not, in the *FCA*'s view, be an invitation under section 21. For example, the *FCA* does not consider an invitation to have been made where:

- (1) a trustee or nominee receives an offer document of some kind and asks the beneficial owner whether he wishes it to be accepted or declined;
- (2) a *person* such as a professional adviser enquires whether or not his client would be willing to sign an agreement; or

- (3) a person is asked to sign an agreement on terms which he has already accepted or to give effect to something which he has already agreed to do.

Inducements

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An inducement may often be followed by an invitation or vice versa (in which case both communications will be subject to the restriction in section 21 of the Act). An inducement may be described as a link in a chain where the chain is intended to lead ultimately to an agreement to *engage in investment activity*. But this does not mean that all the links in the chain will be an inducement or that every inducement will be one to *engage in investment activity*. Only those that are a significant step in persuading or inciting or seeking to persuade or incite a recipient to *engage in investment activity* will be inducements under section 21. The FCA takes the view that the mere fact that a communication may be made at a preliminary stage does not, itself, prevent that communication from being a significant step. However, in many cases a preliminary communication may simply be an inducement to contact the *communicator* to find out what he has to offer. For example, an advertisement which merely holds out a *person* as having expertise in or providing services about investment management or venture capital will not be an inducement to *engage in investment activity*. It will merely be an inducement to make contact for further material and will not be a significant step in the chain. However, that further material may well be a significant step and an invitation or inducement to *engage in investment activity*. In contrast, an advertisement which claims that what the recipient should do in order to make his fortune is to invest in securities and that the *communicator* can provide him with the services to achieve that aim will be a significant step and an inducement to *engage in investment activity*.

8.4.8

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■ PERG 8.4.9 G to ■ PERG 8.4.34 G apply the principles in ■ PERG 8.4.4 G to ■ PERG 8.4.7 G to communications made in certain circumstances. They do not seek to qualify those principles in any way. A common issue in these circumstances arises when contact details are given (for example, of a provider of investments or investment services). In the FCA's view, the inclusion of contact details should not in itself decide whether the item in which they appear is an inducement or, if so, is an inducement to *engage in investment activity*. However, they are a factor which should be taken into account. The examples also refer, where appropriate, to specific exemptions which may be relevant if a communication is an invitation or inducement to *engage in investment activity*.

Directory listings

8.4.9

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Ordinary telephone directory entries which merely list names and contact details (for example where they are grouped together under a heading such as 'stockbrokers') will not be inducements. They will be sources of information. Were they to be presented in a promotional manner or accompanied by promotional material they would be capable of being inducements. Even so, they may merely be inducements to make contact with the listed person. Specialist directories such as ones providing details of venture capital providers, unit trust managers, contractual scheme managers or investment trusts will usually carry greater detail about the services or products offered by the listed firms and are often produced by representative bodies. Such directories may also be essentially sources of information. Whether or not this is the case where individual entries are

concerned will depend on their contents. If they are not promotional, the entries will not be inducements to *engage in investment activity*. However, it is possible that other parts of such a directory might seek to persuade recipients that certain *controlled investments* offer the best opportunity for financial gain. They may go on to incite recipients to contact one of the member firms listed in the directory in order to make an investment. In such cases, that part of the directory will be an inducement to *engage in investment activity*. But this does not mean that the individual entries or any other part of the directory will be part of the inducement. ■ PERG 8.6 provides *guidance* on the meaning of 'communicate' and 'causing a communication'. This is of relevance to this example and those which follow.

Tombstone advertisements (announcements of a firm’s past achievements)

8.4.10

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Such advertisements are almost invariably intended to create awareness, hopefully generating future business. So they may or may not be inducements. This depends on the extent to which their contents seek to persuade or incite *persons* to contact the advertiser for details of its services or to do business with it. Merely stating past achievements with no contact details will not be enough to make such an advertisement an inducement. Providing contact details may give the advertisement enough of a promotional feel for it to be an inducement. But, if this is the case, it will be an inducement to contact the advertiser to find out information or to discuss what he can offer. Only if the advertisement contains other promotional matter will it be capable of being an inducement to *engage in investment activity*. In practice, such advertisements are often aimed at influencing only investment professionals. Where this is the case, the exemption in article 19 of the *Financial Promotion Order* (Investment professionals) may be relevant (see ■ PERG 8.12.21 G). Tombstone advertisements will not usually carry the indicators required by article 19 to establish conclusive proof. However, article 19 may apply even if none of the indicators are present if the *financial promotion* is in fact directed at investment professionals.

Links to a website

8.4.11

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Links on a website may take different forms. Some will be inducements. Some of these will be inducements under section 21 and others not. Links which are activated merely by clicking on a name or logo will not be inducements. The links may be accompanied by or included within a narrative or, otherwise, referred to elsewhere on the site. Whether or not such narratives or references are inducements will depend upon the extent to which they may seek to persuade or incite *persons* to use the links. Simple statements such as ‘these are links to stockbrokers’ or ‘click here to find out about stockmarkets – we provide links to all the big exchanges’ will either not amount to inducements or be inducements to access another site to get information. If they are inducements, they will be inducements to *engage in investment activity* only if they specifically seek to persuade or incite *persons* to use the link for that purpose. Where this is the case, but the inducement does not identify any particular *person* as a provider of a *controlled investment* or as someone who carries on a *controlled activity*, the exemption in article 17 of the *Financial Promotion Order* (Generic promotions) may be relevant (see ■ PERG 8.12.14 G).

Banner advertisements on a website

8.4.12 **G** These are the Internet equivalent to an advertisement in a newspaper and are almost bound to be inducements. So whether they are inducements to *engage in investment activity* will depend upon their contents as with any other form of advertising and the comments in ■ PERG 8.4.11 G will be relevant.

Publication or broadcast of prices of investments (historic or live)

8.4.13 **G** These may or may not involve invitations or inducements. Where a *person* such as a newspaper publisher, broadcaster or data supplier merely presents prices of *investments* whether historic or live the information can be purely factual and not be an inducement. Historic prices on their own will never be invitations or inducements. Merely adding simple contact details to such prices will not make them invitations or inducements to *engage in investment activity*. However, any additional wording seeking to persuade or incite *persons* to contact firms so that they may buy or sell such *investments* may do so. In other circumstances, the publication of prices may involve an invitation or an inducement to engage in *investment activity*. For example, *persons* may use an electronic trading system to display prices and other terms such as lot size and volume at which they are prepared to deal, on screens viewed by potential counterparties. The price and other terms may be firm or indicative. The *persons* using the trading systems will have accepted the general terms and conditions for trading. Where prices and terms quoted are firm, the screen display may be an invitation to *engage in investment activity* by entering into a transaction at that price and on those terms. This will be where the offer may be accepted by the counterparty by a simple electronic response. Where the price or other terms are indicative, the screen display may be an inducement to *engage in investment activity* after negotiating acceptable terms. But in either case, the display of prices and other terms will only be invitations or inducements to *engage in investment activity* if it also contains material which seeks to persuade or incite the recipient to do so.

Company statements and announcements and analyst briefings

8.4.14 **G** Encouraging (or discouraging) statements may be made by a *company* director. These will typically be made in reports or accounts or at a presentation or road show or during a briefing of analysts. Alternatively, such statements may be made on the *company's* behalf by its public relations adviser. Statements of fact about a *company's* performance or activities will not, themselves, be inducements to *engage in investment activity* even if they may lead *persons* to decide to buy or sell the *company's* shares. However, statements which speculate about the *company's* future performance or its *share* price may have an underlying purpose or intent to encourage investors to act. If this is so, whether they will be inducements to *engage in investment activity* will depend entirely on their contents and the extent to which they seek to promote investment in the *company*. ■ PERG 8.21 contains detailed *guidance* on the various exemptions which may apply in this area.

Journalism

8.4.15 **G** Journalism can take many forms. But typically a journalist may write an editorial piece on a *listed company* or about the *investments* or investment services that a particular firm provides. This may often be in response to a press release. The editorial may or may not contain details of or, on a website, a link to the site of the *company* or firm concerned. Such editorial may specifically recommend that readers should consider *buying* or *selling investments* (whether or not particular *investments*) or obtaining investment services (whether or not from a particular firm). If so, those recommendations are likely to be inducements to *engage in investment activity* (bearing in mind that a recommendation not to *buy* or *sell investments* cannot be an inducement to engage in *investment activity*). In other cases, the editorial may be an objective assessment or account of the *investment* or its *issuer* or of the investment firm and may not encourage *persons* to make an *investment* or obtain *investment services*. If so, it will not be an inducement to engage in *investment activity*. Article 20 of the *Financial Promotion Order* (Communications by journalists) contains a specific exemption for journalism and journalists may be able to make good use of the generic promotions exemption in article 17 of the *Financial Promotion Order* (see ■ PERG 8.12.23 G and ■ PERG 8.12.14 G). Journalists should bear in mind that they may communicate a *financial promotion* by repeating a recommendation that originates from another source. That source could be, for example, an *authorised person*, an academic or another publication. Such a *financial promotion* would be viewed as *communicated* by the journalist where he has editorial control over its form and content. In the FCA's view, a *person* is not causing the *communication* of a *financial promotion* merely by providing material, including a press release or a quotation, to a journalist who uses it in an article. This is provided that the *person* has no control over the way in which the article is prepared and published. The press release or quotation itself, if it is a *financial promotion*, should be exempt under article 47 of the *Financial Promotion Order* (Persons in the business of disseminating information) – see ■ PERG 8.21.10 G.

Performance tables

8.4.16 **G** League tables showing the past performance of investment products of a particular kind or investment firms of a particular class (such as investment managers) and determined by the application of pre-set criteria will not, in themselves, be inducements. The fact that such tables represent pure information could, for example, be made clear by their being accompanied by a statement to the effect that the fact of a product or firm being well placed in the tables based on past performance is no guide to their likely future performance. The effectiveness of such a statement will, of course, depend upon it being the case that they do, in fact, represent mere information. But if, for example, the tables are accompanied by or presented or provided in a way that they are an actual or implied recommendation that a particular product's performance suggests it is a potential buy or sell they may become inducements.

8.4.17 **G** Tables or other forms of list may identify products with their relevant features such as interest rates, redemption periods and charges. Again, provided that the tables amount to purely factual information enabling comparison of products they will not be inducements. This includes such things as electronic systems that allow users to programme in their requirements and find details of the products that meet them. Producers of the table or list may, to some extent, expect that the information will lead

persons to make investments. Or they might have negotiated a payment from the firms featured that reflects leads generated. In either case, the absence of a promotional element in the table will be determinative. As with performance tables, these can become inducements to *engage in investment activity*. This will happen when there is an actual or implied recommendation that either the products which come out best in respect of certain features or a specific combination of features or those that have been chosen for inclusion are likely to be good or best buys. This might, for example, include identifying the top ten *deposit* accounts for persons looking for *deposit* accounts offering certain features. The mere inclusion in tables of the kind referred to generally in this paragraph or those in ■ PERG 8.4.16 G of contact details should not turn what is otherwise factual or neutral information into an inducement. Both types of table may benefit, if necessary, from the exemption for journalists in article 20 (see ■ PERG 8.12.23 G). This will be where they are prepared by a person acting as a journalist and are included in a publication, service or broadcast as described in article 20(5)(b). Where the tables are merely a reproduction of information supplied by a third party data source which does not provide them as a journalist article 20 will not be available.

Decision Trees

8.4.18

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A decision tree (or flow chart) will generally be used in one of two ways. Either it will be an educational tool (for instance, where an employer wishes to help his employees understand their pension options) or a promotional tool. As an educational tool which does no more than enable a person to identify generic investment options it will not be an inducement. But if its use is intended to procure business for an investment firm then it is likely to be an inducement. For example, electronic decision trees on websites may typically invite persons to enter basic information about their circumstances and objectives leading to a recommendation or choice of products or services, or both, possibly with links to other firms' sites. These decision trees will be inducements to *engage in investment activity* although, in some cases, the journalists' exemption in article 20 of the *Financial Promotion Order* may be relevant (see ■ PERG 8.12.23 G).

Investment agreements, share purchase agreements and customer agreements

8.4.19

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These types of agreements will only rarely be inducements or invitations. For instance, where the terms of a deal have been agreed in principle and the agreement is merely the means of giving it effect, the inducement phase has clearly passed. And an agreement or draft agreement itself may usually be seen as a document setting out the terms and conditions of a deal and not itself an inducement (or an invitation) to deal. However, an agreement or draft agreement may often be accompanied by an invitation or inducement such as a covering letter or an oral communication that seeks to persuade or incite a person to enter into the agreement. Whilst such accompaniments are capable of being inducements (or invitations), merely offering concessions or amendments to a draft agreement during negotiations will not turn those accompaniments into inducements. It is, however, possible for an agreement itself to be or to include an invitation or inducement. For example, an advertisement that contains the terms and conditions and the means to enter into it as a binding contract, a *direct offer financial promotion* or a prospectus with an application form included.

Image advertising

8.4.20

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Activities which are purely profile raising and which do not identify and promote particular investments or investment services may not amount to either an invitation or inducement of any kind. Examples of this include where *listed companies* sponsor sporting events or simply put their name or logo on the side of a bus or on an umbrella. This is usually done with a view, among other things, to putting their names in the minds of potential investors or consumers. In other cases, an image advertisement for a *company* which provides investment services (for example, on a pencil or a diary) may include, along with its name or logo, a reference to its being an investment adviser or fund manager or a telephone or fax number or both. Profile raising activities of this kind may involve an inducement (to contact the advertiser) but will be too far removed from any possible *investment activity* to be considered to be an inducement to *engage in investment activity*.

Advertisements which invite contact with the advertiser

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These will be advertisements that contain encouragement to contact the advertiser. They are likely to be inducements to do business with him or to get more information from him. If so, they will be inducements to *engage in investment activity* if they seek to persuade or incite *persons* to buy or sell *investments* or to get investment services. See ■ PERG 8.4.7 G for more *guidance* on preliminary communications and whether they are a significant step in the chain of events which are intended to lead to the recipient *engaging in investment activity*. Where advertisements invite *persons* to send for a prospectus, article 71 (Material relating to prospectus for public offer of unlisted securities) may provide an exemption. Any *financial promotion* which contains more information than is allowed by article 71 but which is not the prospectus itself is likely to require *approval* by an *authorised person* unless another exemption applies.

Introductions

8.4.22

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- (1) Introductions may take many forms but typically involve an offer to make an introduction or action taken in response to an unsolicited request. An introduction may be an inducement if the introducer is actively seeking to persuade or incite the *person* he is introducing to do business with the *person* to whom the introduction is made. So it may fall under section 21 if its purpose is to lead to investment activity. For example, if a *person* answers the question 'do you or can you provide investment advice' with a simple 'no, but I can introduce you to someone who does', that may be an inducement. But, if so, it is likely to be an inducement to contact someone to find out information about his services rather than to *engage in investment activity*.
- (2) Where a *person* calls in to an office or branch of a *company* and asks to see 'the investment adviser', a *person* who responds merely by directing or showing the way is not making an inducement.
- (3) Neither would a *person* be making an inducement by responding to an enquiry with 'we do not provide investment services – you need to consult an *authorised person*' or words to that effect. That is provided he does not go on to seek to persuade or incite the enquirer to contact a particular *authorised person* for investment services.

- (4) But a *person* would be making an inducement to *engage in investment activity* if, for example, he seeks to persuade or incite *persons* to allow him to introduce them to a particular *authorised person* so that they may take advantage of the cheap dealing rates which that *person* offers.
- (5) Where introductions do amount to inducements under section 21 they may fall under the exemption for generic promotions (article 17 of the *Financial Promotion Order*) (see ■ PERG 8.12.14 G). This will be the case provided the *financial promotion* does not identify any particular *investment* or *person* to whom introductions are to be made or identify the introducer as a *person* who carries on a *regulated activity* (typically of *making arrangements with a view to transactions in investments* under article 25(2) of the *Regulated Activities Order* - (see ■ PERG 8.33 (Introducing)) or *making arrangements with a view to regulated mortgage contracts* under article 25A(2) of the *Regulated Activities Order* (see ■ PERG 4.5 (Arranging regulated mortgage contracts)). It is most likely to apply where the *financial promotion* relates to *deposits* or *contracts of insurance* which are not *contractually based investments*.
- (6) The journalists' exemption in article 20 of the *Financial Promotion Order* (Communications by journalists) may be relevant where the introduction is made through or in a publication, broadcast or regularly updated news or information service (see ■ PERG 8.12.23 G).
- (7) Article 15 (Introductions) may apply provided certain conditions are met (see ■ PERG 8.12.11 G). In addition, article 28B (Real time communications: introductions) may apply where an introduction is a *real time financial promotion* about *home finance transactions* and *home finance activities* (see ■ PERG 8.17.12 G).

Distributors

8.4.23

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A *person* may be distributing *financial promotions* which have been issued or *approved* by an *authorised person*. This may be by displaying copies or delivering them or handing them out whether or not on request. ■ PERG 8.6 explains when such a *person* will be *communicating* the *financial promotions*. Where this is so, the exemption for mere conduits in article 18 of the *Financial Promotion Order* may apply (see ■ PERG 8.12.18 G). But article 18 will not apply if the distributor creates his own *financial promotion* by seeking to persuade or incite the recipient to act upon the *financial promotions* he is distributing.

Investment trading methods and training courses

8.4.24

G

Trading methods and techniques, such as traded options training courses and software-based or manual trading tools will, in many cases, be too remote from any eventual investment dealing activities to be inducements to *engage in investment activity*. Promotions of such things will be inducements (or invitations) to receive training and general trading tips and techniques. However, such things may be sold on the basis that they are almost certain to produce profits from the trading which the recipient will undertake using the training or technique. If this is the case, the promotions are capable of being inducements to engage in those trading activities. Such *financial promotions* are capable of being generic promotions under article 17 of the *Financial Promotion Order* (see ■ PERG 8.12.14 G).

Invitations to attend meetings or to receive telephone calls or visits

8.4.25 **G** These are clearly invitations or inducements. Whether they will involve invitations or inducements to *engage in investment activity* rather than to attend the meeting or receive the call or visit, will depend upon their purpose and content. ■ PERG 8.4.7 G discusses communications which are a significant step in the chain of events leading to an agreement to *engage in investment activity*. The purpose of the meeting, call or visit to which the invitation or inducement relates may be to offer the audience or recipient investment services. In this case, the invitation or inducement will be a significant step in the chain if it seeks to persuade or incite the invitee to *engage in investment activity* at the meeting, call or visit. Any *financial promotions* made during the meeting, call or visit would still need to be *communicated or approved by an authorised person* or be exempt.

Explanation of terms

8.4.26 **G** An explanation of the terms of an agreement or of the consequences of taking a particular course of action can be merely factual information unless it includes or is accompanied by encouragement to enter into the agreement or take the course of action. The mere fact that the explanation may present the investment in a good light or otherwise influence the recipient will not make it an inducement. Where such communications are *financial promotions* they may fall under one of the exemptions for one-off promotions in articles 28 and 28A of the *Financial Promotion Order* (see ■ PERG 8.14.3 G).

Enquiries about a person's status or intentions

8.4.27 **G** A *person* ('A') may enquire:

- (1) whether another *person* is certified as a high net worth individual or a sophisticated investor so that A may determine whether an exemption applies; or
- (2) whether a *person* has received material sent to him; or
- (3) how a *person* might propose to react to a take-over offer.

Enquiries of this or a similar kind will not amount to inducements to *engage in investment activity*

unless they involve persuasion or incitement to do so. The enquiry may be accompanied by a brief statement of the reason why it is being made. This may, for example, include a reference to the type of *investment* to which any subsequent *financial promotions* would relate. Such initial enquiries may be followed up with an inducement but this fact alone will not turn the initial enquiry into a *financial promotion*. For example, an enquiry about whether a *person* is certified for the purposes of article 48 (Certified high net worth individuals), article 50 (Sophisticated investors) or article 50A (self-certified sophisticated investors) may, where the answer is positive, be followed by a *financial promotion*. That *financial promotion* can then rely on article 48, 50 or 50A as the case may be.

Solicited and accompanying material

8.4.28 **G** Solicited or accompanying material which does not contain any invitation or inducement to *engage in investment activity* will not itself be a *financial promotion*. This is provided that the material is not part of any *financial promotion* which may accompany it. This is explained in greater detail in ■ PERG 8.4.29 G to ■ PERG 8.4.30 G.

8.4.29 **G** *Persons* may sometimes be asked to send material which has not been prepared for use as a *financial promotion* to a *person* who is interested in making an investment. For example, a prospective participant in a Lloyd's *syndicate* may ask for a copy of the business plan or forecast prepared by the *managing agent* to comply with Lloyd's requirements. As another example, a prospective purchaser of, or investor in, a *company* may wish to see a valuation report, a due diligence report or legal advice. The fact that the *person* requesting the material may intend to rely on it in making his investment decision does not, itself, make the material an inducement under section 21.

8.4.30 **G** The *person* who responds to the request for the material in the circumstances in ■ PERG 8.4.29 G may make a *financial promotion* in the form of a covering letter or oral communication ('C'). This will not mean that the material accompanying C must itself be treated as an inducement. This will depend on the circumstances. The material itself would only become an inducement if it is turned into part of the *financial promotion* in C. For example, C may refer to the contents or part of the contents of the accompanying material and claim that they will convince the recipient that he should *engage in investment activity*. In such a case, the contents, or the relevant part of the contents as the case may be, would become part of the *financial promotion* in C. In other cases, C may simply refer to the fact that certain material has been enclosed or is available without using it as a selling point to persuade or incite the recipient to *engage in investment activity*. In that case, the material will not become part of the *financial promotion*. A similar situation arises if a *person* other than the *person* who originated an oral or written communication which is not itself a *financial promotion* uses it to persuade or incite a potential investor.

Telephone services

8.4.31 **G** A *person* ('P') may be engaged, typically by investment product companies, to provide telephone services. Where such services require P to seek to persuade or incite prospective customers to receive investment literature or a personal call or visit from a representative of his principal they will frequently involve inducements to *engage in investment activity*. This is so whether the inducement results from P making unsolicited calls or by his raising the issue during a call made by the prospective customer. Generally speaking, it is likely that P would be carrying on a *regulated activity* under article 25(2) of the *Regulated Activities Order* and require *authorisation* or exemption (for example, as an *appointed representative*) if he is required to procure leads for his principal. In other cases, P may merely respond to a request from a prospective customer. This may be a request for investment literature or to arrange a call or visit. P will not be making an inducement simply by agreeing to send the literature, referring the caller to a representative of his principal or agreeing to arrange for the visit or call. Where *persons* providing telephone services are *appointed representatives* the exemption in article 16 of the *Financial Promotion Order* (Exempt persons) may apply (see ■ PERG 8.12.12 G).

Personal illustrations

8.4.32 **G** A personal illustration (for instance, of the costs of and benefits under a particular investment product) may or may not be an invitation or inducement. This will depend on the extent to which it seeks to persuade or incite the recipient to invest as opposed to merely providing him with information. A personal illustration may, however, be accompanied by an invitation or inducement to buy the investment in which case the exemptions for one-off *financial promotions* in articles 28 or 28A may apply (see ■ PERG 8.14.3 G). *Authorised persons* should note that, where personal quotations or illustrations do amount to a *financial promotion* the *financial promotion rules* will not usually apply to them.

Instructions or guidance on how to invest

8.4.33 **G** Things such as help-lines for *persons* who wish to make an *investment* will not usually involve invitations or inducements to *engage in investment activity*. This is where their purpose is merely to explain or offer *guidance* on how to invest or to accept an offer. In such cases, the investor will already have decided to invest and there will be no element of persuasion on the part of the *person* giving the explanation or guidance.

Communications by employers and contracted service providers to employees

8.4.34 **G** Employers and their contracted service providers may *communicate* with employees on matters which involve *controlled investments*. For example, *work-related insurance*, *staff mortgages*, *personal pension schemes* (including *stakeholder schemes*) and other employee benefit schemes other than *occupational pension schemes*. Interests under the trusts of an *occupational pension scheme* are not a *controlled investment* (see paragraph 27 (2) of Schedule 1 to the *Financial Promotion Order*).

In the case of *personal pension schemes* (including *stakeholder schemes*), such communications will only be invitations or inducements to *engage in investment activity* if they seek to persuade or incite employees to do things such as:

- (1) participate in or leave the pension or other benefit scheme;
- (2) exercise certain rights under such a scheme, including making additional contributions or exercising options.

Communications which seek to persuade or incite employees to subscribe for *work-related insurance* or enter into *staff mortgages* may also be invitations or inducements to *engage in investment activity*.

Communications which are intended to educate or give employees information with no element of persuasion or incitement will not be invitations or inducements under section 21. Employers may wish to give their employees investment material prepared and *approved* by an *authorised person*. This material may be given under cover of a communication from the employer. If so, the covering communication will not itself be an inducement if all it does is to refer employees to the material and explain what they should do if they wish to act on it, without seeking to persuade or incite them to act. Where the covering communication is itself a *financial promotion* it will need to be *approved* by an *authorised person*

provided it is a *non-real time financial promotion* unless an exemption applies. If it is a *real time financial promotion* it cannot be *approved* (see, for example, ■ COBS 4.10.4 R). In such cases, an exemption would need to apply. Where employee share schemes are concerned, the exemption in article 60 of the *Financial Promotion Order* (Participation in employee share schemes) is likely to apply to any *financial promotions* made by employers or members of their *group*. Where an employer's *financial promotions* relate to such things as *company* health or general insurance benefit packages, the exemptions in article 24 (Relevant insurance activity: non real time communications) or 26 (Relevant insurance activity: real time communications) of the *Financial Promotion Order* may apply. Employers who promote pension products, *work-related insurance* or *staff mortgages* to their employees will be able to use the exemptions in article 72, article 72B and article 72D and contracted service providers who promote pension products, *work-related insurance* or *staff mortgages* to employees will be able to use the exemptions in article 72A, article 72C and article 72E, provided certain conditions are met. These conditions are explained in ■ PERG 8.14.40A G to ■ PERG 8.14.40AE G.(Pension products offered by employers (article 72)). Any *financial promotion* made by an employer for the purpose of meeting his obligations under the Welfare Reform and Pensions Act 1999 to offer his employees a *stakeholder pension scheme* should be able to use the exemption in article 29 (Communications required or authorised by enactments).



8.5 In the course of business

- 8.5.1** **G** Under section 21(4) of the *Act*, the Treasury has the power to specify circumstances in which a *person* is viewed as 'acting in the course of business' or 'not acting in the course of business'. The power under section 21(4) relates only to *financial promotions* and is distinct from the power in section 419 which relates to *regulated activities*. To date, the Treasury has not used the power in section 21(4). As a result, the phrase has its ordinary or natural meaning.
- 8.5.2** **G** The *FCA* considers that 'in the course of business' requires a commercial interest on the part of the communicator. This does not necessarily have to be a direct interest. And the communicator does not need to be carrying on *regulated activities* (the test in section 19 of the *Act*) as or as part of his business. Neither does the communication need to be made in the course of carrying on activities as a business in their own right (the test in article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001) (SI 2001/1177). For example, if a holding company proposes to sell one of its subsidiaries, that sale will be 'in the course of business' irrespective of the fact that the company may well not be in the business of selling subsidiaries.
- 8.5.3** **G** The position is slightly more blurred with individuals. The 'in the course of business' test is intended to exclude genuine non-business communications. Examples of these would be friends talking in a pub, letters between family members or e-mails sent by individuals using an Internet chat-room or bulletin board for personal reasons. An issue arises where capital is raised for small private *companies*. Where such a *company* is already in operation, it will be acting 'in the course of business' when seeking to generate additional share or loan capital. At the pre-formation stage, however, it will often be the case that individuals who are proposing to run the *company* will approach a small number of friends, relatives and acquaintances to see if they are willing to provide start-up capital. In the *FCA's* view, such individuals will not be acting 'in the course of business' during the pre-formation stage of a small private *company*. This is provided that they are not:
- (1) forming *companies* with such regularity that they would be regarded as carrying on the business of forming *companies*; or
 - (2) already running the business which the *company* will carry on (for example, as a partnership).
- 8.5.4** **G** There is, of course, no reason why an individual cannot act 'in the course of business'. For example, sole traders who are independent financial advisers

will give investment advice 'in the course of business' and so satisfy the test. Individuals who are merely seeking to make personal investments will not be acting 'in the course of business' by approaching a company about making an investment in its shares. However, it is possible that an individual who regularly seeks to invest in companies who are seeking to raise venture capital with a view to becoming a director and influencing their affairs may be regarded as acting in the course of business. In approaching *companies*, such a *person* should be able to make use of the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* (see ■ PERG 8.14.3 G).

8.5.5

G *Persons* who carry on a business which is not a *regulated activity* will need to be particularly careful in making communications which may amount to *financial promotions* (because they seek to persuade or incite *persons* to *engage in investment activity* (see ■ PERG 8.4)). For example, where a *company* makes *financial promotions* to its employees, they may well be made in the course of business. Examples of these include *financial promotions* concerning employee share schemes, group wide insurance arrangements and *stakeholder pension schemes*. These would need to be *approved* by an *authorised person* unless an appropriate exemption is available. ■ PERG 8.4.34 G provides further *guidance* on this.



8.6 Communicate

8.6.1

G

The word '*communicate*' is extended under section 21(13) of the Act and includes causing a communication to be made. This means that a *person* who causes the *communication* of a *financial promotion* by another *person* is also subject to the restriction in section 21. Article 6(d) of the *Financial Promotion Order* also states that the word '*communicate*' has the same meaning when used in exemptions in the Order. Article 6(a) also states that the word '*communication*' has the same meaning as '*financial promotion*'. It appears to the FCA that a *person* is *communicating* where he gives material to the recipient or where, in certain circumstances (see ■ PERG 8.6.5 G), he is responsible for transmitting the material on behalf of another *person*. As both causers and communicators *communicate* under section 21 the distinction between them is not usually of great significance. What is important is whether a *person* who is not himself *communicating* is or is not causing a communication to be made by another. In the FCA's view, primary responsibility for a communication to which section 21 applies and which is capable of being read will rest with its originator. This is the *person* responsible for its overall contents. Where it is an oral communication primary responsibility will rest with the speaker. A speaker will, of course, be an individual. But where the individual speaks on behalf of his employer, it will be the employer who is responsible. The same will apply if the individual is an officer of a *company* or partner in a partnership and speaks on behalf of the *company* or partnership. Individuals who make *financial promotions* otherwise than in their capacity as employees, officers or partners will need to consider their own position (they may not be acting in the course of business (see ■ PERG 8.5)). Where a *person* other than the originator (for example a newspaper publisher) transmits a communication on the originator's behalf he is *communicating* it and the originator is causing its *communication*.

Persons who communicate or cause a communication

8.6.2

G

Apart from the originators of a *financial promotion*, the FCA considers the following *persons* to be *communicating* it or causing it to be *communicated*:

- (1) publishers and broadcasters who carry advertisements (including websites carrying banner advertisements); and
- (2) intermediaries who redistribute another *person's* communication probably with their own communications.

Persons who do not communicate or cause a communication

8.6.3

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In the FCA's view, the following *persons* will not be causing or *communicating*:

- (1) advertising agencies and others when they are designing advertising material for originators;
- (2) *persons* who print or produce material for others to use as advertisements;
- (3) professional advisers when they are preparing material for clients or advising them on the need to *communicate* or the merits or consequences of their *communicating a financial promotion*; and
- (4) *persons* who are responsible for securing the placing of an advertisement provided they are not responsible for its contents.

Need for an active step to communicate or cause a communication

8.6.4 G The FCA considers that, to *communicate*, a *person* must take some active step to make the communication. This will be a question of fact in each case. But a *person* who knowingly leaves copies of a document where it is reasonable to presume that *persons* will pick up copies and may seek to act on them will be *communicating* them.

8.6.5 G The *Financial Promotion Order* contains an exemption for mere conduits in article 18. It does not follow that all *persons* who provide services for facilitating the distribution of *financial promotions* are *communicating*. Where *persons* of this kind would normally be unaware of the fact that they may be distributing *financial promotions* or are indifferent as to whether they are doing so, or both, they will not be regarded as *communicating* them. This may, for example, include:

- (1) postal services providers;
- (2) telecommunication services providers;
- (3) broadcasting services providers;
- (4) courier services providers;
- (5) *persons* employed to hand out or disseminate communications;
- (6) a newsagent who sells newspapers and journals containing *financial promotions*.

In other cases, *persons* of this kind may need to rely on the mere conduit exemption (see ■ PERG 8.12.18 G).

Website operators

8.6.6 G Where a website operator provides links to other sites he is not usually to be regarded as causing the *communication* of the contents of those other sites to *persons* who may use the links. See further *guidance* on Internet issues in ■ PERG 8.22.

Application of exemptions to persons causing a communication

8.6.7 **G** A general point arises about causing and *communicating* on whether a particular exemption that applies to a communication made by a specified *person* also applies to a *person* who is causing that communication to be made. For example, article 55 of the *Financial Promotion Order* (Communications by members of professions) applies only to a communication by an *exempt professional firm*. This exemption may apply where a *person* ('P') requests an *exempt professional firm* ('E') to *communicate* an offer to a client of E. In this case, where P causes E to *communicate*, it is the FCA's view that the exemption that applies to E will also apply to P. This is because, as '*communicate*' includes '*causing to communicate*', the exemption applies where P causes the *communication* of the *financial promotion* by E.

8.6.7A **G** The position of an *unauthorised person* ('U') who, in the course of business, causes an *authorised person* to communicate a *financial promotion* is somewhat different. This is because the *authorised person* ('A') is not subject to section 21 of the *Act* and so will not necessarily be communicating the *financial promotion* in circumstances in which an exemption would apply. To avoid any doubt about the application of section 21 to U, a specific exemption is provided in article 17A of the *Financial Promotion Order* (Communications caused to be made or directed by unauthorised persons). This exemption applies where U causes A to make or direct a *real time financial promotion*. It also applies to a *non-real time financial promotion* but only where the content is prepared by A. This means that U will remain subject to section 21 where, for example, he provides A with copies of a *financial promotion* for the purpose of A distributing them to other *persons* or where he is placing an advertisement in a publication issued by A.

Application of exemptions to persons who communicate on behalf of others

8.6.8 **G** Another general point arises about the scope of exemptions that apply only to *financial promotions* by a particular *person*. This is whether the exemption applies to the *communication* of a *financial promotion* by an *unauthorised person* on behalf of the *person* to whom the exemption applies. In the FCA's view, this will not be the case unless the exemption specifically states that it applies to a communication made on behalf of the *person* identified in the exemption. For example, article 62 (Sale of body corporate) applies to 'any communication by or on behalf of a body corporate'.

Meaning of 'made to', 'directed at' and 'recipient'

8.6.9 **G** Section 21(1) of the *Act* refers only to the *communication* of an invitation or inducement. It says nothing about communications being 'made to' or 'directed at' *persons* or about who the 'recipient' of a communication will be. These facts are determined by the following sequence:

- (1) section 21(13) of the *Act* indicates that communications are 'made';
- (2) article 6 of the *Financial Promotion Order* (Interpretation: communications) indicates that communications are made by being 'addressed to' a *person*;
- (3) article 6 then indicates that communications may be addressed:

- (a) to a particular *person* or *persons* whether verbally or in a legible form (for example, in a telephone call or letter) – these are referred to as communications which are 'made to' *persons*; or
 - (b) to *persons* generally (for example, in a television broadcast or on a website) – these are referred to as communications which are 'directed at' *persons*;
- (4) article 6 also indicates that a recipient of a communication is the *person* to whom the communication is made, or, in the case of a non-real time communication directed at *persons* generally, anyone who reads or hears the communication.

8.6.10

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In the FCA's opinion, the matters in ■ PERG 8.6.9 G have the following effects.

- (1) Any one particular communication will either be real time or non-real time but not both. This is because:
- (a) a real time communication is one made in the course of an interactive dialogue (see ■ PERG 8.10.2 G for *guidance* on the meaning of real time);
 - (b) those exemptions which concern real time communications apply only to communications which are made to *persons* and not those which are directed at *persons*;
 - (c) a communication is made to a *person* where it is addressed to him specifically;
 - (d) the *persons* to whom a real time communication is addressed are those *persons* who take part in the interactive dialogue; and
 - (e) where a communication is addressed to a particular *person* or *persons* it is not made to anyone else who may read or hear it.

This means that a real time communication cannot also be a non-real time communication made to *persons* other than those to whom it is addressed. But it is possible for the same communication to be issued in different forms. For example, the text of a *real time financial promotion* may be made available to *persons* generally in writing intending to persuade or incite them to *engage in investment activity*. In that case, the written version will be a separate *non-real time financial promotion* which will need to be *approved* or exempt. A similar situation may arise where a *real time financial promotion* made during a meeting is recorded on video and then made available to the public. Also, a *person* may, in the course of an interactive dialogue with a particular *person*, address an invitation or inducement to others who may be present. Where this does not result in an interactive dialogue taking place with those other *persons*, the invitation or inducement will be a separate non-real time communication.

- (2) A communication in the form of a letter or e-mail addressed to a particular *person* is not made to anyone else who, legitimately or otherwise, may read it. For example, it will not be made to any *persons* to whom it is copied unless any invitation or inducement that may be in it is addressed also to those *persons*.

- (3) A communication in the form of a personal conversation or telephone call will not be *communicated* to anyone else who may eavesdrop or otherwise listen to the conversation.
- (4) The recipient of a communication to whom it is addressed, will not always be the *person* who physically receives it. As a communication under section 21 is an invitation or inducement to *engage in investment activity*, it will be addressed to the *person or persons* (P) who is or are being invited or induced. An invitation or inducement may be *communicated* to someone such as a friend or relative of P who is asked to pass it on. If so, the communication will be regarded as addressed to P and not to the friend or relative. The same will usually apply where an invitation or inducement is *communicated* to P's adviser or other agent. However, this will not always be the case. The communication made to the agent may be aimed at getting him to act in a particular way. For example, to exercise discretion on his client's behalf. In this case, the communication may be an invitation or inducement to the agent himself to *engage in investment activity*. In the FCA's view, the friend, relative or agent should not himself be regarded as *communicating* the invitation or inducement simply because he faithfully relays the message to P. This is provided that the friend, relative or adviser, in relaying the message, does not make his own invitation or inducement. Friends and relatives would not, in any case, be *communicating* in the course of business. Should agents be making their own *financial promotions* in relaying messages, it is likely that the exemptions for one-off *financial promotions* in articles 28 and 28A of the *Financial Promotion Order* will apply.
- (5) It is important to consider whether any particular *financial promotion* is 'made to' or 'directed at' *persons* as some exemptions in the *Financial Promotion Order* apply only to *financial promotions* which are made to *persons*.

8.7 Engage in investment activity

8.7.1 **G** A communication must be an invitation or inducement to *engage in investment activity* for the restriction in section 21 to apply. Section 21(8) defines this phrase as:

- (1) entering or offering to enter into an agreement the making or performance of which by either party is a *controlled activity*; or
- (2) exercising any rights conferred by a *controlled investment* to acquire, dispose of, underwrite or convert a *controlled investment*.

8.7.2 **G** *Controlled activity* and *controlled investment* are defined in Schedule 1 to the *Financial Promotion Order* and are listed in ■ PERG 8.36.3 G and ■ PERG 8.36.4 G. Broadly speaking, *controlled activities* and *controlled investments* are similar to *regulated activities* and *specified investments* under the *Regulated Activities Order*. However, with *controlled activities*, the exclusions set out in the *Regulated Activities Order* do not, in most cases, apply. It is important to note, however, that there are certain differences between *controlled activities* and *regulated activities* and between *controlled investments* and *specified investments*. This is most notable where the *financial promotion* is about:

- (1) certain credit agreements (see ■ PERG 8.17 (Financial promotions concerning agreements for qualifying credit));
- (2) *funeral plan contracts* (see ■ PERG 8.16 (Financial promotions concerning funeral plans)); and
- (3) *contracts of insurance* other than *life policies* (see ■ PERG 8.17A (Financial promotions concerning insurance distribution activities)).

So, it is quite possible for a *person* to be carrying on a business in the *United Kingdom* for which he does not require *authorisation* because the business activity either is not connected with financial services or falls within one of the exclusions in the *Regulated Activities Order* but find that the restriction in section 21 applies to his communications. It should also be noted that *electronic money* is not a *controlled investment*. This means that the restriction in section 21 does not apply to the communication of an invitation or inducement that concerns *electronic money*. This is unless the communication is a *financial promotion* for some other reason. For guidance on *electronic money* see ■ PERG 3A.

8.7.3 **G** The overall effect is that a *financial promotion* must relate in some way to a *controlled investment* and may be summarised as the *communication*, in the course of business, of an invitation or inducement to:

- (1) acquire, dispose of or underwrite certain *investments* or exercise rights conferred by such an *investment* for such purpose or for the purpose of converting it; or
- (2) receive or undertake investment services such as *dealing in investments as principal or as agent, managing investments, advising on investments or safeguarding and administering investments*.

8.7.4 **G** So a *financial promotion* will not include an invitation or inducement to:

- (1) refrain from doing any of the things in ■ PERG 8.7.3 G; or
- (2) exercise rights conferred by an *investment* other than to acquire, dispose of, underwrite or convert an *investment*.

This means that most invitations or inducements to exercise voting rights will not be *financial promotions*.

8.7.5 **G** In the FCA's opinion, section 21 will apply to a communication (made in the course of business) if it contains an invitation or inducement to *engage in investment activity* which is addressed to a particular *person* or to *persons* generally. Where this is the case, it will not matter that the communication may be physically delivered to someone other than the *person* who is intended to engage in *investment* activity. ■ PERG 8.6.10 G gives more *guidance* on this.



8.8 Having an effect in the United Kingdom

- 8.8.1** G Section 21(3) of the *Act* states that, in the case of a communication originating outside the *United Kingdom*, the restriction in section 21(1) applies only if it is capable of having an effect in the *United Kingdom*. In this respect, it is irrelevant whether the communication has an effect provided it is capable of doing so.
- 8.8.2** G This appears to give a potentially broad jurisdictional scope to section 21. It seems clear that a communication which originates overseas will be capable of having an effect in the *United Kingdom* if it is an invitation or inducement to *engage in investment activity* which is *communicated to a person* in the *United Kingdom*. It would seem that communications made in other circumstances may also be capable of having an effect in the *United Kingdom*. However, the exemption for communications to overseas recipients in article 12 of the *Financial Promotion Order* (Communications to overseas recipients) (see ■ PERG 8.12.2 G) prevents section 21 from applying to communications which are not directed at *persons* in the *United Kingdom*.
- 8.8.3** G Where communications by *persons* in another *EEA State* are made to or directed at *persons* in the *United Kingdom* account must be taken of the effect of any relevant EU Directives. For example, the *E-Commerce Directive* will, with limited exceptions, prevent the *United Kingdom* from imposing restrictions on incoming *financial promotions* in information society services. The Treasury has given effect to this through the *Financial Promotion Order* (see ■ PERG 8.12.38 G). Other potentially relevant directives include the Television Without Frontiers Directive (89/552/EEC). This prevents the *United Kingdom* from restricting the re-transmission in the *United Kingdom* of television broadcasts from other *EEA States*. *The Financial Promotion Order* does not have any specific provisions about the Television Without Frontiers Directive. However, it is not intended to block incoming television programmes from other *EEA States*. The *FCA* will take this into account in interpreting the *Financial Promotion Order* and enforcing the restriction in section 21 of the *Act*.



8.9 Circumstances where the restriction in section 21 does not apply

- 8.9.1** **G** Section 21(2) of the *Act* sets out two circumstances in which a *financial promotion* will not be caught by the restriction in section 21(1). These are where the *communicator* is an *authorised person* or where the content of the *financial promotion* has been approved for the purposes of section 21 by an *authorised person*. Where *approval* is concerned it must be specifically for the purposes of enabling the *financial promotion* to be *communicated* by *unauthorised persons* free of the restriction under section 21. For example, if a solicitor who is an *authorised person* approves a *financial promotion* for legality generally, that would not suffice unless the solicitor also specifically *approves* the *financial promotion* for the purposes of section 21. And it will not be enough that an *authorised person* has ensured that the *financial promotion* complies with the appropriate *financial promotion rules* purely so that he can *communicate* it himself. In the *FCA's* view an *unauthorised person* should be able to rely on a statement made by an *authorised person* on the face of a *financial promotion* that its approval has been given for the purpose of section 21. Such *approval* may be stated to be made for limited purposes. For example, as with the *approval* of a *financial promotion* for an *unregulated collective investment scheme* (see ■ PERG 8.20). In other cases, the *unauthorised person* may satisfy himself that it is evident from the facts that *approval* has been given for the purposes of section 21.
- 8.9.2** **G** Where an *authorised person* makes a *financial promotion*, he is not subject to the restriction in section 21. So, the *communication* of the *financial promotion* by the *authorised person* will not be a criminal offence under the provisions of section 25 of the *Act* (Contravention of section 21) and any resulting contract will not be unenforceable under section 30 of the *Act* (Enforceability of agreement resulting from unlawful communications). However, the appropriate *financial promotion rules* may apply wholly or partially to any such *financial promotion*.
- 8.9.3** **G** An *unauthorised person* may wish to pass on a *financial promotion* made to him by an *authorised person*. In this case, the fact that the *financial promotion* was made to him by an *authorised person* will not be enough for the restriction in section 21 not to apply to him. The *authorised person* must also both have *approved* its content and have done so for the purpose of section 21 of the *Act*. If an *authorised person* wishes to ensure that an *unauthorised person* can *communicate* a *financial promotion* made by the *authorised person* to third parties, it may *approve* its own *financial promotion* for the purposes of section 21 of the *Act* (see ■ COBS 4.10.3G (2)).

8.9.4

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With *approval* generally, issues may arise as to what would be subject to the restrictions in section 21 where an invitation or inducement to *engage in investment activity* is made through a publication, broadcast or website or is accompanied by other material. In any such instances, it is necessary to consider the circumstances in which the *financial promotion* is made. For example, where a *financial promotion* takes the form of an advertisement or advice in a newspaper, broadcast or website, the rest of the newspaper, broadcast or website would not ordinarily be part of the *financial promotion*. There may, of course, be a number of *financial promotions* in the same publication, broadcast or website. They will be regarded as separate *financial promotions* unless it is clear that they are part of the same invitation or inducement. ■ PERG 8.4.28 G offers *guidance* about when accompanying material may be part of a *financial promotion*.

8.9.5

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The restriction in section 21 is also disapplied by means of an order made under section 21(5) (the *Financial Promotion Order*). This contains a number of specific exemptions which are referred to in ■ PERG 8.12 to ■ PERG 8.15, ■ PERG 8.17 and ■ PERG 8.21.



8.10 Types of financial promotion

8.10.1 **G** Although the restriction in section 21 addresses all forms of *financial promotion*, it is necessary to distinguish between particular types of *financial promotion* as these are treated differently under the *Financial Promotion Order*. This regime recognises two types of *financial promotion*. These are *real time* and *non-real time financial promotions*. *Real time financial promotions* are then divided into *solicited* or *unsolicited real time financial promotions*.

Real time v non-real time financial promotions

8.10.2 **G** The terms *real time financial promotion* and *non-real time financial promotion* are defined in article 7 of the *Financial Promotion Order* (Interpretation: real time communications). Article 7(1) defines a *real time financial promotion* as a *financial promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue. A *non-real time financial promotion* is one that is not a *real time financial promotion*. Article 7(5) states that *financial promotions* made by letter or e-mail or in a publication (defined in article 2 (Interpretation: general) as a newspaper, journal, magazine or other periodical publication, a website, a television or radio programme or a teletext service) are *non-real time financial promotions*. Articles 7(4) and (5) provide certain indicators that a *financial promotion* is a *non-real time financial promotion*. These are that:

- (1) the *financial promotion* is made to or directed at more than one recipient in identical terms (save for details of the recipient's identity);
- (2) the *financial promotion* is made or directed by way of a system which in the normal course is or creates a record of the *financial promotion* which is available to the recipient to refer to at a later time; and
- (3) the *financial promotion* is made by way of a system which in the normal course does not enable or require the recipient to respond to it immediately.

■ PERG 8.6.9 G explains the meaning of 'made to' and 'directed at'.

8.10.3 **G** In the FCA's view, the matters identified in ■ PERG 8.10.2 G mean that:

- (1) for a communication to be real time it must be made in course of an interactive dialogue; but that
- (2) if the interactive dialogue takes place by means of the exchange of letters or e-mails or in a publication, the communication will be

deemed to be non-real time. In this case, publications include newspapers, journals, magazines or other periodical publications, websites or similar systems for the electronic display of information, television or radio programmes and teletext services.

8.10.4

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The words 'personal visit, telephone conversation or other interactive dialogue' clearly imply that the first two are types of the third. In the FCA's view, it is difficult to envisage circumstances in which a personal visit or telephone conversation would not be interactive. The very fact of a conversation taking place would mean two or more *persons* were interacting with each other. A telephone call is not the same thing as a conversation. It may be made to, or even by, an intelligent machine which asks questions and responds to answers. That is, in the FCA's view, no more an interactive dialogue than a questionnaire or an electronic decision tree. The FCA cannot see how a scripted call can avoid being an interactive dialogue. The caller presumably has prompts as to what to say depending on the response given or question asked by the recipient of the call. However, the recipient is clearly able to and likely to interact and the degree of interaction cannot be determined in advance.

8.10.5

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In the FCA's view, the fact that scope for interaction is essential if a *financial promotion* is to be real time leads to the following conclusions.

- (1) Most communications made in written or pictorial form will not offer scope for interaction. The most likely exception to this is where *persons* are expected to respond immediately. This situation may arise, for example, where the equivalent of a telephone conversation is conducted by e-mail. This is the basis of the exemption in article 20A(1)(b)(ii) (see ■ PERG 8.12.37 G). However, the only communications in written or pictorial form which can be real time communications are those which are not contained in a letter, e-mail or publication. This results from article 7(3) as explained in ■ PERG 8.10.2 G and ■ PERG 8.10.3G (2).
- (2) The factors in article 7(5), whilst they are helpful as indicators, do not necessarily have to be satisfied for a communication to be non-real time provided it does not represent an interactive dialogue. For example, in the FCA's view, a broadcast made by megaphone from a moving vehicle or temporary chalk markings on a board are non-real time communications even though there may be no lasting record.
- (3) Some oral communications will not involve an interactive dialogue. This is because:
 - (a) they are recorded or broadcast, so preventing interaction; or
 - (b) they represent a one-way flow such as a speech, address or presentation.

8.10.6

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An issue arises where a *person* (P), during the course of a presentation or meeting, invites or is asked to answer questions from the audience. P's response may or may not be a real time communication. For example, the question may not be personal to the questioner and P may respond by addressing the audience in a way that precludes or does not call for any interaction. This will be a non-real time communication. On the other hand, the question may call for P to pursue a conversation with the questioner, in

which case the communication will be an interactive dialogue and a real time communication. In this case, the communication will not involve a non-real time communication made to or directed at the rest of the audience as it is addressed and made to the questioner. It may be that P, in the course of an interactive dialogue with a questioner, makes an invitation or inducement that is addressed to the audience as a whole. This will be a separate communication that will be non-real time. Any handout or slide or other visual aids used during the presentation will be non-real time communications.

8.10.7 G In the FCA's view, a communication which may exist in enduring form will be a non-real time communication. Examples of this include videos, audio cassettes, bulletin boards, websites and recorded telephone messages. Messages placed on Internet chat-rooms will also be non-real time. Radio or television programmes or teletext services may contain communications that involve an interactive dialogue. For example, a communication made by the broadcaster and addressed to an interviewee studio guest, a member of the audience or a person who speaks to the broadcaster by telephone. These will always be non-real time communications. This is again the effect of article 7(3) as explained in ■ PERG 8.10.2 G and ■ PERG 8.10.3G (2). Broadcasters may be able to use the exemption for journalists in article 20 of the *Financial Promotion Order* (see ■ PERG 8.12.23 G). Interviewee studio guests, if they make *financial promotions* during a broadcast, may be able to use the exemption in article 20A of the *Financial Promotion Order* (Promotion broadcast by company director etc) (see ■ PERG 8.12.32 G).

Solicited v unsolicited real time financial promotions.....

8.10.8 G Article 8(1) of the *Financial Promotion Order* (Interpretation: solicited and unsolicited real time communications) states that a *real time financial promotion* is solicited where it is made in the course of a personal visit, telephone conversation or other interactive dialogue which was initiated by or takes place in response to an express request from the recipient. An express request for these purposes may have been made before section 21 entered into force. An unsolicited *real time financial promotion* is any *real time financial promotion* which is not solicited.

8.10.9 G Article 8(3) of the *Financial Promotion Order* clarifies that a *person* will not have expressly requested a call, visit or dialogue merely:

- (1) because he does not indicate that he does not wish to receive any or any further visits or calls or to engage in any or any further dialogue; or
- (2) because he agrees to standard terms that state that such visits, calls or dialogue will take place, unless he has signified clearly that, in addition to agreeing to the terms, he is willing for the visit, call or dialogue to take place.

8.10.10 G Article 8(3) of the *Financial Promotion Order* also has the effect in broad terms that *financial promotions* made during a visit, call or dialogue will be solicited only if they relate to *controlled activities* or *controlled investments* of the kind to which the recipient envisaged that they would relate. In determining whether this is the case, account must be taken of all the

circumstances when the call, visit or dialogue was requested or initiated. For example, a *person* may ask for a visit from a representative of an investment product company with a view to receiving advice on an appropriate pension product. In this case, the representative would be likely to be making an *unsolicited real time financial promotion* if, during conversation, he attempts to persuade or incite the recipient to make an investment which would not be for the purposes of pension provision.

8.10.11

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■ PERG 8.6.9 G explains that article 6 of the *Financial Promotion Order* has the broad effect that a communication is made to another *person* where it is addressed to a particular *person* or *persons*. It also states that a 'recipient' of a communication is the *person* or *persons* to whom it is made (that is to whom it is addressed). This takes on importance where certain exemptions which apply to *real time financial promotions* made to a *person* are concerned. It appears to the *FCA* that, in certain situations, a *person* may make a *financial promotion* to someone who has expressly asked that it be made or who has initiated it but where, at the same time, it is also made (that is addressed) to *persons* who may have not requested or initiated it. For example, a married couple may visit their financial adviser. One partner may request or initiate the dialogue which the adviser then addresses to both. Article 8(4) of the *Financial Promotion Order* recognises this and has the effect that an *unsolicited real time financial promotion* will have been made to the *persons* other than the *person* who expressly asked for or initiated the call, visit or dialogue in which it was made unless they are:

- (1) close relatives of that *person* (that is, a *person's* spouse, children and step-children, parents and step-parents and brothers and sisters and step-brothers and step-sisters, including a spouse of any of those *persons*); or
- (2) expected to engage in any investment activity jointly with that *person*.

8.10.12

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In the *FCA's* view, *persons* who may be *engaging in investment activity* jointly include:

- (1) a married couple;
- (2) two or more *persons*, who will invest jointly in a product (for example, a cohabiting couple who are not married or members of a family);
- (3) the directors of a *company* or partners in a firm;
- (4) members of a *group of companies*;
- (5) the participants in a joint commercial enterprise;
- (6) the members of an investment club; and
- (7) the managers or prospective managers of a *company* who are involved in a management buy-out or buy-in.

8.10.13

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There will be occasions when *financial promotions* are received by *persons* other than those in ■ PERG 8.10.11G (1) or ■ PERG 8.10.11G (2) who will not have

solicited them. For example, a more distant relative or friend ('F') who acts as a support to the *person* who is to *engage in investment activity* ('P') or P's professional adviser ('A'). As explained in ■ PERG 8.6.10 G, in such cases the *financial promotion* will not be made to F or A unless it is also addressed to them. And it will only be addressed to F or A if the invitation or inducement relates to F or A *engaging in investment activity*. So a solicited *financial promotion* made to P will not also be an unsolicited *financial promotion* made to F or A.

- 8.10.14** G In the FCA's view, the mere fact of a *person* accepting an invitation to attend a meeting does not automatically mean that he has initiated any dialogue which may take place during the meeting and which may amount to a *financial promotion*. This will depend on the facts of each case and such matters as the manner in which the invitations are made, the arrangements for acceptance and how the meeting is conducted. For example, the fact that *investments* or investment services will be offered during the meeting may be made clear in the invitation.

8.11 Types of exemption under the Financial Promotion Order

- 8.11.1** **G** The various exemptions in the *Financial Promotion Order* are split into three categories:
- (1) exemptions applicable to all *controlled activities* (Part IV of the Order);
 - (2) exemptions applicable only to *controlled activities* concerning *deposits and contracts of insurance* other than *life policies* (Part V of the Order); and
 - (3) exemptions applicable to any other types of *controlled activity* (Part VI of the Order).
- 8.11.2** **G** Each individual exemption indicates the type of *financial promotion* (for example, non-real time) to which it relates. ■ PERG 8.36.6 G contains a table showing this breakdown. Each exemption also indicates whether it applies to any communication or only to those made to or directed at *persons*.
- 8.11.3** **G** Article 11 of the *Financial Promotion Order* (Combination of different exemptions) allows for certain exemptions to be combined when no single exemption may apply. The overall effect of article 11 is that any relevant exemptions may be combined except where the conditions applicable to an exemption prevent this (see ■ PERG 8.11.4 G).
- 8.11.4** **G** In a few instances, the requirements of a particular exemption may affect the practicality of its being combined with another. These are article 12 (Communications to overseas recipients) and article 52 (Common interest group of a company). Article 12, for example, requires that *financial promotions* must be made to or directed only at *overseas persons* and certain *persons* in the *United Kingdom*. This presents no difficulty with article 12 being combined with other exemptions in Parts IV or VI of the *Financial Promotion Order* where *financial promotions* are being made to *persons*. But, where a *financial promotion* is directed at the *persons* mentioned in article 12, it is difficult to see how the requirement that it must be directed only at those *persons* can be satisfied if it is also directed at other *persons* under another exemption. However, in the FCA's view, this does not prevent the same *financial promotion* being *communicated* under another exemption in another form or at any other time. For example, an electronic version of a *financial promotion* may be directed at *overseas persons* from a *person's* website in the *United Kingdom* using article 12. That *person* may then use another exemption to send paper copies of the same *financial promotion*.

8.11.5 **G** A number of exemptions require that a *financial promotion* must be accompanied by certain indications. Article 9 of the *Financial Promotion Order* states that indications must be presented in a way that can be easily understood and in such manner as is 'best calculated' to bring the matter to the recipient's attention. In the *FCA's* opinion, the expression 'best calculated' should be construed in a sensible manner. It does not, for instance, demand that the indication be presented in bold red capitals at the start of a document or advertisement. If the indication is given enough prominence, taking account of the medium through which it is *communicated*, to ensure that the recipient will be aware of it and able to consider it before deciding whether to *engage in investment activity*, the *FCA* would regard article 9 as being satisfied.

8.11.6 **G** Some exemptions are based on the *communicator* believing on reasonable grounds that the recipient meets certain conditions. For example, articles 19(1)(a), 44, 47 and 49. What are reasonable grounds for these purposes will be a matter for the courts to decide. In the *FCA's* view, it would be reasonable for a *communicator* to rely on a statement made by a potential recipient that he satisfies relevant conditions. This is provided that there is no reason to doubt the accuracy of the statement. In case of doubt, further checks may be necessary. These could include:

- (1) checking on the record kept by the *FCA* under section 347 of the *Act* (The record of authorised persons etc) that a *person* is *authorised*; or
- (2) checking with a *person's* employer that he is employed in a particular capacity; or
- (3) in the case of a *person* claiming to be a certified high net worth individual or a sophisticated or self-certified sophisticated investor, asking to see a copy of the current certificate.



8.12 Exemptions applying to all controlled activities

8.12.1 G Part IV of the *Financial Promotion Order* contains several exemptions which apply to all *controlled activities*. These are summarised in ■ PERG 8.12.2 G to ■ PERG 8.12.38 G.

Financial promotions to overseas recipients (article 12)

8.12.2 G This exemption concerns *financial promotions* which are made to or directed only at *overseas persons* (except in the circumstances referred to in ■ PERG 8.12.8 G).

8.12.3 G The exemption applies to situations where a *financial promotion* is either:

- (1) made to a *person* who receives it outside the *United Kingdom*; or
- (2) directed at *persons* who are outside the *United Kingdom*.

8.12.4 G The exemption applies whether or not the *financial promotion* is made from the *United Kingdom*. However, there is the exception that, if it is an *unsolicited real time financial promotion*, it must be made from a place outside the *United Kingdom* and be for the purposes of a business carried on entirely outside the *United Kingdom*. To give effect to the principle of *country of origin* regulation of information society services as required by the *E-Commerce Directive*, article 12(7) of the *Financial Promotion Order* prevents the exemption applying to an outgoing electronic commerce communication.

8.12.5 G Articles 12(3) and (4) of the *Financial Promotion Order* (subject to article 12(5) – see ■ PERG 8.12.8 G) have the effect that, where a *financial promotion* is directed from a place outside the *United Kingdom*, it will be conclusive proof that it is not directed at *persons* in the *United Kingdom* even if it is received by a *person* in the *United Kingdom*, if:

- (1) the *financial promotion* is not referred to in or directly accessible from another communication (for example, an advertisement in a *UK* newspaper or a *UK* website) which is itself made to or directed at *persons* in the *United Kingdom* by the *overseas person* who is directing it; and

- (2) there are proper systems and procedures in place to prevent recipients in the *United Kingdom* other than *persons* to whom the communication might otherwise lawfully have been made from engaging in the investment activity to which the *financial promotion* relates with the *overseas person* or his *close relative* or *group company*.

8.12.6

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There is no definition in the *Financial Promotion Order* of what 'proper systems and procedures' are, and the matter will ultimately be for the courts to determine. This is unsurprising as systems and procedures may take many different forms depending upon the precise circumstances in which *financial promotions* are made. But it is clear that *persons* seeking conclusive proof that the exemption applies must consciously make arrangements to prevent their dealing with certain recipients in the *United Kingdom*. In the *FCA's* view, proper systems and procedures will involve arrangements for scrutinising enquirers or applications with a view to identifying *persons* who are located in the *United Kingdom* and are not *persons* to whom the communication could lawfully have been made. *Persons* to whom the *financial promotion* could lawfully have been made does not mean only those covered by article 12. For example, depending on the *controlled investment* which the *financial promotion* is about, they could include a certified high net worth individual or a sophisticated investor. Such arrangements may be conducted manually using a questionnaire or electronically through password-protected access to information or the programming of software to recognise and reject *United Kingdom* addresses or both. The need for proper systems and procedures does not automatically mean that there will no longer be conclusive proof should, on isolated occasions, the systems or procedures fail to prevent dealings with a recipient in the *United Kingdom*. Provided the systems and procedures were and remain proper there will be conclusive proof that the exemption applies. A *financial promotion* from overseas might lead to a recipient in the *United Kingdom* engaging in investment activity with another *group company* (G) of the *person* (P) who makes the *financial promotion*. In this situation, it is not necessary that P operates the proper systems and procedures to get conclusive proof that the exemption applies. It will be enough that G operates the proper systems and procedures.

8.12.7

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Where a *financial promotion* is directed from within the *United Kingdom*, articles 12(3) and (4) also state (subject to article 12(5) – see ■ PERG 8.12.8 G) that there can be conclusive proof that the *financial promotion* is directed only at *persons* outside the *United Kingdom*. This will be the case if, in addition to the conditions referred to in ■ PERG 8.12.5G (1) and ■ PERG 8.12.5G (2), the *financial promotion* is accompanied by an indication that:

- (1) it is directed only at *persons* outside the *United Kingdom*; and
 (2) it must not be acted upon by *persons* in the *United Kingdom*.

8.12.8

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In any case, some but not all of the conditions referred to in ■ PERG 8.12.5G (1) to ■ PERG 8.12.5G (2) and ■ PERG 8.12.7G (1) to ■ PERG 8.12.7G (2) (or the additional condition that the communication is included in a website, newspaper or periodical publication which is principally accessed in or intended for a non-UK market or in a radio or television broadcast or teletext service transmitted principally for reception overseas) may be met. In

these cases, those conditions being satisfied will be taken into account in assessing whether the *financial promotion* is directed only at *persons* outside the *United Kingdom*. Even if none of the conditions are satisfied, it is still possible that a *financial promotion* which has been received by a *person* in the *United Kingdom* may properly be regarded as not having been directed at him. In the *FCA's* view, it will be an indication that a *financial promotion* in a website is directed at the *United Kingdom* if the website is registered with a *UK* search engine. Article 12(5) of the *Financial Promotion Order* also states that a *financial promotion* may be regarded as directed only at *persons* outside the *United Kingdom* where it is also directed at *persons* in the *United Kingdom*. This is provided those *persons* are limited to:

- (1) investment professionals (article 19); or
- (2) high net worth companies etc (article 49); or
- (3) previously overseas customers of overseas *communicators* (article 31); or
- (4) any combination of (1), (2) and (3).

Where a *financial promotion* is also directed at such *persons* in the *United Kingdom* the conclusive conditions referred to in ■ PERG 8.12.5G (1) to ■ PERG 8.12.5G (2) and ■ PERG 8.12.7G (1) to ■ PERG 8.12.7G (2) should be read as if references to *persons* to whom the *financial promotion* may be made or directed included investment professionals or high net worth companies etc. ■ PERG 8.11.4 G explains how article 12 may be combined with other exemptions.

Financial promotions from customers and potential customers (article 13)

8.12.9 G *Financial promotions* made by a prospective customer to a *person* who supplies a *controlled investment* or services comprising *controlled activities* with a view to his acquiring the *investment*, or receiving the services or receiving information about those *investments* or services, are exempted. This exemption will only be of relevance to corporate customers or others who are acting in the course of business. Other types of customers will not be subject to section 21 to begin with.

Follow up financial promotions (article 14)

8.12.10 G *Financial promotions* other than *unsolicited real time financial promotions* are exempt where they follow up an earlier *financial promotion* which, in compliance with another exemption (such as that for promotions made to high net worth individuals or sophisticated investors – see ■ PERG 8.14.21 G and ■ PERG 8.14.27 G), contains certain indications or information. This is provided the *financial promotion*:

- (1) is made by the *person* who made or directed the earlier *financial promotion*;
- (2) is made to a recipient of the earlier *financial promotion*;
- (3) relates to the same matter as the earlier *financial promotion*; and
- (4) is made within 12 months of the earlier *financial promotion*.

This exemption does not help in situations where the original *financial promotion* was made or directed under an exemption which did not require it to include any indications or information. However, it is likely that, in many cases where no indications or information are required, the exemption to which the earlier *financial promotion* applies would also apply to any follow up *financial promotion*. The requirement that the follow up *financial promotion* be made by the *person* who made or directed the earlier one would seem to prevent use of the exemption by someone acting on behalf of that *person*. However, the earlier *financial promotion* may have been made or directed by an individual in his capacity as an officer or employee of a *company* or a partner or employee of a partnership. If so, the exemption will be satisfied if the follow-up *financial promotion* is made by another employee, director or partner of the same *company* or *partnership*.

Introductions (article 15)

8.12.11

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This exemption applies to any *financial promotion* that is made with a view to or for the purposes of introducing the recipient to certain kinds of *person*. These are *authorised persons* who carry on the *controlled activity* to which the *financial promotion* relates, or *exempt persons* where the *financial promotion* relates to a *controlled activity* that is also a *regulated activity* in relation to which he is an *exempt person*. This is subject to the requirement that:

- (1) the *person* making the *financial promotion* ('P') is not a *close relative* or *group company* of the *authorised* or *exempt person*;
- (2) P does not receive any financial reward for making the introduction other than from the recipient of the *financial promotion*; and
- (3) the recipient of the *financial promotion* has not, in his capacity as investor, sought advice from P or, if he has, P has declined to provide it and has recommended that he seek advice from an *authorised person*.

For the purposes of (2), it is the FCA's view that P may be viewed as not receiving any financial reward other than from the recipient where P treats any commission or other financial benefit received from third parties to whom introductions are made as belonging to and held to the order of the recipient. P cannot simply tell the recipient that P will receive commission. The position must be that the commission belongs to the recipient and must be paid to him unless he agrees to its being kept by P. Where this occurs, the payment may be seen to be received by P from the recipient. In the FCA's opinion, the condition would be satisfied by P paying over to the recipient any third party payment he receives. Otherwise, it would be satisfied by P informing the recipient of the sum and that he has the right to require that the sum to be paid to him. This would allow the sum to be used to offset fees due from the recipient for other services provided to him by P. This could take the form of an agreement between P and the recipient that sums received by P will be used to offset any other fees due to P from the recipient. This is provided that P informs the recipient of sums which P has received and of the fees which they have been used to offset. However, it does not allow P to keep third party payments by seeking the recipient's agreement through standard terms and conditions. Similarly, a mere notification to the recipient that a particular sum has been received coupled with a request to keep it does not satisfy the condition.

8.12.11A G This exemption does not apply to any *financial promotion* that is made with a view to, or for the purpose of, an introduction to a person who carries on the *controlled activities* of:

- (1) credit broking;
- (2) operating an electronic system in relation to lending; or
- (3) agreeing to carry on the above activities.

Exempt persons (article 16)

8.12.12 G This exemption covers three distinct situations. Article 16(1) applies to all *exempt persons* where they make *financial promotions* for the purpose of their exempt activities. These *persons* would include *appointed representatives* (except *appointed representatives* to whom the exemption in article 16(1A) applies; see ■ PERG 8.12.12A G), *recognised investment exchanges*, *recognised clearing houses*, *recognised auction platforms* and those who are able to take advantage of the *Exemption Order*. So, it allows *exempt persons* both to promote that they have expertise in certain *controlled activities* and to make *financial promotions* in the course of carrying them on. Article 16(1) does not apply to *unsolicited real time financial promotions*. *Persons* to whom the *general prohibition* does not apply because of Part XX (Provision of financial services by members of the professions) or Part XIX (Lloyd's members and former underwriting members) of the *Act* are not, for the purposes of article 16, *exempt persons* for their Part XX or Part XIX activities.

8.12.12A G Article 16(1A) applies to *non-real time financial promotions* and *solicited real time financial promotions* made:

- (1) by an *appointed representative* who is carrying on an activity to which sections 20(1) and (1A) and 23(1A) of the *Act* do not apply as a result of section 39(1D) of the *Act*; and
- (2) for the purposes of the appointed representative's business of carrying on a *controlled activity* which is also a *regulated activity* to which sections 20(1) and (1A) and 23(1A) of the *Act* do not apply by virtue of section 39(1D) of the *Act*.

■ SUP 12.2.2AG (3) provides *guidance* on section 39(1D) of the *Act*.

8.12.13 G Article 16 (2) applies to *unsolicited real time financial promotions* made by an *appointed representative* in carrying on the business:

- (1) for which his principal has accepted responsibility for the purposes of section 39 of the *Act* (Exemption of appointed representatives); and
- (2) in relation to which the *appointed representative* is exempt under section 39.

In addition, the *financial promotion* may only be made in the circumstances in which it could be made by the *appointed representative's principal* under the appropriate *financial promotion rules*. This ensures a level playing field as between employed and tied sales forces. This exemption may be of

particular use to telephone sales agencies who will often need to be *appointed representatives* of investment product companies.

Generic promotions (article 17)

8.12.14 **G** Under this exemption, the *financial promotion* itself must not relate to a *controlled investment* provided by a *person* who is identified in it, nor must it identify any *person* as someone who carries on any *controlled activity*. So, it will apply where there is a *financial promotion* of a class of products. For example 'ISAs are great' or 'buy into an investment trust and help the economy'. Such *financial promotions* may be made by a *person* such as a trade association which is not itself carrying on a *controlled activity*. But this is provided there is no mention of any particular *ISA* or investment trust or of any *person* who may give advice on or arrange, *sell* or manage such investments.

8.12.15 **G** The exemption can also be used in certain circumstances where an intermediary is advertising its services as an intermediary. This is because advising on and arranging *deposits* and *contracts of insurance* other than *life policies* are not *controlled activities*. This means that an unauthorised intermediary offering to find the best rates on *deposits* may identify himself in the *financial promotion* as he will not be carrying on a *controlled activity*. This is provided that the *financial promotion* does not identify any particular deposit-taker. The same considerations would apply to an *authorised* intermediary who offers to advise on the best available motor insurance.

8.12.16 **G** Other *persons* may be able to take advantage of the exemption. For example, a *person* making a generic *financial promotion* may identify himself, whether he may carry on a *controlled activity* or not. This is provided that the *financial promotion* does not (directly or indirectly) identify him as someone who carries on a *controlled activity*.

8.12.17 **G** Journalists may be able to take advantage of this exemption when writing about *investments* generally. But the exemption would not apply if the *financial promotion* recommends the purchase or sale of particular *investments* such as XYZ Plc *shares*. This is because it will be identifying XYZ Plc as a *person* who provides the *controlled investment* (being its *shares*) and as a *person* who carries on the *controlled activity* of dealing in *securities* and *contractually based investments* (by issuing its own *shares*). Nor would the exemption apply if the *financial promotion* identifies an exchange on which *investments* are traded. That would indirectly identify the exchange as a *person* who carries on the *controlled activities* of dealing in *securities* or *contractually based investments* or *arranging deals* in investments. Journalists may also be able to use the exemption for journalists in article 20 (See ■ PERG 8.12.23 G).

Mere conduits (article 18 and 18A)

8.12.18 **G** The purpose of these exemptions is to ensure that, subject to certain conditions, the restriction in section 21 of the Act does not apply to those who merely transport the *financial promotions* of other *persons*. Obvious examples here are postal and Internet service providers, courier companies and telecommunications companies. ■ PERG 8.6.5 G explains that such *persons* may not be regarded as *communicating a financial promotion* simply

because they have distributed it. Article 18 (Mere conduits) does not apply to the *person* who causes the mere conduit to make the communication. Neither does it apply where the *financial promotion* is an *electronic commerce communication* that is, or will be, *communicated* from an *establishment* in the *United Kingdom* to a *person* in an *EEA State* other than the *United Kingdom*. A *person* acting as a mere conduit for *financial promotions* of this kind will, however, be able to use article 18A (Outgoing electronic commerce communications: mere conduits, caching and hosting). Article 18A is not subject to the conditions that apply to other forms of mere conduit (as referred to in ■ PERG 8.12.19 G and ■ PERG 8.12.20 G). However, it does require compliance with the conditions in articles 12(1), 13(1) and 14(1) of the *E-Commerce Directive* that relate to the liability of intermediary service providers.

8.12.19 G The conditions in article 18(2) include a requirement that the *person* making the *financial promotion* does not select, modify or otherwise exercise control over its content before it is transmitted or received. Article 18(3) provides that a *person* is not selecting, modifying or exercising control merely as a result of having power to remove material which is illegal, defamatory or in breach of copyright or at the request of a regulatory body or where the law requires him to do so. However, in the *FCA's* view, the control normally exercised by newspaper publishers or broadcasters over traditional forms of advertising they carry is likely to be enough for the exemption not to be available to such *persons*.

8.12.20 G The conditions in article 18 also require that the *person* acting as the mere conduit must *communicate* in the course of an activity carried on by him the principal purpose of which is transmitting or receiving material provided to him by others. In the *FCA's* view, what matters is that the *person* is carrying on an activity which has the required principal purpose. Such an activity might represent but a part of a *person's* overall business activities (however small), so long as it represents a discrete activity. A discrete activity is an activity whose principal purpose is to receive and transmit other *persons'* communications and which is not simply an activity that is carried on incidentally or as an adjunct to another activity. For example, a *person* who operates a website will not be entitled to the exemption (should he be *communicating financial promotions* see ■ PERG 8.6) simply because he chooses to provide a chatroom or bulletin board for the use of his customers.

Investment professionals (article 19)

8.12.21 G *Financial promotions* made only to or directed only at certain types of *person* who are sophisticated enough to understand the risks involved are exempt. These are:

- (1) *authorised persons*;
- (2) *exempt persons* (where the *financial promotion* relates to a *controlled activity* which is a *regulated activity* for which the *person* is exempt);
- (3) governments and local authorities; and

- (4) *persons* whose ordinary business involves carrying on a *controlled activity* of the kind to which the *financial promotion* relates and which may include:
 - (a) investment trust companies;
 - (b) *companies* which provide venture capital;
 - (c) large *companies* which have a corporate treasury function;
 - (d) other *persons* who carry on an activity such as dealing in, arranging or advising on *investments* but who do not require *authorisation* because of an exclusion in the *Regulated Activities Order*; and
 - (e) *professional firms* who are exempt under Part XX of the *Act*.

This also includes *persons* acting in their capacity as directors, officers or employees of such *persons*.

8.12.22

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Article 19(4) sets out conditions which, if all are satisfied, offer conclusive proof that a *financial promotion* is directed only at investment professionals. These conditions relate to indications accompanying the *financial promotion* and the existence of proper systems and procedures. The *guidance* about proper systems and procedures in ■ PERG 8.12.6 G applies equally to article 19. Article 19(6) specifically states that a *financial promotion* may be treated as made only to or directed only at investment professionals even if it is also made to or directed at other *persons* to who it may lawfully be communicated. This would include *overseas persons* and high net worth companies, etc. Where this is the case, the conditions in article 19(4) should, in the *FCA's* view, be satisfied if:

- (1) the indications make it clear that the *financial promotion* is directed only at investment professionals and other *persons* to whom it may lawfully be promoted; and
- (2) the systems and procedures are designed to prevent *persons* other than such types of *persons engaging in investment activity*.

Journalists (article 20)

8.12.23

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The broad scope of the restriction in section 21 of the *Act* will inevitably mean that it will, from time to time, apply to journalists and others who make their living from commenting on news including financial affairs (such as broadcasters). This is liable to happen when such *persons* offer share tips or recommend the use of a particular firm for investment purposes. Such tips or recommendations are likely to amount to inducements to *engage in investment activity*.

8.12.24

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The Treasury, in making the *Financial Promotion Order*, noted that financial journalism has an important part to play in increasing consumer awareness of financial services and products. It further observed the need to strike the right balance between protecting consumers and ensuring that the level of regulation is as light as possible, while respecting the principle of the freedom of the press.

8.12.25 **G** With this objective in mind, the exemption in article 20 applies to any *non-real time financial promotion* the contents of which are devised by a *person* acting as a journalist where the *financial promotion* is in:

- (1) a newspaper, journal, magazine or other periodical publication;
- (2) a regularly updated news or information service (such as a website or teletext service); or
- (3) a television or radio broadcast or transmission.

In addition, the publication, service or broadcast must be one which satisfies the principal purpose test set out in article 54 of the *Regulated Activities Order*. This means that the principal purpose must not be to advise on or lead or enable *persons* to *buy or sell securities or relevant investments*. See ■ PERG 7 for further *guidance* on this. Article 20 does not define what is meant by a *person* 'acting in the capacity of a journalist'. In the *FCA's* opinion, this expression has a potentially wide meaning. It will apply to anyone who writes for or contributes to a publication, service or broadcast. This includes experts or analysts who may be asked to contribute articles for a publication or website service or to offer their opinion in a broadcast.

8.12.26 **G** Provided the conditions in ■ PERG 8.12.25 G are met, the exemption in article 20 applies to any *non-real time financial promotion*. However, there is an additional condition where the subject matter of the *financial promotion* is *shares or options, futures or contracts for differences* relating to *shares* and the *financial promotion* identifies directly a *person* who issues or provides such an *investment*. In such cases, the exemption is subject to a disclosure requirement which is itself subject to certain exceptions (see ■ PERG 8.12.27 G). This requirement is that the *financial promotion* must be accompanied by an indication of the nature of any financial interest held by the *person* responsible for the promotion (that is, the journalist or editor) or member of his family (his spouse or children under 18). A financial interest would be subject to disclosure where the *person* or a member of his family would be likely to get a financial benefit or avoid a financial loss if *persons* acted in line with the *financial promotion*. Article 20 does not specify the way in which a financial interest should be indicated. In the *FCA's* view, a financial interest should be disclosed in a way that will enable recipients to understand readily its nature. For example, 'the writer has a substantial holding of traded call options in these shares'.

8.12.27 **G** The exceptions to the disclosure requirement are where the *financial promotion* is in either:

- (1) a publication, service or broadcast which has proper systems and procedures which prevent the publication of communications without disclosure of financial interests; or
- (2) a publication, service or broadcast which falls within the remit of:
 - (a) the Code of Practice issued by the Press Complaints Commission; or
 - (b) the OFCOM Broadcasting Code; or
 - (c) the Producers' Guidelines issued by the British Broadcasting Corporation.

8.12.28 **G** The effect of **■ PERG 8.12.27G (2)** is that *financial promotions* made by journalists in publications, services or broadcasts to which one of the codes or the guidelines apply are not subject to the disclosure requirement. This is so even if a *financial promotion* is made in breach of the codes or guidelines. Such *financial promotions* would remain to be dealt with by the body responsible for the code or guidelines and the publisher concerned. The code or guidelines may, of course, themselves require disclosure but the fact that they have been specified does not necessarily mean that they will or will always require disclosure. That is something which depends on the requirements of the particular code or guidelines.

8.12.29 **G** The effect of **■ PERG 8.12.27G (1)** is that a journalist will not breach section 21 by not disclosing a financial interest, providing that the publication, service or broadcast concerned operates proper systems and procedures. As with the exemption in article 12 of the *Financial Promotion Order* (see **■ PERG 8.12.6 G**), what proper systems and procedures are will be a matter ultimately for the courts to determine and may vary according to the medium used. It will depend upon all the circumstances surrounding the publication, service or broadcast. In the *FCA's* opinion, proper systems and procedures may achieve the objective of preventing the publication of communications without the required disclosure in one of two ways. They may require that disclosure be made. Or they may seek to prevent journalists from acting in a way which would enable them to profit if *persons* follow their published recommendations. For example, by banning their dealing in the *shares* or related investments for a reasonable period following the promotion. This would ensure that the journalist will not have a financial interest to disclose. For example, and in the *FCA's* opinion, a publication, service or broadcast may be likely to satisfy the test referred to in **■ PERG 8.12.27G (1)** if it has set up procedures:

- (1) for *persons* responsible for devising the content of *financial promotions*, or for deciding that they should be included in the publication, service or broadcast, to register their financial interests in a central log;
- (2) for the central log to be properly maintained and regularly reviewed;
- (3) where disclosure is required, for all *financial promotions* to be subject to review before publication or broadcast by an appropriately qualified and senior *person*; and
- (4) for the *persons* referred to in (1) to be made aware in writing of the procedures and of their obligations to disclose their financial interests or to refrain from any course of action which may be likely to give them a financial interest requiring disclosure and, preferably, to have confirmed their acceptance of those obligations in writing.

8.12.30 **G** *Persons* such as experts or analysts may be approached to contribute at very short notice and may be overseas. In such cases, the systems and procedures referred to in **■ PERG 8.12.29 G** may not be practical. It is the *FCA's* opinion that, where occasional contributors are concerned, proper systems and procedures may include arrangements for ensuring that the need for disclosure (or the avoidance of financial interests) is drawn to the contributor's attention before the communication is made. The contributor's confirmation that he understands and accepts the position on disclosure would also need to be obtained. The arrangements for bringing the position

on disclosure to the contributor's attention and for obtaining his understanding and acceptance should be made in whatever way is most appropriate in the circumstances. In other cases, it may be enough that the *persons* responsible for the broadcast satisfy themselves that contributors represent reputable regulated businesses. And that it would be reasonable to believe that they would not seek to promote an investment or investment service in which they had a financial interest without disclosing that fact. This is, of course, merely an example and not the only circumstances in which overseas broadcasts may be regarded as having proper systems and procedures.

8.12.31 G It appears to the *FCA*, however, that there will be situations when it may not be practical for the *persons* who are responsible for a publication, service or broadcast to apply proper systems and procedures to every *person* who may, whilst acting in the capacity of a journalist, *communicate a financial promotion*. For example where *persons* are asked to stand in at the last moment. In such cases, it is the *FCA*'s opinion that the benefit of the exclusion will not be lost as respects those *persons* who are subject to the proper systems and procedures. However, any *financial promotions communicated by persons* who are not subject to them would still be subject to the restriction in section 21 and would need to be approved by an *authorised person* or otherwise exempt.

Promotion broadcast by company director etc (article 20A).....

8.12.32 G Article 20A provides a further exemption for certain *financial promotions communicated by means of a service or broadcast* which satisfies the principal purpose test in article 54 of the Regulated Activity Order (see ■ PERG 8.12.25 G and ■ PERG 7). Readers of this section should also refer to the *guidance on company statements* in ■ PERG 8.21.

8.12.33 G The main purpose of the exemption appears to be to guard against the possibility that, during the course of a broadcast interview or a live website presentation, a *financial promotion* is made inadvertently by a director or employee of a *company* or other business undertaking when he is not acting in the capacity of a journalist (see ■ PERG 8.12.25 G). The exemption applies if the *financial promotion* relates only to:

- (1) *shares* of the undertaking or of another undertaking in the same *group* or *options, futures or contracts for differences* related to those *shares*; or
- (2) any *controlled investment* issued or provided by an *authorised person* in the same *group* as the undertaking.

8.12.34 G The exemption applies where the *financial promotion*:

- (1) comprises words which are spoken by the director or employee and not broadcast, transmitted or displayed in writing; or
- (2) is displayed in writing only because it is part of an interactive dialogue to which the director or employee is a party and in the course of which he is expected to respond immediately to questions put by a recipient of the communication.

This is provided that the *financial promotion* is not part of an organised marketing campaign. ■ PERG 8.14.4G (3) provides *guidance* on the meaning of an organised marketing campaign. In the context of article 20A, it is the FCA's view that an individual or isolated *financial promotion* will not represent or be part of an organised marketing campaign. However, a *company* representative may use a broadcast interview or webcast to encourage or incite viewers or listeners to acquire *investments* or investment services which are the subject of an advertising campaign being conducted at the same time. In such cases, any *financial promotion* contained in that interview or webcast will be part of an organised marketing campaign. Where this is the case, the company representative may be able to rely on other exemptions depending upon the subject matter of the *financial promotion* – see ■ PERG 8.21.

8.12.35 G The exemption also requires that the director or employee is identified as such in the *financial promotion* before it is *communicated*.

8.12.36 G The first part of the exemption (referred to in ■ PERG 8.12.34G (1)) specifically precludes any form of written communication. However, the FCA understands that the Treasury did not intend to prohibit the use of written words in the form of subtitling. These may be an aid to those with hearing difficulties or to interpret a foreign language, or the use of captions which supplement a spoken communication by highlighting aspects of it without introducing anything new. The FCA cannot fetter its discretion and must consider potential breaches of section 21 of the Act on their merits. However, where the only reason why a *person* may have breached section 21 of the Act is because he has used subtitling or captioning in this way the FCA would not expect to take further action. In the FCA's view, the position is different if a transcript of the spoken communication is later made available. This would be a separate communication and would need to be *approved* or otherwise exempt.

8.12.37 G The second part of the exemption (referred to in ■ PERG 8.12.34G (2)) envisages that the director or employee will be holding the equivalent of a conversation conducted in writing. Typically this will involve the exchange of e-mails. It is possible that this part of the exemption could be used by companies making so-called webcasts over the Internet. However, this would only be the case if the service through which the webcast is provided is a regularly updated news or information service (and which meets the principal purpose test – see ■ PERG 8.12.25 G). There is no reason why the exemption should not apply to a *company* website which provides regularly updated news or information about the activities, products or services of the *company* where the website represents a service provided to those who use it. However, not all *company* websites will be services of this kind.

Incoming electronic commerce communications (article 20B).....

8.12.38 G Article 20B gives effect to the provisions of the *E- Commerce Directive* by exempting *electronic commerce communications* made from an *establishment* in an *EEA State* other than the *United Kingdom* to an *ECA recipient* in the *United Kingdom*. However, article 20B does not apply to the following communications:

- (1) an advertisement by the *operator* of a UCITS of *units* in that *scheme*;
or
- (2) an invitation or inducement to enter into a *contract of insurance*
where:
 - (a) it is made by an undertaking which has received official
authorisation for direct insurance in line with article 14 of the
Solvency II Directive; and
 - (b) the insurance falls within the scope of the *Solvency II Directive*; or
- (3) an unsolicited communication made by electronic mail.

For the purposes of (3), a communication is unsolicited unless it is made in response to an express request from its recipient.



8.13 Exemptions applying to financial promotions concerning deposits and certain contracts of insurance

- 8.13.1** **G** The exemptions in Part V of the *Financial Promotion Order* concern *financial promotions* relating to *deposits* and *contracts of insurance*. The exemptions may be combined with exemptions in Part IV and Part VI (see ■ PERG 8.11.3 G (Types of exemption under the Financial Promotion Order)). The exemptions in Part V do not apply to *life policies* or *structured deposits*.
- 8.13.2** **G** Part V provides two kinds of exemption of a general nature and one specific exemption. The exemptions of a general nature are:
- (1) any form of *real time financial promotion* (articles 23 (Deposits: real time communications) and 26 (Relevant insurance activity; real time communications)); and
 - (2) *non-real time financial promotions* containing certain specified information including the name, country of incorporation (if relevant) and principal place of business of the deposit-taker or *insurer* and whether it is regulated, details of any redress schemes and, for deposit-takers only, certain financial information (articles 22 (Deposits: non-real time communications) and 24 (Relevant insurance activity: non-real time communications)).
- 8.13.3** **G** Article 25 (Relevant insurance activity: non-real time communications: reinsurance and large risks) exempts *financial promotions* concerning *contracts of insurance* which are either contracts of reinsurance or contracts covering certain large risks.
- 8.13.4** **G** Intermediaries involved with *arranging* and advising on *deposits* may be *unauthorised persons* as such activities do not amount to *regulated activities* (other than where they involve giving basic advice on a *stakeholder product* (article 52A of the *Regulated Activities Order* (Giving basic advice on a stakeholder product))) and so do not require *authorisation* under section 19 of the *Act*. However, the combination of the exemptions in Part V together with certain of the exemptions in Part IV (such as generic promotions – see ■ PERG 8.12.14 G – and follow up communications – see ■ PERG 8.12.10 G) should mean that it will often be possible for such *persons* to avoid any need to seek *approval* for their *financial promotions* from an *authorised person*. *Guidance* on the application of these exemptions to *financial promotions* about *insurance distribution activities* is in ■ PERG 8.17A (Financial promotions concerning insurance distribution activities).

8.14 Other financial promotions

8.14.1 G The exemptions in Part VI apply to different types of *financial promotion*, and the exemption available may be based on a number of facts. These may be the identity of the maker of the *financial promotion*, the identity of the recipient of the *financial promotion*, the subject matter of the *financial promotion* or the nature of the *financial promotion* itself. Some of these exemptions apply to *non-real time financial promotions*, others to *solicited real time financial promotions* and others to *unsolicited real time financial promotions*. Many of the exemptions apply to more than one category of *financial promotion*. ■ PERG 8.36.6 G contains a table showing which types of *financial promotion* are covered by each individual exemption.

8.14.2 G ■ PERG 8.14.3 G to ■ PERG 8.14.42 G describe some of the more significant exemptions contained in Part VI. See the *Financial Promotions Order* for full details of all the exemptions in Part VI.

One-off financial promotions (articles 28 and 28A)

8.14.3 G Article 28 exempts *financial promotions*, other than *unsolicited real time financial promotions*, which are one-off in nature. Whether or not any particular *financial promotion* is one-off in nature will depend upon the individual circumstances in which it is made. Article 28(3) sets out conditions which, if all are met, are conclusive. Otherwise they are indicative. Even if none are met the exemption may still apply. This makes it clear that the overriding issue is whether the *financial promotion* is, in fact, a one-off. The conditions are that:

- (1) the *financial promotion* is made only to one recipient or to a group of recipients in the expectation that they would *engage in investment activity* jointly;
- (2) the product or service involved has been determined having regard to the circumstances of the recipient or recipients; and
- (3) the *financial promotion* is not part of an organised marketing campaign.

8.14.4 G The *FCA* considers the effect of each of the conditions in ■ PERG 8.14.3G (1) to ■ PERG 8.14.3G (3) to be as follows.

- (1) The first condition requires the *financial promotion* to be made, so ruling out any *financial promotions* which are directed at *persons*. The effect of article 6(b) and (e) of the *Financial Promotion Order* is

that a communication is made to a *person* when it is addressed to him and that *person* to whom the *financial promotion* is addressed is its recipient. This means that when one *person* addresses a *financial promotion* to another *person*, it will not be regarded as having been made to anyone else. So, in the case of a *real time financial promotion*, it is not made to any other *person* who may be present. And in the case of a *non-real time financial promotion*, it is not made to any other *person* who may read or hear it. If the *financial promotion* is addressed to more than one *person* they must be proposing to *engage in investment activity* jointly (see ■ PERG 8.14.6 G).

- (2) The second condition requires the *financial promotion* to apply to the personal circumstances of the recipient so not benefiting a *financial promotion* which take no account of the personal circumstances of the recipient or recipients.
- (3) The third condition requires that the *financial promotion* must not be part of an organised marketing campaign. There is no definition of an organised marketing campaign but, in the *FCA's* view, it is appropriate to consider each of the words and their effect in this context:
 - (a) 'organised' suggests that the campaign is planned in advance and not something done on the spur of the moment;
 - (b) 'marketing' suggests an element of public promotion so as not to apply to anything of a personal or very limited nature even if it is promotional; and
 - (c) 'campaign' suggests that the *financial promotion* must be part of an overall plan having a common objective.

8.14.5

G In the *FCA's* opinion, the indicators referred to in ■ PERG 8.14.4 G suggest that there are two essential elements of a one-off *financial promotion*. These are that it is tailored to the circumstances of the recipient and that it is individual in nature (in that it is not simply a personalised letter sent out as part of a general mailshot). Apart from this there is no need for the communication to be an isolated instance. For example, the fact that there may be a considerable number of communications made during negotiations for a transaction will not prevent each communication from being one-off. The *FCA* is of the view that none of the three conditions carries significantly more weight than the others. Each *financial promotion* must be assessed against the conditions on its merits. The *FCA* regards the following to be *financial promotions* which will meet the conclusive conditions provided, in each case, that the *financial promotion* is tailored to the personal circumstances of and addressed to the recipient.

- (1) Individual personal written communications or one-to-one conversations.
- (2) A response printed in a publication or website or given during a broadcast in response to an enquiry from a reader, viewer or listener.
- (3) A response given to a *person* who asks a question at a presentation or meeting.

(4) A response to a question raised by another *person* using an internet chatroom or bulletin board.

8.14.6 **G** In the *FCA's* view, a group of recipients who may be *engaging in investment activity* jointly could include:

- (1) a married couple;
- (2) two or more *persons* who will invest jointly in a product (for example, a cohabiting couple who are not married or members of a family);
- (3) the directors of a *company* or partners in a firm;
- (4) members of a *group of companies*;
- (5) the participants in a joint commercial enterprise;
- (6) the members of an investment club; and
- (7) the managers or prospective managers of a *company* who are involved in a management buy-out or buy-in.

8.14.7 **G** A *financial promotion* may fail to satisfy all of the indicators referred to in **■ PERG 8.14.4 G** because it is addressed to more than one recipient and they are not *persons* who will *engage in investment activity* jointly. In the *FCA's* view, such a *financial promotion* is capable of being one-off where the *persons* are to enter into the same transaction and the promotion is tailored to their individual circumstances. This may typically happen during negotiations for the sale of a *company* or the raising of corporate finance where a small number of parties are involved.

8.14.8 **G** The fact that a *financial promotion* may be made following an organised marketing campaign does not mean that it must automatically be regarded as part of the campaign or that it cannot be one-off. For example, after a *person* has responded to a general promotion, an investment manager may make *financial promotions* to him and tailor them to his individual objectives. Such subsequent *financial promotions* can be one-off. Similarly, a *person* who provides corporate finance services may use an organised marketing campaign to find a potential investor or investee company. Any subsequent *financial promotions* made during negotiations for the deal may be one-off even though they may represent a series of communications to the same recipient. On the other hand, the situation is slightly different where an organised marketing campaign involves the sale of an investment product such as a *life policy*. There will be fewer instances where subsequent *financial promotions* to individual recipients will be capable of being one-off. For example, any *financial promotion* which has the basic elements of selling the product is likely to be part of an organised marketing campaign and will not be a one-off.

8.14.9 **G** In the *FCA's* view, a *person* such as an investment manager or adviser is not conducting an organised marketing campaign purely because he regularly provides a particular client with *financial promotions* as part of his service. Neither is such a *person* conducting an organised marketing campaign purely because he may have several clients whose personal circumstances and

objectives may suggest that a particular investment opportunity may attract them. If he considers the individual circumstances and objectives of each client before determining that the opportunity would be suitable for that client the *financial promotions* should be capable of being one-off.

8.14.10 **G** In the *FCA's* view, a *person* will not be making one-off *financial promotions* simply by sending out a series of letters to a number of customers or potential customers where a few details are changed (such as the name and address) but the bulk of the letter is standard. Such letters would be likely to be part of an organised marketing campaign.

8.14.11 **G** Article 28A exempts one-off *unsolicited real time financial promotions* provided that the *person* making the *financial promotion* believes on reasonable grounds:

- (1) that the recipient understands the risks associated with engaging in the investment activity to which the *financial promotion* relates; and
- (2) (at the time the communication is made) that the recipient would expect to be contacted by him about the investment activity to which the *financial promotion* relates.

8.14.12 **G** In the *FCA's* view, the article 28A exemption should provide scope for *persons* such as professional advisers to make *unsolicited real time financial promotions* in various situations. For example, when approaching *persons* with whom their clients are proposing to do business or those *persons'* professional advisers. The exemption will not apply where the *financial promotions* are part of an organised marketing campaign (see ■ PERG 8.14.4G (3)). So, in cases where a professional adviser is to contact a number of *persons* on a matter which involves each of them it will be necessary for him to consider whether the approaches would be part of an organised marketing campaign. For example, where they are significant shareholders in a *company* for which an offer has been made. In the *FCA's* opinion, provided the professional adviser considers the circumstances of each recipient and tailors the *financial promotions* to them it should be possible for the *financial promotions* to be regarded as one-off. Ultimately, however, the matter depends on the precise circumstances in which the *financial promotions* are made.

8.14.13 **G** Whether or not it would be reasonable to believe that any *person* understands the risks associated with the investment activity covered in a *financial promotion* or would expect to be contacted about it must be judged on the particular circumstances. In the *FCA's* opinion, the exemption requires that the recipient has the required understanding of risk at the time the promotion is made to him. However, it would be reasonable to believe that a *person* understands the risk involved if:

- (1) he is understood to be a professional in relation to the investment activity to which the *financial promotion* relates; or
- (2) he is advised about the risks by a *person* who is professionally qualified to give such advice; or

- (3) he has a position in a *company* which it is reasonable to suppose would require him to have such an understanding (such as a *person* who is in charge of a *company's* treasury function).

In the *FCA's* opinion, a *person* such as the managing director or finance director of a *company* that is seeking venture capital may reasonably be regarded as expecting to be contacted by or on behalf of a potential investor.

Overseas communicators (articles 30-33)

8.14.14 G There are a number of exemptions in the *Financial Promotion Order* relating to *financial promotions* sent into the *United Kingdom* by an overseas *communicator* who does not carry on certain *controlled activities* in the *United Kingdom*. These exemptions apply in addition to any other exemptions which may apply to any particular *financial promotion* by an overseas *communicator*.

8.14.15 G Article 30 exempts any solicited *real time financial promotion* made by an overseas *communicator* in the course of or for the purposes of certain *controlled activities* which he carries on outside the *United Kingdom*. This enables an overseas *communicator*, for example, to respond to an unprompted telephone enquiry made by a *person* in the *United Kingdom* or an enquiry which follows a *financial promotion* made by the overseas *communicator* and which was *approved* by an *authorised person*.

8.14.16 G In order to make an *unsolicited real time financial promotion*, an overseas *communicator* must rely on either article 32 or article 33. Article 32 provides an exemption for *unsolicited real time financial promotions* made by an overseas *communicator* to *persons* who were previously overseas and were a customer of his then. This is subject to certain conditions, including that, in broad terms, the customer would reasonably expect to be contacted about the subject matter of the *financial promotion*. Article 33 is similar to a sophisticated investor exemption and applies where the overseas *communicator* has reasonable grounds to believe that the recipient is knowledgeable enough to understand the risks associated with the *controlled activity* to which the *financial promotion* relates. It is also necessary for the recipient to have been informed that he will not gain the protections under the *Act* in respect of the activity or of the making of *unsolicited real time financial promotions*, and whether he will lose the benefit of dispute resolution and compensation schemes. The recipient must also have signified clearly that he accepts the position after having been given a proper opportunity to consider the information. There is no definition of a proper opportunity for this purpose. In the *FCA's* opinion it is likely to require the recipient to have a reasonable time to reflect on the matter and, if appropriate, seek other advice. What is a reasonable time, will depend upon the circumstances of the recipient, but, in the *FCA's* opinion, it is unlikely that a time of less than 24 hours will be enough.

8.14.17 G Article 31 exempts *non-real time financial promotions* made to previously overseas customers and subject to certain conditions. Again, to satisfy this exemption, the *communicator* must be based overseas and must be *communicating* with a *person* who was previously a customer of his while that *person* was overseas.

Governments, central banks etc (article 34)

8.14.17A **G** A local authority (in the *United Kingdom* or elsewhere) is exempt from the *financial promotion* restriction (that is, the restriction in section 21 of the *Act*) for a communication which is a *non-real time financial promotion* or a *solicited real time financial promotion*. However, this exemption does not apply to a communication which relates to a *regulated credit agreement*, where entering into the agreement or exercising, or having the right to exercise, the *lender's* rights and duties under the agreement constitutes the carrying on of an activity of the kind specified in article 60B of the *Regulated Activities Order* (and where the exclusion in article 72G of that Order does not apply).

Nationals of EEA States other than the United Kingdom (article 36)

8.14.18 **G** This exemption allows a *person* in another *EEA State* who lawfully carries on a *controlled activity* in that State to promote into the *United Kingdom*. The terms of the exemption are that the promotion must comply with the *rules* in ■ **COBS 4**, ■ **MCOB 3A** or ■ **CONC 3** (as relevant). Care should be taken as any failure to satisfy any of the relevant requirements of these rules may mean that this exemption is not satisfied and that the *financial promotion* may breach section 21 if it has not been *approved* and no other exemption applies to it. The *FCA* recommends that anyone seeking to rely on this exemption either seeks professional advice or contacts the *FCA* before *communicating* the *financial promotion*. This exemption does not apply to *unsolicited real time financial promotions*.

Joint enterprises (article 39)

8.14.19 **G** Article 39 of the *Financial Promotion Order* exempts a *financial promotion* that:

- (1) is *communicated* by one participator or potential participator in a joint enterprise to another; and
- (2) is in connection with or for the purposes of that enterprise.

A joint enterprise means, in general terms, arrangements entered into by two or more *persons* for commercial purposes related to a business that they carry on. The business must not involve a

controlled activity

. The term 'participant' includes other members of a *group* of which a participant is a member.

8.14.20 **G** In the *FCA's* opinion;

- (1) it will not matter that a *person* enters into arrangements for investment or other purposes provided that he also enters them into for commercial purposes; and
- (2) each participant must be carrying on the business in question in their own right.

This means that the sponsors or promoters of a *company* who arrange for private investors to become shareholders will not be setting up a joint enterprise simply because the *company* may intend to carry on a relevant business which is not a

controlled activity

. Examples of a joint enterprise include a special purpose *company* owned by the participants and set up to operate a commercial project or to hold property of some kind. The participants in joint enterprises of this kind would typically be businesses which are to undertake work on the project or property development and investment companies.

Certified high net worth individuals (article 48)

8.14.21

G

This exemption disapplies the restriction in section 21 of the *Act* from *non-real time financial promotions* or *solicited real time financial promotions* which are made to a *person* who the communicator believes on reasonable grounds to be a certified high net worth individual and which relate to certain *investments*. These *investments* must be either:

- (1) *shares* in or *debentures* or *alternative debentures* of an unlisted *company*; or
- (2) *warrants*, *certificates representing certain securities*, *options*, *futures* or *contracts for differences* relating to *shares* in or *debentures* of an unlisted *company*; or
- (3) *units* in *collective investment schemes* investing predominantly in *shares* in or *debentures* of an unlisted *company*.

There is an additional requirement that the recipient must have no contingent liability so that the maximum he may lose is the amount he invests. The term 'unlisted company' is defined in article 3 of the *Financial Promotion Order*. This exemption is expected to be of help to unlisted *companies* seeking venture capital.

8.14.22

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A certified high net worth individual is an individual who has signed a statement in the form prescribed in Part I (Statement for certified high net worth individuals) of Schedule 5 to the *Financial Promotion Order*. This requires the individual to certify that he has earned at least £100,000 or have held net assets to the value of more than £250,000 throughout the financial year before the date of the certificate. Where the *financial promotion* is an outgoing electronic commerce communication, the earnings or net assets may be of an equivalent amount in another currency. For the exemption to apply, the certificate must have been signed within twelve months of the date on which the communication is made. The validity of the statement is not affected by a defect in its wording or form provided the defect does not alter its meaning or involve failure to place certain paragraphs in bold.

8.14.23

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In addition, the *financial promotion* must be accompanied by:

- (1) a warning in the terms prescribed in article 48(5) and which satisfies certain conditions regarding its form as set out in article 48(6) – this warning must either be given in legible form at the time the communication is made or given orally at that time and a copy in legible form sent to the recipient within two business days; and
- (2) certain indications as set out in article 48(7).

8.14.24 **G** A *person* seeking to make a *financial promotion* to another *person* may wish to make enquiries of that *person* to establish whether he is certified. Unless another exemption applies or the *financial promotion* is approved by an *authorised person*, such enquiries will not be possible if the enquiry communication is an inducement or invitation to *engage in investment activity*. In the FCA's view, a communication which is merely an enquiry seeking to establish that a *person* holds a current certificate will not itself be an inducement or invitation. Once it has been established that the *person* qualifies as a certified high net worth individual *financial promotions* about the *controlled investments* in ■ PERG 8.14.21 G may then be sent to him under article 48. ■ PERG 8.4.27 G offers further *guidance* on this.

High net worth companies, unincorporated associations and trusts (article 49)

8.14.25 **G** This exemption works on a different basis to that for high net worth individuals. There is no requirement for a certificate or statement to be signed. Instead, the *person* making the promotion must believe on reasonable grounds that the recipients are high net worth companies, unincorporated associations or trusts or be reasonably regarded as directing the *financial promotion* only at such *persons*. A high net worth company, unincorporated association or trust is a *person* who satisfies the conditions in article 49(2)(a) to (d) which, for the most part, involve the amount of assets held. In addition, the exemption allows a *financial promotion* that is made to, or directed at, *persons* coming under article 49(2)(a) to (d) also to be made to, or directed at, any other *persons* to whom it may lawfully be made (article 49(2)(e)). This would include *persons* such as overseas recipients (article 12 (Communications to overseas recipients)) and investment professionals (article 19 (Investment professionals)).

8.14.26 **G** Article 49(4) gives the list of conditions which, if all are met, is proof that the *financial promotion* is directed at relevant *persons*. It is not necessary for all or any of the conditions to be met for a *financial promotion* to be regarded as directed at relevant *persons*. Ultimately the matter will be one of fact to be determined by taking account of the circumstances in which the *financial promotion* is made. In the FCA's opinion, it is not necessary for a *financial promotion*, to comply with the condition in article 49(4)(a) that there be an indication of the types of *person* to whom it is directed, to refer in detail to the terms of article 49(2). It will be enough that it is clear that the *financial promotion* is directed at *persons* to whom article 49 applies. *Persons* using article 49 will need, however, to consider the extent to which recipients of the *financial promotion* are likely to understand the indication. An appropriate approach may often be to refer to the *financial promotion* being 'directed at high net worth companies, unincorporated associations etc for the purposes of article 49' or similar.

Sophisticated investors (articles 50 and 50A)

8.14.26A **G** There are two exemptions that relate to sophisticated investors. The first (article 50 (Sophisticated investors)) applies to *persons* who are certified by an *authorised person* and to a broad range of *specified investments*. The second (article 50A (Self-certified sophisticated investors)) is similar to the exemption for certified high net worth individuals and applies where the investor has self-certified himself and to a narrower range of *specified investments*. ■ PERG 8.14.27 G to ■ PERG 8.14.28D G describe these exemptions in greater detail.

8.14.27 **G** To be a sophisticated investor for the purposes of article 50, the recipient of a *financial promotion* must have a current certificate from an *authorised person* stating that he has enough knowledge to be able to understand the risks associated with the description of investment to which the *financial promotion* relates. Where the *financial promotion* is an outgoing electronic commerce communication, the certificate may be signed by a *person* who is entitled, under the law of an *EEA State* other than the *United Kingdom*, to carry on *regulated activities* in that *EEA State*. The *FCA* considers that a 'description of investment' relates to a category of *investments* with similar characteristics. Examples are given below.

- (1) The *shares* in a private *company* are not the same 'description of investment' as shares in a plc as there will usually be certain significant distinctions. For instance, there will often be restrictions on the transfer of *shares* in a private *company*.
- (2) *Shares* traded on a market or exchange will be a different 'description of investment' to unlisted *shares*.
- (3) *Shares* which have similar characteristics will be of the same 'description of investment' irrespective of whether they are *shares* of *companies* in the same market or geographical sector.

The recipient must also have signed a statement in the terms in article 50(1)(b). The validity of the statement is not affected by a defect in its wording provided the defect does not alter its meaning. The exemption applies to all kinds of *financial promotion* made to a certified sophisticated investor. However, it does not, unlike articles 48 and 50A, provide for the communicator to have reasonable belief that the recipient is a certified sophisticated investor. The *financial promotion* must not invite or induce the recipient to *engage in investment activity* with the *person* who has signed the certificate. But it may invite or induce the recipient to *engage in investment activity* with an associate or *group* member of that *person*.

8.14.28 **G** The exemption also requires that certain warnings are given to the potential investor. In this respect, article 50(3)(d) provides that the *financial promotion* must state that there is a significant risk of losing all monies invested or of incurring additional liability. In the *FCA*'s view, these are alternative statements and whichever is the relevant statement should be included. If there is no risk of incurring additional liability the statement may simply say that there is a risk of losing the sum invested. This is a mandatory requirement, although the exemption under article 50 may be used to promote *investments* for which either statement would be inappropriate or potentially confusing (for instance if it is used to offer gilts). The *FCA* cannot fetter its discretion to decide individual cases on their merits. However, where a *person* seeks to rely on the article 50 exemption for a *financial promotion* which would otherwise satisfy the terms of article 50 but which omits the statement required under article 50(3)(d), on the grounds that it would be misleading to include it, the *FCA* would, generally, take no further action.

8.14.28A **G** The second exemption in article 50A disapplies the restriction in section 21 of the *Act* from any *financial promotions* which are made to a *person* who the communicator believes on reasonable grounds to be a self-certified sophisticated investor and which relate to one or more of the *specified*

investments in ■ PERG 8.14.21G (1) to ■ (3) (Certified high net worth individuals (article 48)).

8.14.28B G A self-certified sophisticated investor is an individual who has signed a statement in the form prescribed in Part II (Statement for certified sophisticated investor) of Schedule 5 to the *Financial Promotion Order*. This requires the individual to certify that one or more of the following statements apply to him:

- (1) he is a member of a network or syndicate of business angels and has been so for at least the last six months prior to the date on which the certificate was signed; or
- (2) he has made more than one investment in an unlisted *company* in the two years prior to that date; or
- (3) he is working, or has worked in the two years prior to that date, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises; or
- (4) he is currently, or has been in the two years prior to that date, a director of a *company* with an annual turnover of at least £1 million.

8.14.28C G For the exemption to apply, the certificate must have been signed within twelve months of the date on which the communication is made. The validity of the statement is not affected by a defect in its wording or form provided the defect does not alter its meaning or involve failure to place certain paragraphs in bold.

8.14.28D G In addition, the *financial promotion* must be accompanied by:

- (1) a warning in the terms prescribed in article 50A(5) and which satisfies certain conditions regarding its form as set out in article 50A(6) – this warning must either be given in legible form at the time the communication is made or given orally at that time and a copy in legible form sent to the recipient within two business days; and
- (2) certain indications as set out in article 50A(7).

Associations of high net worth or sophisticated investors (article 51)

8.14.29 G (1) This exemption allows a *non-real time* or *solicited real time financial promotion* to be made to an association with a particular membership. Membership of this association must be reasonably believed to be wholly or predominantly made up of certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors. The *financial promotion* must not relate to an *investment* under the terms of which a *person* can incur additional liability of more than his original investment. In each case, whether the membership of an association is predominantly made up of certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified

sophisticated investors will be a question of fact. The exemption may be expected to be likely to apply, for example, to *financial promotions* to business angel networks.

- (2) The exemption extends to *financial promotions* made to *persons* who are members of an association with a particular membership and not simply to *financial promotions* made to the operator or secretariat of the association. It would appear that this includes members who are not themselves certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or certified or self-certified sophisticated investors.

Common interest group of a company (article 52)

8.14.30 G Article 52 concerns *non-real time and solicited real time financial promotions* about offers of *shares or debentures or alternative debentures* of a *company*. The offers must be made only to or be reasonably regarded as only directed at certain *persons*. These *persons* must belong to an identified group of *persons* who, when the *financial promotion* is made, might reasonably be regarded as having an existing and common interest with each other and the *company*.

8.14.31 G The exemption is subject to certain conditions. In broad terms, these are that the *financial promotion* must be accompanied by an indication:

- (1) that the directors or promoters of the *company* have taken all reasonable care to ensure that the *financial promotion* is true and not misleading;
- (2) that the directors or promoters have not limited their liability;
- (3) that any *person* who is in doubt about the investment should consult an *authorised person*; and
- (4) that:
 - (a) the directors or promoters of the *company* have taken all reasonable care to ensure that potential investors have access to relevant information about the *company*; or
 - (b) any *person* considering investing in the *company* should regard his subscription as helping the *company* to meet its non-financial objectives and only secondarily, if at all, as an investment.

Where the *financial promotion* is an outgoing electronic commerce communication, the reference in (3) to an *authorised person* includes a *person* who is entitled, under the law of an *EEA State* other than the *United Kingdom*, to carry on *regulated activities* in that *EEA State*.

8.14.32 G In line with other exemptions, article 52 contains indicators which, if all are met, mean that the *financial promotion* is directed at relevant *persons*.

8.14.33 G Example of situations where article 52 is likely to apply include offers made by:

- (1) a club or association which is considering incorporation to its members;
- (2) a private school to the parents of its pupils; and
- (3) a *company* to its existing members or creditors (where the exemption in article 43 might also be expected to apply).

8.14.34 G However, *persons* are not to be regarded as having a common interest with each other and a *company* simply because:

- (1) they would have such an interest if they became its members or creditors; or
- (2) they all carry on a particular trade or profession; or
- (3) they have an existing business relationship with the *company* whether by being its clients, customers, contractors, suppliers or otherwise.

Insolvency practitioners (article 55B)

8.14.34A G The *financial promotion* restriction (that is, the restriction in section 21 of the Act) does not apply to a communication which is a *non-real time financial promotion* or a *solicited real time financial promotion* by an insolvency practitioner who acts in that capacity (see the definition of “acting as an insolvency practitioner” in article 3 of the *Regulated Activities Order*). The exemption only applies where the communication is made in the course of carrying on an activity which is excluded from being a *regulated activity* by virtue of article 72H of the *Regulated Activities Order* (see ■ PERG 2.9.25G and ■ PERG 2.9.26G).

Sale of body corporate (article 62)

8.14.35 G The exemption in article 62 of the *Financial Promotion Order* applies to any *financial promotion communicated* by or on behalf of a *body corporate*, a *partnership*, an individual or a group of connected individuals. The *financial promotion* must relate to a transaction which is one to acquire or dispose of *shares* in a *body corporate* and either:

- (1) it is the case that:
 - (a) the *shares*, in addition, where appropriate, to any *shares* already held by the buyer, amount to 50% or more of the voting *shares* in the *body corporate*; and
 - (b) the party or parties who act as seller is a *body corporate*, a *partnership*, a single individual or a group of connected individuals and the party or parties who act as buyer is also one or other of these (but not necessarily the same type as the seller); or
- (2) where the conditions in (1) are not met, but the object of the transaction may reasonably be regarded as being the acquisition of day to day control of the affairs of the *body corporate*.

- 8.14.36** **G** A group of connected individuals is defined in article 62(4) of the *Financial Promotion Order* as being a group of *persons* each of whom is (for sellers) or is to be (for buyers):
- (1) a director or manager of the *body corporate*;
 - (2) a *close relative* of such a *person*; or
 - (3) a *person* acting as trustee for a *person* as referred to in (1) or (2)
- 8.14.37** **G** In the *FCA's* view, a main aim of the exemption (see ■ PERG 8.14.35G (1)) is to remove from the scope of section 21 a *financial promotion* concerning the sale of a corporate business by a *person* who, either alone or with others, controls the business to another *person* who, either alone or with others, proposes to control the business.
- 8.14.38** **G** In any case where the conditions referred to in ■ PERG 8.14.35G (1) are not met, it will be necessary to consider the circumstances in which the transaction is to take place in order to determine whether its objective is the acquisition of day-to-day control (see ■ PERG 8.14.35G (2)). In situations where the 50% holding of voting *shares* test is not met it is still possible that the objective of a transaction could be the acquisition of day-to-day control. For instance, because the remaining shareholders represent a large number of small shareholders who it is reasonable to suppose will not regularly act in concert.
- 8.14.39** **G** Where the nature of the parties test (see ■ PERG 8.14.35G (1)(b)) is not met and the purpose for which the *person* who is the buyer holds or proposes to hold the voting *shares* is considered, it may still be the case that the objective of the transaction is the acquisition of day-to-day control. This may typically be because there are two or more parties involved as buyer and they do not collectively represent a group of connected individuals as defined. For example, this may happen where the *shares* are to be held by one of the following *persons* who intends to acquire control either alone or with others:
- (1) a *person* (of either sex) with whom a *person* who is to be a manager or director cohabits; or
 - (2) a venture capital company which proposes to invest in the *company* and which is to provide a representative to act as a manager or director of the *company*; or
 - (3) a private *company* used as a vehicle to hold *shares* by a *person* who is to be a manager or director of the *company* (or his *close relative*).
- 8.14.40** **G** In the *FCA's* opinion, provided that the purpose of the transaction is for the buyer to acquire the necessary control, it is irrelevant who is the seller. The exemption specifically applies to *financial promotions* which are *communicated* on behalf of the parties or potential parties to the transaction.

Pension products offered to employees by employers (article 72) and third parties (article 72A)

8.14.40A **G**

Article 72 exempts any *financial promotion* made by an employer to an employee in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the *financial promotion* must inform the employee that the employer will make a contribution to the pension that the employee will receive from the pension scheme to which the *financial promotion* relates in the event of the employee becoming a member;
- (2) the employer must not receive or have received any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication;
- (3) the employer must notify the employee in writing, prior to the employee becoming a member, of the amount of the contribution that the employer will make to the scheme in respect of that employee or the basis on which the contribution will be calculated; and
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek independent advice from an *authorised person* or an *appointed representative*.

8.14.40AA **G**

Article 72A exempts any *financial promotion* made to an employee by or on behalf of a person ("A") in relation to a *group personal pension scheme* or a *stakeholder pension scheme*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person ("B") on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) the employer must make a contribution to the scheme in the event of the employee becoming a member of the scheme and the communication must contain a statement informing the employee of this;
- (5) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (6) the employer or A must notify the employee in writing prior to the employee becoming a member of the *scheme* of:

- (a) the amount of the contribution that the employer will make to the *scheme* in respect of that employee, or the basis on which the contribution will be calculated; and
- (b) any remuneration A or B has received, or will receive, as a consequence of the employee becoming a member of the *scheme*, or the basis on which any such remuneration will be calculated.

Insurance product offers communicated to employees by employers (article 72B) and third parties (article 72C)

8.14.40AB G

Article 72B exempts any *financial promotion* made by an employer to an employee in relation to *work-related insurance*. This is subject to certain requirements as follows:

- (1) where the provider of the insurance is not the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication; and
- (2) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*.

8.14.40AC G

Article 72C exempts any *financial promotion* made to an employee by or on behalf of a person ("A") in relation to *work-related insurance*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person ("B") on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (5) the employer or A must notify the employee in writing prior to the employee entering into a contract for the *work-related insurance* of any remuneration A or B has received, or will receive, as a consequence of the employee entering into the contract, or the basis on which any such remuneration will be calculated.

Staff mortgage offers communicated to employees by employers (article 72D) and third parties (article 72E)

8.14.40AD G

Article 72D exempts any *financial promotion* made by an employer to an employee in relation to a *staff mortgage*. This is subject to certain requirements as follows:

- (1) where the provider of the *staff mortgage* is an undertaking in the same group as the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of making the communication; and
- (2) where the communication is a *non-real time financial promotion*, it must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*.

8.14.40AE G

Article 72E exempts any *financial promotion* made to an employee by or on behalf of a person (“A”) in relation to a *staff mortgage*. This is subject to certain requirements as follows:

- (1) the employer and A must have entered into a written contract specifying the terms on which the communication may be made;
- (2) in the case of a communication made by a person (“B”) on behalf of A, A and B must also have entered into a written contract specifying the terms on which the communication may be made;
- (3) where the provider of the *staff mortgage* is an undertaking in the same group as the employer, the employer must not receive or have received, any direct financial benefit (including any commission, discount, remuneration or reduction in premium) as a result of the communication being made;
- (4) in the case of a non-real time communication, the communication must contain, or be accompanied by, a statement informing the employee of his right to seek advice from an *authorised person* or an *appointed representative*; and
- (5) the employer or A must notify the employee in writing prior to the employee entering into the *staff mortgage* of any remuneration A or B has received, or will receive, as a consequence of the employee entering into the *staff mortgage*, or the basis on which any such remuneration will be calculated.

Credit agreements offered to employees by employers (article 72F)

8.14.40AEA G

Article 72F exempts any *financial promotion* which is made to an employee by or on behalf of a *person* in relation to an exempt staff loan. An exempt staff loan is defined as a *credit agreement* which is:

- (1) offered by a *lender* to a *borrower* as an incident of employment with the *lender*, or with an undertaking in the same group as the *lender*; and

- (2) an exempt agreement under a provision of article 60G (exempt agreements: exemptions relating to the total charge for credit) of the *Regulated Activities Order* other than article 60G(2) (relating to loans by *credit unions*). *Guidance* on article 60G can be found in
 - PERG 2.7.19I G.

8.14.40AF G The exemptions described in ■ PERG 8.14.40A G to ■ PERG 8.14.40AEA G should enable employers (and their contracted service providers) to promote employee benefits packages that include any *pension schemes*, *work-related insurance schemes*, *staff mortgages* and certain staff loans to employees without undue concern that they may be breaching the restriction in section 21 of the Act. ■ PERG 8.14.34 G (Communications by employers and contracted service providers to employees) has further *guidance* about the application of section 21 to employers and contracted service providers generally.

Advice centres (article 73)

8.14.40B G Article 73 exempts any *financial promotion* made by a *person* in the course of carrying out his duties as an adviser for, or employee of, an advice centre. This is provided the *financial promotion* relates to:

- (1) a *home finance transaction*; or
- (2) rights under, or rights to or interests in rights under, a *life policy*; or
- (3) a child trust fund within the meaning of section 1(2) of the Child Trust Funds Act 2004.

8.14.40C G An advice centre is defined in article 73 as a body which:

- (1) gives advice which is free and in respect of which it does not receive any fee, commission or other reward;
- (2) provides debt advice as its principal financial services activity; and
- (3) in the case of a body which is not part of a local authority, holds adequate professional indemnity insurance or a guarantee providing comparable cover.

This exemption should be of particular use to bodies such as Citizens Advice Bureaux.

Other issues

8.14.41 G Several exemptions, including article 43 of the *Financial Promotion Order* (Members and creditors of certain bodies corporate), apply only in relation to relevant *investments* being *shares* or *debentures* or *alternative debentures* in the *body corporate* or a member of its group, or *warrants* or *certificates representing certain securities* relating to such *shares* or *debentures* or *alternative debentures*. In the *FCA's* view, an exchangeable *debt security* which is partly a *debenture* or *alternative debenture* and partly an *option* is a relevant *investment* for these purposes.

- 8.14.42** **G** The exemptions for bearer instruments (articles 41 and 42 of the *Financial Promotion Order*) relate to *financial promotions* made to or directed at *persons* entitled to bearer instruments. For clarity, the *FCA* takes the view that *persons* who hold bearer instruments through a clearing system such as Euroclear or Clearstream are *persons* entitled to those instruments for the purposes of articles 41 and 42.

8.15 Financial promotions by members of the professions (articles 55 and 55A)

Real time financial promotions by professional firms

8.15.1 **G** Article 55 of the *Financial Promotion Order* contains a specific exemption for *professional firms* allowing them to make *solicited or unsolicited real time financial promotions*. This is provided the *financial promotion* is made:

- (1) by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption*; and
- (2) to someone who has already (that is, before the *financial promotion* is made) engaged the *person* making the *financial promotion* to provide professional services (that is services which are not *regulated activities* and whose provision is supervised and regulated by a *Designated Professional Body*).

8.15.2 **G** The article 55 exemption also requires that:

- (1) the *financial promotion* relates to an activity to which the *Part XX exemption* applies or which would be a *regulated activity* but for the exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) which concerns activities which are a necessary part of professional services; and
- (2) the activity to which the *financial promotion* relates would be undertaken for the purposes of, and be incidental to, the provision of professional services to or at the request of the recipient.

8.15.3 **G** The *FCA* considers that, to satisfy the condition in ■ PERG 8.15.2G (2) that an activity be incidental to the provision of professional services, *regulated activities* cannot be a major part of the practice of the *professional firm*. The *FCA* also considers that the following further factors are relevant.

- (1) The scale of *regulated activity* in proportion to other professional services provided.
- (2) Whether and to what extent services that are *regulated activities* are held out as separate services.

- (3) The impression given of how the *professional firm* provides *regulated activities*, for example, through its advertising or other promotions of its services.

In the *FCA* opinion, one consequence of this is that the *professional firm* cannot provide services which are *regulated activities* if they amount to a separate business to the provision of professional services. This does not, however, preclude the *professional firm* operating its professional business in a way which involves separate teams or departments one of which handles the *regulated activities*.

8.15.4

G

One of the effects of the requirements in ■ PERG 8.15.2 G concerns *financial promotions* which relate to an activity which is not a *regulated activity* as the result of an exclusion in the *Regulated Activities Order*. In this case, a *professional firm* using the *Part XX exemption* cannot make a *real time financial promotion* relying on article 55 of the *Financial Promotion Order* unless the exclusion is provided by article 67 of the *Regulated Activities Order*. Neither can a *professional firm* rely on article 55 to make *real time financial promotions*, in connection with the provision of professional services to an existing client, if the *financial promotions* are made to a third party. Third parties may be prospective counterparties, rather than a client. In such circumstances, another exemption would need to be available.

Non-real time financial promotions by professional firms

8.15.5

G

Article 55A of the *Financial Promotion Order* exempts *non-real time financial promotions* where the *financial promotion*:

- (1) is made by a *person* who carries on a *regulated activity* without needing *authorisation* under the *Part XX exemption* (referred to in ■ PERG 8.15.6 G and ■ PERG 8.15.7 G as 'Part XX activities'); and
- (2) contains a specified statement and is limited in its content to the matters referred to in ■ PERG 8.15.6 G.

8.15.6

G

A *financial promotion* made under article 55A must contain a statement in the following terms: "The [firm/company] is not authorised under the Financial Services and Markets Act 2000 but we are able in certain circumstances to offer a limited range of investment and consumer credit-related services to clients because we are members of [relevant designated professional body]. We can provide these investment and consumer credit-related services if they are an incidental part of the professional services we have been engaged to provide". The *financial promotion* may also set out the *Part XX activities* which the *person* is able to offer to his clients, provided it is clear that these are the incidental services to which the statement relates. The exemption also provides that a defect in the wording of the statement does not affect its validity. This is provided that the defect does not alter the meaning of the communication.

8.15.7

G

The article 55A exemption should enable *professional firms* to issue brochures, websites and other *non-real time financial promotions* without any need for *approval* by an *authorised person*. This is provided the *financial promotion* does not also contain an invitation or inducement relating to *regulated activities* other than those covered by the *Part XX exemption*. In

this respect, it should be noted that, unlike article 55, the article 55A exemption does not extend to activities which are excluded under article 67 of the *Regulated Activities Order*. The *FCA* takes the following views in relation to article 55A.

- (1) It is not necessary for the details of the Part XX activities to be set out in one place or adjacent to the statement. A brochure or website, for example, may contain details of Part XX activities in various places so long as it is made clear that they will be incidental investment activities as referred to in the statement. So, this only needs to be set out once in the brochure or website.
- (2) The inclusion of contact details would be regarded as part of the description of Part XX activities.
- (3) A *financial promotion* made under article 55A may be likely, on occasion, to result in the carrying on by the *professional firm* of activities which are excluded under the *Regulated Activities Order*. However, this does not mean that the *financial promotion* will fail to satisfy the terms of article 55A. There will be occasions where a *professional firm* will have to offer to provide services which may or may not involve Part XX activities or excluded activities. In the area of corporate finance, for example, a *professional firm* may offer its services in relation to the sale of an incorporated business or a substantial shareholding in such a business. It will not be clear whether the *professional firm's* services will be Part XX activities or excluded activities until the details of a proposed deal are known. Similarly, a *professional firm* may offer services which in some instances, will fall under the 'necessary' exclusion in article 67 of the *Regulated Activities Order* but, in others, will be Part XX activities. In practice, it will often be impossible for a *professional firm* to distinguish between Part XX activities and excluded activities at the preliminary stage of a brochure or website offering its services. In the *FCA's* view, the article 55A exemption will apply provided the only *regulated activities* held out in the brochure, website or other *non-real time financial promotion* are Part XX activities. It will, of course, be possible for a *professional firm* to make an offer involving excluded activities to a *person* who responds to a *financial promotion* issued under article 55A. But this is provided another exemption (such as the one-off *financial promotion* exemption (see ■ PERG 8.14.3 G)) is available in respect of any subsequent *financial promotions*.



8.16 Financial promotions concerning funeral plans

8.16.1

G

Section 21 of the Act came into force for *financial promotions* about funeral plans on 1 January 2002. A *financial promotion* about funeral plans is subject to the restriction in section 21 of the Act if it relates to a pre-paid funeral plan of any kind where the provider of the plan carries on the *regulated activity of entering as provider into a funeral plan contract* under article 59 of the *Regulated Activities Order* (see ■ PERG 2.8.14 G). This is the case even if the actual plan being promoted is excluded under article 60 of the *Regulated Activities Order*. However, providers may choose only to enter into *funeral plan contracts* which are excluded under article 60 of the *Regulated Activities Order*. If this is the case, any *financial promotion* relating to those plans will not be subject to the restriction in section 21 of the Act.



8.17 Financial promotions concerning agreements for qualifying credit

8.17.1 G Section 21 applies to *financial promotions* concerning agreements for *qualifying credit* and relevant consumer credit. ■ PERG 8.17.1A G to ■ PERG 8.17.18 G has *guidance* about the treatment of *financial promotions* concerning agreements for *qualifying credit*. PERG 8.17-AG has *guidance* about *financial promotions* concerning relevant consumer credit.

Introduction

8.17.1A G Section 21 also applies to *financial promotions* concerning *home reversion plans*, *home purchase plans* and *regulated sale and rent back agreements*. *Guidance* on these activities and related *financial promotions* is given in ■ PERG 14 (*Guidance on home reversion, home purchase and regulated sale and rent back activities*).

Controlled investment: agreement for qualifying credit

8.17.2 G Rights under an agreement for *qualifying credit* are a *controlled investment*. *Qualifying credit* is defined in paragraph 10 of Schedule 1 to the *Financial Promotion Order* (*Controlled activities*) as credit provided pursuant to an agreement under which:

- (1) the lender is a *person* who carries on the *regulated activity* of *entering into a regulated mortgage contract* (whether or not he is an *authorised or exempt person* under the Act); and
- (2) the obligation of the borrower to repay is secured (in whole or in part) on land.

8.17.3 G An agreement for *qualifying credit* includes the following types of loan in addition to those that would be a *regulated mortgage contract*, but in each case only if the lender carries on the *regulated activity* of *entering into regulated mortgage contracts*:

- (1) [deleted]
- (2) secured loans for buy-to-let or other purely investment purposes;
- (3) loans secured on land situated outside the *United Kingdom*;

- (4) loans that include some unsecured credit such as a flexible mortgage that includes an unsecured credit card; and
- (5) commercial mortgages.

Controlled activities

8.17.4 **G** There are four controlled activities involving qualifying credit:

- (1) *providing qualifying credit*;
- (2) *arranging qualifying credit*;
- (3) advising on qualifying credit; and
- (4) agreeing to carry on any of (1) to (3).

8.17.5 **G** *Providing qualifying credit is a controlled activity under paragraph 10 of Schedule 1 to the Financial Promotion Order. In the FCA's view, 'providing' means, in this context, providing as lender; an intermediary does not 'provide' qualifying credit.*

8.17.6 **G** *Arranging qualifying credit is a controlled activity under paragraph 10A of Schedule 1 to the Financial Promotion Order; that is, making arrangements:*

- (1) for another *person* to enter as borrower into an agreement for *qualifying credit*; or
- (2) for a borrower under a *regulated mortgage contract* entered into on or after 31 October 2004 or a borrower under a *legacy CCA mortgage contract* to vary the terms of that contract in such a way as to vary that person's obligations under that contract.

This means that invitations and inducements relating to the services of mortgage arrangers will potentially be within the scope of section 21 of the Act.

8.17.7 **G** Advising on qualifying credit is a *controlled activity* under paragraph 10B of Schedule 1 to the *Financial Promotion Order*; that is, advising a *person* if the advice is:

- (1) given to the *person* in his capacity as a borrower or potential borrower; and
- (2) advice on the merits of that person's doing any of the following:
 - (a) entering into an agreement for *qualifying credit*; or
 - (b) varying the terms of a *regulated mortgage contract* entered into by that person's on or after 31 October 2004 or the terms of a *legacy CCA mortgage contract* entered into by that person in such a way as to vary that person's obligations under that contract.

This means that invitations and inducements relating to the services of mortgage advisers will potentially be within the scope of Section 21 of the Act.

8.17.8 G Agreeing to carry on each of these three *controlled activities* is also a *controlled activity* under paragraph 11 of Schedule 1 to the *Financial Promotion Order*.

Application of exemptions to financial promotions about agreements for qualifying credit

8.17.9 G The exemptions in Part IV of the *Financial Promotion Order* (Exempt communications: all controlled activities) will apply to *financial promotions about qualifying credit*. Some of the exemptions in Part VI of the *Financial Promotion Order* (Exempt communications: certain controlled activities) will also apply. Those of particular note are referred to in ■ PERG 8.17.10 G to ■ PERG 8.17.12 G.

8.17.10 G Article 46 (Qualifying credit to bodies corporate) exempts any *financial promotion* about providing *qualifying credit* (or relevant consumer credit or consumer hire) if it is:

- (1) made to or directed at *bodies corporate* only; or
- (2) accompanied by an indication that the *qualifying credit* to which it relates is only available to *bodies corporate*.

8.17.11 G [deleted]

8.17.12 G Article 28B (Real time communications: introductions) exempts a *real time financial promotion* that relates to one or more of the *controlled activities about regulated mortgage contracts*, as well as *home reversion plans*, *home purchase plans*, *regulated sale and rent back agreements*, certain *consumer hire agreements* and relevant credit agreements. The exemption is subject to the following conditions being satisfied:

- (1) the *financial promotion* must be made for the purpose of, or with a view to, introducing the recipient to a *person* ('N') who is:
 - (a) an *authorised person* who carries on the *controlled activity* to which the communication relates; or
 - (b) an *appointed representative*, where the *controlled activity* is also a *regulated activity* in respect of which the *appointed representative* is exempt or in relation to which sections 20 (1) and (1A) and 23 (1A) of the *Act* do not apply by virtue of section 39(1D) of the *Act* (see ■ SUP 12.2.2AG (3)); or
 - (c) an overseas person who carries on the *controlled activity* to which the communication relates; for this purpose, an 'overseas person' is a *person* who carries on any of the *controlled activities about home finance transactions* or of providing relevant consumer credit or consumer hire but does not do so, or offer to do so, from a permanent place of business maintained by him in the *United Kingdom*; and

- (2) the *person* ('M') communicating the *financial promotion*:
- (a) must not receive any money paid by the recipient in connection with any transaction that the recipient enters into with or through N as a result of the introduction, other than money payable to M on M's own account; and
 - (b) before making the introduction, must disclose to the borrower the following information where it applies to M:
 - (i) whether M is a member of the same *group* as N;
 - (ii) details of any payment which M will receive from N, by way of fee or commission, for introducing the recipient to N; and
 - (iii) an indication of any other reward or advantage arising out of M's introducing to N.

8.17.13 G Introducers can check whether a *person* is an *authorised person* or an *appointed representative* by visiting the FCA's register at www.fca.org.uk/firms/financial-services-register. If an *authorised person* has *permission* to carry on a *regulated activity* (which can be checked on the FCA's register) it is reasonable, in the FCA's view, to conclude that the *authorised person* carries on that activity (but not a *controlled activity* which is not a *regulated activity*). The FCA would normally expect introducers to request and receive confirmation of other facts necessary to satisfy the condition in ■ PERG 8.17.12G (1), prior to proceeding with an introduction.

8.17.14 G In the FCA's view, money payable to an introducer on his own account includes money legitimately due to him for services rendered to the borrower, whether in connection with the introduction or otherwise. It also includes sums payable in connection with transfer of property to an introducer (for example, a housebuilder) by a borrower. For example, article 28B allows a housebuilder to receive the purchase price on a property that he sells to a borrower, whom he previously introduced to an *authorised person* or *appointed representative* to help him finance the purchase in return for a fee payable by the borrower, and still take the benefit of the exclusion. This is because the sums that the housebuilder receives in connection with the introduction and the sale of his property to the borrower are both 'payable to him on his own account'. The housebuilder could also receive a commission from the *person* introduced to.

8.17.15 G In the FCA's view, the provision of details of fees or commission referred to in ■ PERG 8.17.12G (2)(b)(ii) does not require an introducer to provide an actual sum to the borrower, where it is not possible to calculate the full amount due prior to the introduction. This may arise in cases where the fee or commission is a percentage of the eventual loan taken out and the amount of the required loan is not known at the time of the introduction. In these cases, it would be sufficient for the introducer to disclose the method of calculation of the fee or commission, for example the percentage of the eventual loan to be made by N.

8.17.16 G In the FCA's view, the information condition in ■ PERG 8.17.12G (2)(b)(iii) requires the introducer to indicate to the borrower any other advantages accruing to him as a result of ongoing arrangements with N relating to the introduction of borrowers. This may include, for example, indirect benefits

such as office space, travel expenses, subscription fees. This and other relevant information may, where appropriate, be provided on a standard form basis to the borrower. The FCA would normally expect an introducer to keep a written record of disclosures made to the borrower under article 33A of the *Regulated Activities Order* including those cases where disclosure is made on an oral basis only.

8.17.17 **G**

8.17.18 **G**

Interaction with providing relevant consumer credit

8.17.19 **G**

Rights under a relevant credit agreement are also a *controlled investment*. A relevant credit agreement is a *credit agreement* other than a *regulated mortgage contract* or a *regulated home purchase plan*. Entering into a relevant credit agreement as lender, or exercising or having the rights to exercise the rights of the lender under such an agreement, is a *controlled activity* under paragraph 10BA of Schedule 1 to the *Financial Promotion Order*, except where the agreement is for the provision of *qualifying credit*. Further guidance on providing relevant consumer credit is given in ■ PERG 8.17-A.

8.17.20 **G**

■ CONC 3 contains *rules* about *financial promotions* relating to *credit-related regulated activity*. ■ CONC 3 does not apply, however, to the *communication, or approval for communication, of a financial promotion* to the extent it concerns *qualifying credit*. ■ MCOB 3A applies to the *communication or approval of a financial promotion of qualifying credit*. This means that a *financial promotion about credit* will not usually be subject to both ■ MCOB 3A and ■ CONC 3 unless it is about secured and unsecured lending. *Guidance* on the potential application of ■ MCOB 3A and ■ CONC 3 to particular types of *financial promotion of credit* is given in the table in ■ PERG 8.17.21 G. *Firms* must also comply with *Principle 7* (a *firm* must pay due regard to the information needs of its *clients*, and communicate information to them in a way which is clear, fair and not misleading).

8.17.21 **G**

Guide to potential application of ■ MCOB 3A and ■ CONC 3 to *financial promotion of credit*. This table belongs to ■ PERG 8.17.20 G.

	Subject of promotion	MCOB 3A may apply	CONC 3 may apply
(1)	<i>regulated mortgage contracts</i>	Yes	No
(2)	credit agreements secured on land where the lender also enters into <i>regulated mortgage contracts</i> as lender	Yes	No
(3)	credit agreements not secured on land, whether or not the lender also enters into <i>regulated mortgage contracts</i> as lender	No	Yes

	Subject of promotion	MCOB 3A may apply	CONC 3 may apply
(4)	credit agreements secured on land where the lender does not enter into <i>regulated mortgage contracts</i> as lender	No	Yes
(5)	credit agreements partly secured on land that include some unsecured credit and where the lender enters into <i>regulated mortgage contracts</i> as lender	Yes	No
(6)	credit agreements with features as in (1), (2) or (5) promoted in combination with other unsecured credit agreements	Yes	Yes



8.17-A Financial promotions concerning consumer credit and consumer hire

8.17-A.1 **G** Section 21 of the *Act* applies to *financial promotions* in relation to relevant consumer credit and consumer hire. This section sets out guidance about such *financial promotions*.

Controlled investments

8.17-A.2 **G** Rights under a relevant credit agreement are a *controlled investment*. A relevant credit agreement is defined as a *credit agreement* other than a *regulated mortgage contract* or a *regulated home purchase plan*.

8.17-A.3 **G** Rights under a *consumer hire agreement* are also a *controlled investment*.

Controlled activities

8.17-A.4 **G** Providing relevant consumer credit is a *controlled activity*. This is defined as entering into a relevant credit agreement (other than an agreement under which *qualifying credit* is provided) as *lender*, or exercising or having the rights to exercise the rights of the *lender* under such an agreement.

8.17-A.5 **G** The *controlled activities* also include providing consumer hire. A *person* provides consumer hire if he enters into a *regulated consumer hire agreement* (or an agreement that would be such an agreement were it not exempt under article 60O (exempt agreements: exemptions relating to the nature of the agreement) or 60Q (exempt agreement: exemptions relating to nature of hirer) of the *Regulated Activities Order*) as *owner* or exercises or has the right to exercise the rights of the *owner* under such an agreement.

8.17-A.6 **G** Operating an electronic system in relation to lending is a *controlled activity*. For the purposes of this *controlled activity*, the *controlled investment* of rights under a relevant credit agreement includes rights under an agreement within paragraph 4C(4) of Schedule 1 to the *Financial Promotion Order* (which is similar to an agreement within article 36H of the *Regulated Activities Order*, guidance on which is given in ■ PERG 2.7.10 G).

8.17-A.7 **G** There are three other *controlled activities* that involve both of the *controlled investments* of relevant credit agreements and consumer hire agreements:

- (1) credit broking;
- (2) debt adjusting;
- (3) debt counselling;

8.17-A.8 G The *controlled activities* in ■ PERG 8.17-A.6 G and ■ PERG 8.17-A.7 G are substantially the same as the *regulated activities* of *operating an electronic system in relation to lending, credit broking, debt adjusting and debt counselling* (although an activity is not the *controlled activity* of credit broking to the extent that it constitutes the *controlled activity* of arranging *qualifying credit*). *Guidance* on these *regulated activities* is given in ■ PERG 2.7.7E G (credit broking), ■ PERG 2.7.7H G (operating an electronic system), ■ PERG 2.7.8B G (debt adjusting) and ■ PERG 2.7.8C G (debt counselling). Agreeing to carry on the above activities also constitutes a *controlled activity*.

Application of exemptions to financial promotions about agreements for relevant consumer credit or consumer hire

8.17-A.9 G *Financial promotions* about relevant consumer credit or consumer hire are subject to the exemptions in Part IV of the *Financial Promotion Order* (Exempt communications: all controlled activities). A number of the exemptions in Part VI of the *Financial Promotion Order* (Exempt communications: certain controlled activities) also apply. *Guidance* on some of these (which apply to *financial promotions* about both *qualifying credit* and relevant consumer credit) is given in ■ PERG 8.17.10 G to ■ PERG 8.17.12 G. There is one exemption that applies specifically to relevant consumer credit and consumer hire, referred to in ■ PERG 8.17-A.10 G.

Promotions of credit for business purposes (article 46A)

8.17-A.10 G

- (1) Article 46A of the *Financial Promotion Order* exempts a *communication* which relates to the *controlled activities* of operating an electronic system in relation to lending, providing relevant consumer credit or providing consumer hire.
- (2) This exemption applies only if the *communication*:
 - (a) indicates clearly that a *person* is willing to engage in the investment activity for the purposes of another *person's* business; and
 - (b) does not indicate (by express words or otherwise) that the *person* is willing to engage in the investment activity for any other purpose.
- (3) For the purposes of this exemption, references to a "business" do not include a business carried on by the *person communicating* the promotion, or by a *person* who is a *credit broker* in relation to the agreement to which the promotion relates.

8.17A Financial promotions concerning insurance distribution activities

8.17A.1 **G** The application of section 21 of the *Act* and of exemptions in the *Financial Promotion Order* to invitations or inducements about *insurance distribution activities* will vary depending on the type of activity. The implementation of the *IDD* has not led to any changes in the definitions of a *controlled investment* or a *controlled activity* under the *Financial Promotion Order*. So:

- (1) rights under any *contract of insurance* are a *controlled investment*;
- (2) rights to or interests in rights under *life policies* are *controlled investments* but rights to or interests in rights under other *contracts of insurance* are not;
- (3) the activities of:
 - (a) *dealing in investments as agent*;
 - (b) *arranging (bringing about) deals in investments*;
 - (c) *making arrangements with a view to transactions in investments*;
and
 - (d) *advising on investments*;where they relate to *contracts of insurance*, are *controlled activities* only where the *contract of insurance* is a *life policy*; and
- (4) the activity of *assisting in the administration and performance of a contract of insurance* is not a *controlled activity*.

8.17A.2 **G** This means that an *insurance intermediary* will not be *communicating a financial promotion*:

- (1) where the only activity to which the promotion relates is *assisting in the administration and performance of a contract of insurance*; or
- (2) purely by reason of his inviting or inducing *persons* to make use of his advisory or *arranging* services where they relate only to *general insurance contracts* or *pure protection contracts* or both.

But as regards (2), an intermediary will be *communicating a financial promotion* if he is also inviting or inducing *persons* to enter into a *contract of insurance*. This is because the making and performance of the contract by the insurer will be a *controlled activity* (of *effecting and carrying out a*

contract of insurance). *Insurance intermediaries* will, however, be able to use the exemptions in Part V of the *Financial Promotion Order* (see ■ PERG 8.13 (Exemptions applying to financial promotions concerning deposits and certain contracts of insurance) where they promote a *general insurance contract* or a *pure protection contract*. Where an *insurance intermediary* is promoting *life policies*, he will be able to use any exemptions in Part VI of the *Financial Promotion Order* that apply to a *contractually based investment*.

8.18 Financial promotions concerning the Lloyd's market

8.18.1

G

A person involved in *insurance business* written at Lloyd's may be making *financial promotions* when attracting another person:

- (1) to effect or carry out contracts of insurance written at Lloyd's (where the *controlled activity* which is the subject of the *financial promotion* is effecting and carrying out contracts of insurance); or
- (2) to have assets held under funds at Lloyd's (where the *controlled activity* may involve dealing in securities and contractually based investments, arranging deals in investments, managing investments or safeguarding and administering investments); or
- (3) to participate in particular *syndicates* at Lloyd's (where the *controlled activity* is advising on *syndicate* participation or arranging deals in *syndicate* participations or underwriting capacity); or
- (4) to participate indirectly in the Lloyd's market as a shareholder of a corporate *underwriting member* or a limited partner in a *limited liability partnership* which is an *underwriting member* (where the *controlled activity* is dealing in, arranging deals in or advising on shares or units); or
- (5) to take out insurance which is written at Lloyd's (where the *controlled activity* is effecting a contract of insurance).

8.18.2

G

Most persons making *financial promotions* as referred to in this section are likely to be *authorised persons*. As such they will be subject to the appropriate *financial promotion rules*. Any persons who are making *financial promotions* as referred to in ■ PERG 8.18.1 G and who do not need to be *authorised persons* will need to ensure that their *financial promotions* are approved by an *authorised person* or that a specific exemption applies (see ■ PERG 8.13).

8.19 Additional restriction on the promotion of life policies

8.19.1

G Article 10 of the *Financial Promotion Order* (Application to qualifying contracts of insurance) precludes any of the exemptions from applying to a *financial promotion* which invites or induces a *person* to enter into a *life policy* with a *person* who is not:

- (1) an *authorised person*; or
- (2) an exempt *person* who is exempt in relation to *effecting or carrying out contracts of insurance* of the class to which the promotion relates; or
- (3) a *company* with its head office or a *branch* or agency in another *EEA State* and which is entitled to carry on in that country the class of *insurance business* being promoted; or
- (4) a *company* authorised in one of the following countries or states to carry on the class of *insurance business* being promoted:
 - (a) Guernsey; or
 - (b) the Isle of Man; or
 - (c) Pennsylvania; or
 - (d) Iowa;
 - (e) Jersey.

■ COBS 4.9.4 R imposes a similar restriction on *authorised persons* concerning their *communicating or approving financial promotions* in the precluded circumstances.

8.20 Additional restriction on the promotion of collective investment schemes

8.20.1 G Where *collective investment schemes* are concerned additional restrictions are placed on their promotion to ensure that only those which are regulated are promoted to the general public. This is achieved by a combination of sections 21 and 238 (Restrictions on promotion) of the Act as explained in ■ PERG 8.20.2 G. A *regulated collective investment scheme* is:

- (1) an *authorised unit trust scheme*; or
- (1A) an *authorised contractual scheme*; or
- (2) an *investment company with variable capital*; or
- (3) a *scheme* recognised under section 264 of the Act (Schemes constituted in other EEA States); or
- (4) [deleted]
- (5) a *scheme* recognised under section 272 of the Act (Individually recognised overseas schemes).

8.20.2 G Section 21 precludes the promotion by *unauthorised persons* of *unregulated collective investment schemes* unless the *financial promotion* is approved by an *authorised person* or is exempt. Section 238 then precludes the promotion of an *unregulated collective investment scheme* by *authorised persons* except where:

- (1) there is an exemption in an order made by the Treasury under section 238(6); or
- (2) the *financial promotion* is permitted under *rules* made by the FCA under section 238(5) to exempt the promotion, otherwise than to the general public, of *schemes* of certain descriptions; or
- (3) the *scheme* is a single property scheme and its promotion is exempt under regulations made by the Treasury under section 239 of the Act (Single property schemes).

In addition, section 240 of the Act (Restriction on approval of promotion) precludes an *authorised person* from *approving a financial promotion* for the purpose of section 21 if he would not be able to *communicate* it himself under section 238.

8.20.3

G

- (1) The Treasury has made an order under section 238(6). This is the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (as amended by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 (SI 2001/2633), by articles 7 to 10 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157) and, by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion and Promotion of Collective Investment Schemes) (Miscellaneous Amendments) Order 2005 (SI 2005/270) ('the CIS Financial Promotion Order') and by regulation 10 of The Collective Investment in Transferable Securities (Contractual Scheme) Regulations 2013).
- (2) The overall effect of the CIS Financial Promotion Order is to ensure that *authorised persons* are able to promote an *unregulated collective investment scheme* at least as widely as an *unauthorised person* is allowed to do under section 21 without needing the approval of an *authorised person*. In general terms, the order contains exemptions equivalent to those in the *Financial Promotion Order* which are relevant to units in an *unregulated collective investment scheme*. Guidance in ■ PERG 8 relating to exemptions in the *Financial Promotion Order* will apply equally to those exemptions where they appear in the CIS Financial Promotion Order. The main exception to this relates to the exemption for one-off *financial promotions* in article 15 of the CIS Financial Promotion Order. That article provides conditions which, if met, are conclusive proof that a *financial promotion* is one-off. However, these do not include the condition that the identity of the product or service must be determined having regard to the recipient's circumstances (see ■ PERG 8.21.8G (2) and ■ PERG 8.14.4G (2)).

8.20.4

G

The FCA has made *rules* under section 238(5) which allow *authorised firms* to *communicate or approve a financial promotion* for an *unregulated collective investment scheme* in certain specified circumstances. These circumstances are set out in ■ COBS 4.12.4 R To date, the Treasury has not made an order exempting single property schemes under section 239.

8.20.5

G

In addition, where the *collective investment scheme* is an *AIF*, the *marketing* of that *scheme* is subject to additional restrictions (see ■ PERG 8.37).

8.21 Company statements, announcements and briefings

- 8.21.1** **G** There is a general concern that the practice of *companies* issuing statements and giving briefings may involve a *financial promotion*. These arise sometimes as a result of requirements imposed by a listing authority or an exchange or market, **■ PERG 8.4.14 G** offers *guidance* on when such statements or briefings may amount to or involve an inducement to *engage in investment activity*. It indicates that whilst statements of fact alone will not be inducements, there may be circumstances where there is a promotional element which may amount to an inducement (typically to buy the *company's shares*). In the *FCA's* experience, it is rare for *company* statements or briefings to involve an invitation.
- 8.21.2** **G** It is common practice for *listed companies* to brief analysts, usually at the time of the *company's* preliminary, interim and, if applicable, quarterly results and after the information has been issued to the market as a whole. Briefings may be made personally to a small or large number of analysts in a meeting or through a conference call. It is increasingly becoming the practice for *listed companies* to make their briefings available live to journalists and the general public on the basis that they may listen to or view, but not take part in, the briefing and any question and answer session. This is usually done through a conference call or a live broadcast (usually termed a webcast) through the *company's* website or the website of a specialist provider. Where such briefings include a *financial promotion* they must be *approved* by an *authorised person* (if they are *non-real time financial promotions*) or exempt.
- 8.21.3** **G** **■ PERG 8.21.4 G** to **■ PERG 8.21.21 G** set out the *FCA's* views on the potential relevance of certain exemptions to *company* statements and briefings. The exemptions are referred to in the same order as the *Financial Promotion Order*. In the *FCA's* view, these exemptions (whether alone or, where applicable, in combination) should enable most statements and briefings which involve *financial promotions* to be made by the *company* concerned without the need for *approval*. In particular, the *FCA* considers that article 69 (see **■ PERG 8.21.17 G**) should ensure that *financial promotions* made during the course of analyst briefings by *listed* and *AIM companies* are exempt and do not require *approval*. Some but not all of these exemptions apply equally to *financial promotions* which are *communicated* by a third party (for instance, a public relations adviser) on behalf of its corporate client. Those exemptions which are not available to a third party in such circumstances are those contained in article 20A (see **■ PERG 8.21.6 G**), 59 (see **■ PERG 8.21.11 G**), and 69 (see **■ PERG 8.21.17 G**).

Article 17: Generic promotions

8.21.4 **G** Any statement or briefing which did not identify the *company* as an *issuer* of *securities* (for example, by referring to its *securities*) and which does not identify any other particular *investment* or provider of *investments* or *investment services* will be exempt as a generic promotion (see ■ PERG 8.12.14 G). In practice, it will be unlikely that such a statement or briefing would involve a *financial promotion* but the article 17 exemption may be useful where any doubt arises.

Article 19: Investment professionals

8.21.5 **G** Where statements or briefings are only available to analysts who are, or who work for, *authorised persons* (including *overseas persons* who would need to be *authorised* if they were conducting their business in the *United Kingdom*), article 19 will exempt any *financial promotion* that may be made (see ■ PERG 8.12.21 G). Furthermore, where a *financial promotion* is made in the course of an interactive dialogue with an analyst and is addressed to him, the *financial promotion* will be regarded as having been made to that analyst irrespective of who else may hear or view it (article 6(b) of the *Financial Promotion Order* (see ■ PERG 8.6.9 G). For example, where a representative of the *company* is responding to a particular question article 19 would then apply. This is not to say that every time a *company* representative answers a question his response, if it involves a *financial promotion*, will be addressed to the questioner for the purpose of article 6(b). This will depend upon the particular circumstances.

Article 20A: Promotion broadcast by company director etc

8.21.6 **G** ■ PERG 8.12.32 G contains detailed *guidance* on the exemption in article 20A. The exemption is capable of applying to *financial promotions* in a *company* statement or briefing where they are *communicated* through a webcast if the website is a regularly updated news or information service. For this to be the case, the website must be a service provided to *persons* who use it (so it must not, for example, simply be an advertising vehicle) and that service must be one of providing news or information which will be updated regularly. This is capable of applying to some corporate websites. For example, the website of a *company* may amount to a service of information about the *company's* activities, services and products which is regularly updated and the webcast may be seen as part of that service. Not all corporate websites will qualify, however, and each website must be considered on its merits. *Company* representatives seeking to use this exemption will need to bear in mind any restrictions on the making available of certain information to which they may be subject (for example, under *listing rules*).

Article 28 and 28A: One off promotions

8.21.7 **G** Article 28 applies to one-off *non-real time* and *solicited real time financial promotions*. Article 28A applies to one-off *unsolicited real time financial promotions*. It is possible that articles 28 or 28A could apply to *financial promotions* in *company* statements or briefings if they were to be made other than to an analyst or journalist. In this respect, the comments made in ■ PERG 8.14.3 G about one-off *financial promotions* are relevant.

Article 43: Members and creditors of certain bodies corporate

8.21.8

G

Article 43 applies to *non-real time* and *solicited real time financial promotions* made by, or on behalf of, a *company* ('C') to *persons* who, in broad terms, are:

- (1) members or creditors of C or a *group* member of C ('G');
- (2) entitled to a relevant investment issued by C or G;
- (3) entitled to become a member of C or G;
- (4) entitled to have transferred to them title to a relevant investment issued by C or G.

The *financial promotion* must relate only to relevant investments issued or to be issued by C or G or, in certain circumstances, another *person* (see ■ PERG 8.21.9G (2)). C and G must not be *open-ended investment companies*.

8.21.9

G

A 'relevant investment' in article 43 means:

- (1) *shares* or *debentures* or *alternative debentures*; and
- (2) *warrants* and *certificates representing certain securities* relating to (1) and issued by G or a *person* acting on behalf of or under arrangements made with C.

Article 43 allows a *company* to *communicate* a *financial promotion* to its shareholders about rights issues or a cash offer by a third party for their *shares*. It also allows a *company* to *communicate* with its creditors about restructuring debt obligations.

Article 47: Persons in the business of disseminating information

8.21.10

G

Article 47 will exempt *financial promotions* in *company* statements or briefings where they are made to members of the press and may be combined with article 19 (Investment professionals). This means that *companies* will only need to look for other exemptions where the recipients of their *financial promotions* are *persons* other than analysts or journalists or both.

Article 59: Annual accounts and directors' report

8.21.11

G

Article 59 is capable of applying to *financial promotions* in *company* statements and briefings where they are accompanied by:

- (1) the whole or any part of the annual accounts of the *company* (provided it is not an *open-ended investment company*); or
- (2) any report prepared and approved by the directors of such a *company* under sections 414A and 414D of the Companies Act 2006 (strategic reports) or sections 415 and 419 of that Act (directors' reports), or corresponding legislation in another *EEA State*.

In this respect, the *FCA* considers that the annual accounts (or part of them) or directors' report accompanies a *financial promotion* where it is made available to the recipients of the *financial promotion* at the same time. The *financial promotion* should refer to the accompanying material. For example, the accounts or report may be available on a *company's* website and referred to in a *financial promotion* on that website. Or they may be contained in or enclosed with a written communication (including an e-mail) or handed over during a meeting or discussion.

8.21.12 G Article 59 imposes certain conditions.

- (1) The *financial promotion* must be an inducement and not be an invitation or amount to advice to acquire or dispose of an *investment*.
- (2) The inducement must not relate to any *investment* other than *shares* or *debentures* or *alternative debentures* issued, or to be issued, by the *company* making the *financial promotion* (or a member of its *group*) or *warrants* relating to or certificates representing such *shares* or *debentures* or *alternative debentures*.
- (3) If the *financial promotion* contains any reference to past prices of or yields on the *company's securities* as referred to in (2), it must be accompanied by a statement that past performance cannot be relied on as guide to future performance.

Article 67: Promotions required or permitted by market rules

8.21.13 G Article 67 exempts any *financial promotion* other than an *unsolicited real time financial promotion* which relates to *shares*, *debentures*, *alternative debentures*, *government and public securities*, *warrants* or *certificates representing certain securities* which are permitted to be traded or dealt in on a relevant market. A relevant market for the purposes of article 67 is one which meets the criteria in Part I of, or is specified in or established under the rules of an exchange specified in Part III of schedule 3 to the *Financial Promotion Order*. This includes *recognised investment exchanges* and various overseas markets. The *financial promotion* must, however, be required or permitted to be *communicated* by the rules of the market or by a body which either regulates the market or regulates offers or issues of *investments* to be traded on the market.

8.21.14 G The reference to *financial promotions* which are permitted to be *communicated* relates, in the *FCA's* opinion, to something which is expressly permitted rather than simply not expressly prohibited. Article 67 itself does not specify any particular medium for *communicating* required or permitted material. So, it will be enough for the *financial promotion* to be part of a document which is itself required or permitted to be *communicated* (such as reports or financial statements). Market rules or usual market practice may require the *financial promotion* to be *communicated* in a particular form or by a particular medium. However, the exemption will still apply if the *financial promotion* is *communicated* in a different form or by a different medium provided that its substance is unchanged. But article 67 will not apply to a *financial promotion* simply because it is included in another document which is required or permitted where the *financial promotion* amounts to additional information to that which is required or permitted. Neither does article 67 specify what form permission can take. In the *FCA's*

view, however, permission would need to be given either in rules or guidance applicable to the market in question.

8.21.15 G Article 67 refers to an *investment* which is permitted to be traded or dealt in on a relevant market. In the FCA's opinion, this includes a situation where a class of *securities* is traded on a relevant market but the *financial promotion* relates to new *securities* of that class which have not yet themselves been issued or started trading. Where *securities* of that class have not yet been admitted to trading on a relevant market, article 68 may apply – see ■ PERG 8.21.16 G.

Article 68: Promotions in connection with admission to certain EEA markets

8.21.16 G Article 68 applies where the *financial promotion* relates to *securities* which have not yet been admitted to trading but for which application has been or is to be made. It exempts a *non-real time* or a *solicited real-time financial promotion* which a relevant *EEA* market requires to be *communicated* before admission to trading can be granted. A relevant *EEA* market for this purpose is a market with its head office in an *EEA State* and which meets the conditions in Part I of Schedule 3 to the *Financial Promotion Order*. Article 68 also requires that the *financial promotion* be one:

- (1) which, if it were included in a prospectus issued in line with prospectus rules made under Part VI of the *Act*, would be required to be *communicated* by those rules; and
- (2) which is not accompanied by any information other than that information which is required or permitted to be published by the rules of the relevant *EEA* market.

Article 69: Promotion of securities already admitted in certain markets

8.21.17 G Article 69 is somewhat similar to article 59 in the conditions it imposes (see ■ PERG 8.21.12 G). There are two main differences between article 69 and article 59.

- (1) Article 69 does not apply to *unsolicited real time financial promotions*.
- (2) The requirement in article 59 that the *financial promotion* be accompanied by accounts or a report is replaced in article 69. It is replaced by a requirement that *shares* or *debentures* or *alternative debentures* of the *company* or another *body corporate* in its *group* (or *warrants* relating to or certificates representing such *investments*) are permitted to be traded on a relevant market (relevant market having the same meaning as in article 67 - see ■ PERG 8.21.13 G).

8.21.18 G [deleted]

8.21.19 **G** In the *FCA's* opinion, companies whose *securities* are permitted to be traded or dealt in on a relevant market should be able to make good use of the article 69 exemption. But such companies will need to ensure that they meet the specific requirements in article 69(3). In very general terms, a *financial promotion* will comply with these requirements if:

- (1) the only reason it is a *financial promotion* is that it contains or is accompanied by an inducement about certain *investments* issued, or to be issued, by the *company* or a *group* member; and
- (2) should it contain any reference to past prices of or yields on the *company's investments*, it is accompanied by a statement that past performance cannot be relied on as a guide to future performance.

Article 70: Promotions included in listing particulars, etc

8.21.20 **G** Article 70 applies to a *non-real time financial promotion* included in:

- (1) *listing particulars*; or
- (2) *supplementary listing particulars*; or
- (3) a prospectus or supplementary prospectus approved in line with *Prospectus Rules* or by the *competent authority* of another *EEA State* (provided the requirements of section 87H of the *Act* are met) – including part of such a prospectus or supplementary prospectus; or
- (4) any other document required or permitted to be published by *listing rules* or *Prospectus Rules*.

Article 70 also applies to a *non-real time financial promotion* comprising the final terms of an offer or the final offer price or amount of *securities* which will be offered to the public and that complies with articles 5(4), 8(1) and 14(2) of the *Prospectus Directive*.

The comments in ■ PERG 8.21.14 G about when something is required or permitted to be published apply also to (4).

General issues

8.21.21 **G** A requirement common to the exemptions in articles 59, 67 and 69 is that the *financial promotions* must not relate to *investments* other than those issued, or to be issued, by the *company* or a member of its *group*. The *FCA* is aware that there is concern about comments made in *company* statements or briefings. This is that they may be held to be inducements to acquire or dispose of, or exercise rights conferred by, an *investment* issued by a third party. For example, traded options on or certificates representing the *company's shares*. ■ PERG 8.4 sets out the *FCA's* general views on when a communication is an inducement. It appears to the *FCA* that, for a *company* statement or briefing to involve an inducement to *persons* to, for example, exercise rights under a traded option written on or acquire certificates representing the *securities*, it must seek to persuade or induce *persons* specifically to do that. The mere fact that a *person* reading, hearing or viewing a *company* statement or briefing containing an inducement to acquire the *company's securities* may be influenced to exercise traded options which he holds is not enough to make it an inducement to exercise those rights.

8.22 The Internet

- 8.22.1** **G** The Internet is a unique medium for *communicating financial promotions* as it provides easy access to a very wide audience. At the same time, it provides very little control over who is able to access the *financial promotion*.
- 8.22.2** **G** The test for whether the contents of a particular website may or may not involve a *financial promotion* is no different to any other medium. If a website or part of a website, operated or maintained in the course of business, invites or induces a *person* to *engage in investment activity*, it will be a *financial promotion*. The *FCA* takes the view that the *person* who caused the website to be created will be a *communicator*. So, any software engineers that may or may not have been involved in establishing the website, provided they have no interest in it other than being paid for its design, will not be *communicating financial promotions* contained in it. Similarly, an Internet services provider who merely manages a website for another *person* and who has no control over or responsibility for its contents will not be *communicating any financial promotion* in the site. An Internet service provider whose circumstances are such that he is *communicating financial promotions* for other *persons* may be able to use the exemption for mere conduits (see ■ PERG 8.12.18 G).
- 8.22.3** **G** The Internet also allows hypertext links, where two different sites in the Internet can be connected almost instantaneously by simply clicking on the link. The *FCA*'s views on the position of hypertext links (which should be read with the remainder of ■ PERG 8, especially ■ PERG 8.4 (Invitation or inducement)) are as follows.
- (1) A hypertext link may or may not be a *financial promotion* in itself. This will depend on the nature of the hypertext link and the context in which it is placed. However, taken in isolation, a hypertext link which is purely the name or logo of the destination will not be a *financial promotion* in its own right. More sophisticated links, such as banners or changeable text, may be *financial promotions*. This will depend upon the facts in each case.
 - (2) The material on a host website which contains the hypertext link may in itself be a *financial promotion*. For example, it may contain text which seeks to encourage or incite *persons* to activate the link with a view to *engaging in investment activity*.
 - (3) Website material which represents a directory of website addresses or e-mail addresses will not be a *financial promotion* in its own right. That is unless the material also contains an inducement to contact a named addressee with a view to *engaging in investment activity*.

- (4) The destination website (that is, the one that is reached through the hypertext link) may or may not be a *financial promotion*. This will depend upon the content of that website. Website operators are responsible for the contents of their website if it hosts or creates links to the websites of *unauthorised persons*. In most cases they will not be causing the *communication* of any *financial promotion* in those other websites and so will not be responsible for those websites complying with section 21. In some cases, however, the operator ('O') of a website which hosts a link to another website, may be causing the *communication* of a *financial promotion* on that other website. This will only arise when O has made arrangements with the operator of the other website under which O is to procure users of his site to access the link provided with a view to their *engaging in investment activity*.
- (5) An exemption may require certain indications to be made in a *financial promotion* on a website. In these cases, the requirement may be satisfied by putting information on separate pages which can be accessed through a link on the page, or one of the pages, which contains the *financial promotion*.

8.23 Regulated activities

8.23.1 **G** Under section 19 of the *Act* (The general prohibition) no *person* may, by way of business, carry on a *regulated activity* in the *United Kingdom* unless he is *authorised* or exempt. The meaning of *regulated activity* is set out in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) (as amended). Any *person* who breaches section 19 of the *Act* commits a criminal offence for which the maximum penalty is two years' imprisonment and an unlimited fine.

8.23.2 **G** Anyone who is carrying on a *regulated activity* is likely to make *financial promotions* in the course of or for the purposes of carrying on that activity. It is beyond the scope of this *guidance* to cover *regulated activities* as such (for a general guide see ■ PERG 2). There are circumstances, however, where *persons* whose main aim is either:

- (1) to make *financial promotions* for their own purposes or on behalf of others; or
- (2) to help other *persons* to make *financial promotions*;

may find themselves conducting *regulated activities*. Such *persons* may typically include publishers or broadcasters, financial commentators, Internet service providers and website operators and telephone marketing companies.

8.23.3 **G** The *regulated activities* which are likely to be conducted in the circumstances referred to in ■ PERG 8.23.2 G are:

- (1) giving advice on certain investments (articles 53 (Advising on investments), 53A (Advising on regulated mortgage contracts), 53B (Advising on regulated home reversion plans), 53C (Advising on regulated home purchase plans), 53D (Advising on regulated sale and rent back agreements) and 56 (Advice on syndicate participation at Lloyd's) of the *Regulated Activities Order*) - for example, where the *financial promotion* is the advice;
- (2) *making arrangements with a view to transactions in investments* (article 25(2) of the *Regulated Activities Order* (Arranging deals in investments));
- (2A) *making arrangements with a view to regulated mortgage contracts* (article 25A(2) of the *Regulated Activities Order* (Arranging regulated mortgage contracts));

- (2B) *making arrangements with a view to a home reversion plan* (article 25B(2) of the *Regulated Activities Order* (Arranging regulated home reversion plans));
- (2C) *making arrangements with a view to a home purchase plan* (article 25C(2) of the *Regulated Activities Order* (Arranging regulated home purchase plans));
- (2D) *making arrangements with a view to a regulated sale and rent back agreement* (article 25E(2) of the *Regulated Activities Order* (Arranging regulated sale and rent back agreements)); and
- (3) agreeing to carry on either (1) or (2) (article 64 of the *Regulated Activities Order* (Agreeing to carry on specified kinds of activity)).

8.23.4 **G** The *guidance* that follows is concerned with the *regulated activities* of *making arrangements with a view to transactions in investments* and *advising on investments (except P2P agreements)*. *Guidance on the regulated activities of making arrangements with a view to regulated mortgage contracts and advising on regulated mortgage contracts* is in **■ PERG 4** (*Guidance on regulated activities connected with mortgages*). *Guidance on the regulated activities of making arrangements with a view to a home reversion plan and advising on a home reversion plan, making arrangements with a view to a home purchase plan and advising on a home purchase plan, and making arrangements with a view to a regulated sale and rent back agreement and advising on a regulated sale and rent back agreement* is in **■ PERG 14** (*Guidance on home reversion, home purchase and sale and rent back activities*).

8.23.5 **G** As explained in **■ PERG 1.2.3AG**, where the *guidance* that follows uses the defined term *advising on investments*, this term should be read as referring only to the *regulated activity* (in article 53(1) of the *Regulated Activities Order*) of *advising on investments (except P2P agreements)*. Related text should be construed accordingly.

8.24 Advising on investments

- 8.24.-1** **G** The definition of the *regulated activity of advising on investments (except P2P agreements)* differs depending on the *person* giving the advice.
- 8.24.1** **G** Under article 53(1) of the *Regulated Activities Order*, for anyone except a *person* in ■ PERG 8.24.1AG, *advising on investments (except P2P agreements)* covers advice which:
- (1) is given to a *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
 - (2) is advice on the merits of his (whether as principal or agent):
 - (a) *buying, selling*, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security, a structured deposit or a relevant investment; or
 - (b) exercising or not exercising any right conferred by such an *investment to buy, sell*, subscribe for, exchange or redeem such an *investment*.
- 8.24.1A** **G**
- (1) However if a *person* is authorised for the purposes of the Act to carry on any *regulated activity* other than (or in addition to):
 - advising on investments (except P2P agreements)*; or
 - the *regulated activity of agreeing to carry on a regulated activity* in relation to (a);
 that *person* only *advises on investments (except P2P agreements)* if it is providing a *personal recommendation*.
 - (2) A *person* described in (1) is referred to in the *Regulated Activities Order* as appropriately authorised.
 - (3) ■ PERG 8.30B describes *personal recommendations*.
 - (4) The result is that for a *person* in (1), the definition of the *regulated activity of advising on investments (except P2P agreements)* only covers a subset of the advisory activities that apply to other *persons* giving advice.
 - (5) In the FCA's view a *person* is only appropriately authorised for the purposes of (1) if it is a *firm* whose *permission* includes *regulated activities* other than (or in addition to) the ones listed in (1)(a) and (b).

- 8.24.1B** G
- (1) A *firm* that is not appropriately authorised (see ■ PERG 8.24.1AG for what this means) will need *permission* for *advising on investments* (except *P2P agreements*) whether it wants:
 - (a) to give non-personalised advice (see (4)); or
 - (b) to give any other kind of advice coming within the *regulated activity of advising on investments* (except *P2P agreements*).
 - (2) If a *firm* in (1) only wants to give non-personalised advice, it may apply for an appropriate *limitation*.
 - (3) For a *firm* that is appropriately authorised:
 - (a) it may give non-personalised advice without the need to have *advising on investments* (except *P2P agreements*) in its *permission*;
 - (b) giving non-personalised advice will (for it) be an *unregulated activity*; and
 - (c) if it wishes to provide *personal recommendations*, its *permission* should include *advising on investments* (except *P2P agreements*).
 - (4) In this paragraph non-personalised advice means advice that:
 - (a) is covered by ■ PERG 8.24.1G; but
 - (b) is not a *personal recommendation*.

- 8.24.1C** G
- (1) ■ PERG 8.30B (Personal recommendations) is only relevant to a *firm* that is appropriately authorised.
 - (2) The rest of the material in this chapter about *advising on investments* (except *P2P agreements*) is still relevant to a *firm* that is appropriately authorised because, as explained in ■ PERG 8.30B.6G, that material is also relevant to the definition of *personal recommendation*.
 - (3) See ■ PERG 8.24.1AG for what appropriately authorised means.

- 8.24.1D** G For:
- (a) a *firm* that is not appropriately authorised (see ■ PERG 8.24.1AG for what appropriately authorised means); and
 - (b) an *unauthorised person*;
- all the material in this chapter about *advising on investments* (except *P2P agreements*) is relevant, except for ■ PERG 8.30B (Personal recommendations).
- (2) The definition of *advising on investments* (except *P2P agreements*) that applies to a *person* in (1) is the one in ■ PERG 8.24.1G. It is not relevant to such a *person* whether or not the advice is a *personal recommendation*.

- 8.24.2** **G** For advice to be covered by ■ PERG 8.24.1 G:
- (1) it must relate to an *investment* which is a *security, structured deposit* or a *relevant investment*;
 - (2) that *investment* must be a particular *investment*;
 - (3) it must be given to *persons* in their capacity as investors or potential investors;
 - (4) it must be advice (that is, not just information); and
 - (5) it must relate to the merits of investors or potential investors (or their agents) *buying, selling, subscribing for or underwriting* (or exercising rights to acquire, dispose of or underwrite) the *investment*.
- 8.24.3** **G** Each of the requirements referred to in ■ PERG 8.24.2G is considered in greater detail in ■ PERG 8.25 to ■ PERG 8.29.
- PERG 8.30 and ■ PERG 8.30A have further material about the definition of *advising on investments (except P2P agreements)* found in ■ PERG 8.24.1G.
- PERG 8.30B explains what a *personal recommendation* is.
- 8.24.4** **G** ■ PERG 8.24 to ■ PERG 8.30B only cover *advising on investments (except P2P agreements)*. They do not cover the following *regulated activities*, which also cover giving advice:
- (1) providing *basic advice* on a *stakeholder product* under article 52A of the *Regulated Activities Order*;
 - (2) *advising on P2P agreements*;
 - (3) *advising on regulated mortgage contracts*;
 - (4) *advising on a home reversion plan*;
 - (5) *advising on a home purchase plan*;
 - (6) *advising on a regulated sale and rent back agreement*;
 - (7) *advising on regulated credit agreements for the acquisition of land*;
 - (8) *advising on conversion or transfer of pension benefits*;
 - (9) *advising on syndicate participation at Lloyd's*; or
 - (10) *debt counselling*.
- 8.24.5** **G** ■ PERG 5.8 (The regulated activities: advising on contracts of insurance) explains how the material in ■ PERG 8.24 to ■ PERG 8.30A applies in the specific context of *contracts of insurance*.

**8.25 Advice must relate to an
investment which is a security or
contractually based investment**

8.25.1 **G** For the purposes of article 53(1) of the *Regulated Activities Order*, a security or relevant investment is any one of the following:

- (1) shares;
- (2) debentures;
- (2A) alternative debentures;
- (3) government and public securities;
- (4) warrants;
- (5) certificates representing certain securities;
- (6) units in collective investment schemes;
- (7) stakeholder pension schemes or personal pension schemes;
- (7A) emission allowances;
- (8) options;
- (9) futures;
- (10) contracts for differences;
- (11) contracts of insurance;
- (12) funeral plan contracts;
- (13) rights to or interests in such investments.

8.25.2 **G** Article 53(1) does not apply to advice given on any of the following:

- (1) deposit or other bank or building society accounts (but note the exceptions and points in ■ PERG 8.25.3G);
- (2) interests under the trusts of an occupational pension scheme (but rights under an occupational pension scheme that is a stakeholder pension scheme will be securities);

- (3) mortgages or other loans (but note that advising on *regulated mortgage contracts* is a separate *regulated activity* under article 53A of the *Regulated Activities Order* – see the *guidance* in ■ PERG 4 (Regulated activities connected with mortgages));
- (4) National Savings products;
- (5) foreign exchange (or cash);
- (6) commodities (for example, gold);
- (7) real estate;
- (8) any other physical property capable of having investment potential (for example, works of art, racehorses) unless investment is made through a *collective investment scheme*.

8.25.3

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- (1) There are some circumstances in which giving advice about a *deposit* is a *regulated activity*.
- (2) *Providing basic advice on a stakeholder product* is a separate *regulated activity* under article 52A of the *Regulated Activities Order*. A *stakeholder product* includes a stakeholder deposit account. See the *guidance* in ■ PERG 2.7.14AG (Providing basic advice on stakeholder products) for more about this.
- (3) Article 53(1) does apply to advice on *structured deposits*.



8.26 The investment must be a particular investment

- 8.26.1 **G** For the purposes of article 53(1), advice must relate to a particular *investment* – generic or general advice is not covered. Generic or general advice may, however, be a *financial promotion* (see ■ PERG 8.4).
- 8.26.2 **G** Generic advice will not be caught by article 53(1). Examples of generic advice may include:
 - (1) financial planning;
 - (2) advice on the merits of investing in Japan rather than Europe;
 - (3) advice on the merits of investing in investment trusts as opposed to unit trusts or unit-linked insurance; and
 - (4) advice on the merits of investing offshore, or in fixed income rather than floating rate bonds.
- 8.26.3 **G** ■ PERG 8.30A includes material about guiding a *person* through a decision tree.
- 8.26.4 **G** Examples of a particular investment include:
 - (1) *securities* – shares in ABC plc, Treasury 10% 2001 stock, XYZ plc warrants;
 - (2) *units* in *collective investment schemes* - ABC smaller companies fund, XYZ Growth Trust;
 - (3) exchange-traded derivatives - LME Copper Grade A 3 months, LIFFE Japanese Government bond, ABC plc traded options;
 - (4) contractual *investments*, for example, *futures* and other contracts having specified terms and conditions such as duration, volume, interest rate or price and which are to be entered into with a particular *person*;
 - (5) *contracts of insurance*, which are both products and contractual *investments*; so a particular *investment* would include:
 - (a) the ABC Life Personal Pension or the XYZ Life Guaranteed Bond;
 - or

8.26.5

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- (b) a contract having essential terms and provider specified – for instance, a 25 year with-profits low cost endowment contract covering husband and wife and to be issued by XYZ Life Plc.
- (1) Although giving generic advice is generally not a *regulated activity*, if it is given in the course of or in preparation for a *regulated activity* it can form part of that *regulated activity*.
- (2) For example, if a *firm* gives generic advice (for instance about the merits of investing in Japan rather than Europe) and then goes on to identify a particular Japanese *share*, the generic advice will form part of the *regulated activity* of *advising on investments* (except *P2P agreements*).
- (3) Another example is a *firm* that provides generic advice to a customer or a potential customer prior to or in the course of carrying on the *regulated activity* of *arranging (bringing about) deals in investments* for the customer. That generic advice is part of that *regulated activity* of *arranging (bringing about) deals in investments*.



8.27 Advice to be given to persons in their capacity as investors (on the merits of their investing as principal or agent)

- 8.27.1** **G** For the purposes of article 53(1), advice must be given to or directed at someone who either holds *investments* or is a prospective investor (or their agent). Where the *investment* is a risk-only contract of insurance such as house contents insurance, the *policyholder* or prospective *policyholder* is regarded as an investor.
- 8.27.2** **G** Article 53(1) does not apply where the advice is given to *persons* who receive it as:
- (1) an adviser who may use it to inform advice given by him to *persons* for whom he does not act as agent; or
 - (2) a journalist or broadcaster; or
 - (3) an employer (for example, on setting up a pension scheme).
- 8.27.3** **G** Article 53(1) does not apply to advice given to a *person* (such as an independent financial adviser) who is acting as an agent for an investor if it does not relate to a transaction into which the *person* is to enter as agent for the investor.
- 8.27.4** **G** Article 53(1) does apply where the recipient is someone who invests on behalf of other *persons* (whether as a principal or agent), such as:
- (1) a trustee or nominee; or
 - (2) a discretionary fund manager; or
 - (3) an attorney or anyone else who enters into investment transactions as agent for investors;
- where he receives the advice in that capacity.
- 8.27.5** **G** Advice will still be covered by article 53(1) even though it may not be given to or directed at a particular investor (for example, advice given in a periodical publication or on a website). The expression 'investor' has a broad meaning and will include institutional or professional investors.

8.28 Advice or information

- 8.28.1** **G** In the *FCA's* view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of fact or figures.
- 8.28.2** **G**
- (1) In general terms, simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make is not advice.
 - (2) The provision of purely factual information does not become regulated advice merely because it feeds into the customer's own decision-making process and is taken into account by them.
 - (3) Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.
 - (4) A key to the giving of advice is that the information:
 - (a) is either accompanied by comment or value judgment on the relevance of that information to the customer's investment decision; or
 - (b) is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision.
 - (5) Advice can still be regulated advice if the *person* receiving the advice:
 - (a) is free to follow or disregard the advice; or
 - (b) may receive further advice from another *person* (such as their usual financial adviser) before making a final decision.
- 8.28.3** **G** Information may often involve:
- (1) listings of *share* and *unit* prices; or
 - (2) company news or announcements; or
 - (3) an explanation of the terms and conditions of an *investment*; or
 - (4) a comparison of the benefits and risks of one *investment* as compared to another; or

- (5) league tables showing the performance of *investments* of a particular kind against set published criteria; or
- (6) details of directors' dealings in the *shares* of their own companies; or
- (7) alerting *persons* to the happening of certain events (for example, XYZ shares reaching a certain price).

8.28.4 G In the FCA's opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

- (1) a *person* may offer to provide information on directors' dealings on the basis that, in his opinion, were directors to buy or sell investors would do well to follow suit;
- (2) a *person* may offer to tell a client when certain *shares* reach a certain value (which would be advice if the *person* providing the information has offered to do so on the basis that the price of the *shares* means that it is a good time to buy or sell them); and
- (3) a *person* may provide information on a selected, rather than balanced, basis which would tend to influence the decision of the recipient.

8.28.5 G A key question is whether an impartial observer, having due regard to the regulatory regime and guidance, context, timing and what passed between the parties, would conclude that what the adviser says could reasonably have been understood by the customer as being advice.

8.28.6 G An explicit recommendation to buy or sell is likely to be advice. However, something falling short of an explicit recommendation can be advice too. Any significant element of evaluation, value judgment or persuasion is likely to mean that advice is being given.

8.28.7 G

- (1) A *person* can give advice without saying (or implying) categorically that the customer should invest. The adviser does not have to offer a definitive recommendation as to whether the customer should go ahead.
- (2) For example, saying the following can still be advice:
 - (a) this *investment* is a very good buy but it is your decision whether or not to buy; or
 - (b) this *investment* is a very good buy but I am going to leave it to you to decide because I don't know your up-to-date financial position.

The examples in (2):

- (a) involve advice and not just information; and
- (b) involve advice on the pros and cons of buying the *investment* (see ■ PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment))).

8.28.8 **G** One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If an investor asks for a recommendation, any response is likely to be regarded as advice.

8.28.9 **G** On the other hand, if a customer makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that it does not give advice; or whether the adviser runs an advisory business.



**8.29 Advice must relate to the merits
(of buying or selling a particular
investment)**

- 8.29.1** **G** Advice must relate to the *buying*, holding or *selling* of an *investment* – in other words, the pros or cons of doing so.
- 8.29.2** **G** An explanation of the implications of, for example, exercising certain rights or the happening of certain events (such as death) need not involve advice on the merits of exercising those rights or on what to do following the event.
- 8.29.3** **G** Neither does advice on the merits of using a particular stockbroker or investment manager in his capacity as such amount to advice for the purpose of article 53(1). This is because it is not advice on the merits of *buying* or *selling* an *investment* and it is not advice on the merits of exchanging, redeeming or holding one.
- 8.29.4** **G** Advice in the form of rating issuers of *debt securities* as to the likelihood that they will be able to meet their repayment obligations need not, of itself, involve any advice on the merits of *buying*, *selling* or holding on to that issuer's stock.
- 8.29.5** **G** Without an explicit or implicit recommendation on the merits of *buying*, exchanging, redeeming, holding or *selling* an *investment*, advice will not be covered by article 53(1) if it is advice on:
- (1) the likely meaning of uncertain provisions in an investment agreement; or
 - (2) how to complete an application form; or
 - (3) the value of *investments* for which there is no ready market; or
 - (4) the effect of contractual terms and their commercial consequences; or
 - (5) how to structure a transaction to comply with regulatory, competition and taxation requirements; or
 - (6) terms which are commonly accepted in the market.

8.29.6 **G** Advice as to what might happen to the price or value of an *investment* if certain events were to take place, however, may be covered by article 53(1) in some circumstances.

8.29.7 **G** Typical recommendations and whether they will be regulated as *advising on investments (except P2P agreements)* under article 53(1) of the *Regulated Activities Order*. This table belongs to ■ PERG 8.29.1 G to ■ PERG 8.29.6 G.

Recommendation	Regulated under article 53(1) or not?
I recommend that you take out the ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> in the direction of a particular <i>investment</i> which the <i>client</i> could buy.
I recommend that you do not take out the ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> away from a particular <i>investment</i> which the <i>client</i> could have bought.
I recommend that you take out either the ABC <i>investment</i> or the DEF <i>investment</i> .	Yes. This is advice which steers the <i>client</i> in the direction of more than one particular <i>investment</i> which the <i>client</i> could buy.
I recommend that you sell your ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> in the direction of a particular <i>investment</i> which the <i>client</i> could sell.
I recommend that you do not sell your ABC <i>investment</i> .	Yes. This is advice which steers the <i>client</i> away from a particular <i>investment</i> which the <i>client</i> could have sold.
I recommend that you transfer ownership of your ABC <i>investment</i> to your spouse.	Advising the <i>client</i> to gift an <i>investment</i> to another person will not be advice because it does not involve advice on buying, selling, subscribing for or underwriting an investment.
I recommend that you increase the regular payments you are making to your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund.
I recommend that you decrease the regular payments you are making to your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund but advises against the <i>client</i> buying as many as he intended.
I recommend that you keep making the same regular payments to your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund.
I recommend that you stop making the regular payments you are making to the GHI fund*.	Yes. This is advice which steers the <i>client</i> away from buying <i>units</i> in a particular fund which the <i>client</i> could have bought.
I recommend that you pay a lump sum into your GHI fund*.	Yes. This is advice which steers the <i>client</i> in the direction of acquiring further <i>units</i> in a particular fund.

Recommendation	Regulated under article 53(1) or not?
I recommend that you do not pay a lump sum into your GHI fund*.	Yes. This is advice which steers the <i>client</i> away from buying <i>units</i> in a particular fund which the <i>client</i> could have bought.
I recommend that you move part of your investment in the JKL <i>investment</i> from fund X into fund Y*.	Yes. This is advice which steers the <i>client</i> in the direction of selling <i>units</i> in a particular fund and buying <i>units</i> in another specific fund. Where the two funds are sub-funds of the same main fund it is still advice. The terms 'bought' and 'sold' are given a wide meaning and include any acquisition or disposal for valuable consideration.
I recommend that you move all of your investment in JKL <i>investment</i> from fund X into fund Y*.	Yes, for the same reason.
I recommend that you keep your investment in fund X*.	Yes. This is advice because it is advice to hold on to an <i>investment</i> and advice not to <i>sell</i> it.
I recommend that you move your MNO <i>investment</i> from platform X and re-register it on platform Y.	This is unlikely to be advice because normally it will not involve buying and selling the <i>investment</i> held on the platform.
A <i>client</i> decides of his own accord to increase, decrease or temporarily suspend his regular payments or the payments are increased automatically into an <i>investment</i> without advice being given.	No. No advice is being given.
The <i>firm</i> is providing discretionary management services under a mandate and makes changes to a <i>client's investment</i> without providing advice.	No. No advice is being given.
Dividends are re-invested into an <i>investment</i> without advice being given.	No. No advice is being given.
* The same answer would apply where the fund is a <i>life policy</i> as rights under a <i>contract of insurance</i> are regulated <i>investments</i> under the <i>Act</i> . The position under a <i>personal pension scheme</i> is similar, as explained in more detail in PERG 12.3.	



**8.30 Medium used to give advice or
information**

- 8.30.1** G With the exception of periodicals, broadcasts and other news or information services (see ■ PERG 8.31.2 G), the medium used to give advice should make no difference to whether or not it is caught by article 53(1).
- 8.30.2** G Advice can be provided in many ways including:

 - (1) face to face;
 - (2) orally to a group;
 - (3) by telephone;
 - (4) by correspondence (including e-mail);
 - (5) in a publication, broadcast or website; and
 - (6) through the provision of an interactive software system.
- 8.30.3** G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The provider of the service will be giving advice for the purpose of article 53(1) only if the service results in something more than a generic recommendation, as with a paper version.
- 8.30.4** G Advice in publications, broadcasts and websites is subject to a special regime – see ■ PERG 8.31.2 G and ■ PERG 7.
- 8.30.5** G Some software services involve the generation of specific *buy, sell* or hold signals relating to particular *investments*. These signals are liable, as a general rule, to be advice for the purposes of article 53(1) (as well as *financial promotions*) given by the *person* responsible for the provision of the software. The exception to this is where the user of the software is required to use enough control over the setting of parameters and inputting of information for the signals to be regarded as having been generated by him rather than by the software itself.



8.30A Pre-purchase questioning (including decision trees)

Introduction

8.30A.1 **G** Pre-purchase questioning involves putting a sequence of questions in order to extract information from a *person* to help them best select an *investment* that meets their needs. A decision tree is an example of pre-purchase questioning. The process of going through the questions will usually narrow down the range of options that are available.

8.30A.2 **G** There are two aspects of the definition of *advising on investments (except P2P agreements)* that are particularly relevant to whether pre-purchase questioning involves *advising on investments (except P2P agreements)*:

- (1) the distinction between information and advice (see ■ PERG 8.28); and
- (2) the fact that advice must relate to a particular *investment* (see ■ PERG 8.29).

8.30A.3 **G** This section deals with *advising on investments (except P2P agreements)* where it is not relevant whether there is a *personal recommendation* (see ■ PERG 8.24.1AG for an explanation of when the definition of *personal recommendation* is relevant to the definition of *advising on investments (except P2P agreements)*).

■ PERG 8.30B.6G explains the relevance of this section where *advising on investments (except P2P agreements)* is restricted to making a *personal recommendation*.

8.30A.4 **G**

- (1) Whether or not pre-purchase questioning in any particular case is *advising on investments (except P2P agreements)* will depend on all the circumstances.
- (2) The pre-purchase questioning process may involve identifying one or more particular *investments*. If so, to avoid *advising on investments (except P2P agreements)*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the *person* as, assisting the *person* to make their own choice of product which has particular features which the *person* regards as important. The questioner will need to avoid providing any judgment on the suitability of one or more products for that *person*.

8.30A.5 G There is considerable potential for variation in the form, content and manner of scripted questioning, but there are two broad types, as described in ■ PERG 8.30A.6G and ■ PERG 8.30A.7G.

Identification of product based on facts

- 8.30A.6** G
- (1) The first type involves identifying *investments* based on factual matters.
 - (2) For example, the purpose may be to identify funds that invest in debt instruments of European commercial companies.
 - (3) One possible scenario is that the questioner may go on to identify several particular *investments* which match features identified by the scripted questioning; provided these are presented in a balanced and neutral way (for example, they identify all the matching *investments*, without making a recommendation as to a particular one) this need not, of itself, involve *advising on investments* (except *P2P agreements*).
 - (4) Another possible scenario is that the questioner may go on to advise the investor on the merits of one particular *investment* over another; this would be *advising on investments* (except *P2P agreements*).
 - (5) Another possible scenario is that the questioner may, before or during the course of the scripted questioning, give information that considered on its own would not involve *advising on investments* (except *P2P agreements*); but may, following the scripted questioning, identify one or more particular *investments*. The factors described in ■ PERG 8.30A.8G are relevant to deciding whether or not the questioner is *advising on investments* (except *P2P agreements*).

Identification of product based on judgment

- 8.30A.7** G
- (1) The second type of scripted questioning referred to in ■ PERG 8.30A.5G involves providing questions and answers incorporating opinion, judgment or recommendations.
 - (2) There are various possible scenarios, including the following.
 - (3) One scenario is that the scripted questioning may not lead to the identification of any particular *investment*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on investments* (except *P2P agreements*).
 - (4) (a) Another scenario is that the scripted questioning may lead to the identification of one or more particular *investment*.
(b) In principle this is likely to involve *advising on investments* (except *P2P agreements*) as regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell (see ■ PERG 8.28.2G).

(c) However, the factors described in ■ PERG 8.30A.8G are still relevant to deciding whether or not the questioner is *advising on investments (except P2P agreements)*.

Factors to take into account

8.30A.8

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- (1) When the scripted questioning identifies particular *investments* (see ■ PERG 8.30A.6G(5) and ■ PERG 8.30A.7G(4)), the FCA considers that it is necessary to look at the process and outcome of the scripted questioning as a whole in deciding whether or not the process involves *advising on investments (except P2P agreements)*.
- (2) Factors that may be relevant include the following:
 - (a) any representations made by the questioner at the start of the questioning relating to the service they are to provide;
 - (b) the context in which the questioning takes place;
 - (c) the stage in the questioning at which the opinion is offered and its significance;
 - (d) the role played by the questioner who guides a *person* through the pre-purchase questions;
 - (e) the outcome of the questioning (whether particular *investments* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
 - (f) whether the pre-purchase questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the *person* understand what the questions or options are and how to determine which option applies to their particular circumstances.

Filtering: introduction

8.30A.9

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A *firm* selling products through its website might make its list of the *investments* it sells easier to search by allowing the customer to filter products based on factors presented by the website and selected by the customer. Only products that meet the search criteria input by the customer are displayed.

Filtering based on objective factors

8.30A.10

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- (1) The filtering described in ■ PERG 8.30A.9G might be based upon simple objective factors like price.
- (2) This should not generally involve *advising on investments (except P2P agreements)*, as explained in ■ PERG 8.30A.6G(3).

Filtering based on a factor involving judgment

8.30A.11

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The filtering described in ■ PERG 8.30A.9G might, however, be based upon a factor such as riskiness, which is not a simple objective factor like price.

8.30A.12

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Where all a *firm* is doing is ranking its own *investments'* riskiness with reference to the specific investment objectives for those products, that *firm* is

unlikely to be *advising on investments (except P2P agreements)* as long as it is clear to the customer that this is all the *firm* is doing. A description of a product's investment objectives is not advice, in the same way that an explanation of its terms is not advice (see ■ PERG 8.28.3G).

8.30A.13 G Similarly, where the *firm* is offering *investments* that are issued by a third party and the level of riskiness is drawn directly from the *investment's* disclosure material, the *firm* is unlikely to be *advising on investments (except P2P agreements)* as long as it is clear to the customer that this is all the *firm* is doing. The level of riskiness is the factual representation of the *investment's* disclosure material and therefore information and not advice.

8.30A.14 G

- (1) A *firm* may rank third-party *investments* into risk categories using its own opinion of the level of risk of each *investment*. The ranking is self-generated and not drawn directly from the *investment's* disclosure material.
- (2) As explained in ■ PERG 8.30A.7G(4), this is likely to involve *advising on investments (except P2P agreements)*.
- (3) *Advising on investments (except P2P agreements)* involves advice on the merits of the investor buying or selling *investments*. A factor like riskiness is in itself neutral, because riskiness is not necessarily a good or a bad thing. So the filtering is done on the basis of what the customer wants and not what is right for the customer.
- (4) However, (3) does not mean that the *firm* is not *advising on investments (except P2P agreements)*.
 - (a) By selecting their preferred level of risk, the customer has effectively told the *firm*, via the website, what their investment objectives are; and the purpose of the filtering process is to identify *investments* that are suitable for the customer to buy based on these objectives.
 - (b) In this scenario the *firm* is providing its opinion as to the riskiness of an *investment* to a *person* who is accessing the website in order to buy *investments*, i.e. in their capacity as investor. In that context that opinion (advice) would amount to an opinion about the pros and cons of investing in the particular product (see ■ PERG 8.29.1G).
 - (c) The *firm* is not just supplying information: it is making a skilled value judgment to determine the relative merits of products for an investor with a particular risk appetite.
- (5) It is the combination of self-generated rankings and the fact that these are given to someone in their capacity as an investor, that makes it likely to be *advising on investments (except P2P agreements)*.
- (6) As riskiness taken on its own is a neutral factor in the pros and cons of whether to buy an *investment*, an analysis of riskiness in a technical publication about investment issues rather than in a sales context may not involve *advising on investments (except P2P agreements)* by the *person* writing and issuing it.

8.30A.15 **G**

- (1) If the input from the customer is much more extensive than, and the way that those inputs interact on the website is much more complicated than, the processes described in ■ PERG 8.30A.12G and ■ PERG 8.30A.13G, the website is not simply displaying factual information about the design of the product.
- (2) In that case the production of a list of results uses an element of opinion and skill (albeit automated) in translating the customer's input into a display of a particular product or products. Either explicitly or implicitly this is presented as meeting the customer's requirements and wishes as input into the system.
- (3) The result is that the filtering process is closer to the one in ■ PERG 8.30A.11G than the one in ■ PERG 8.30A.10G and so it is more likely that the *firm* is *advising on investments (except P2P agreements)*.

8.30A.16 **G**

- (1) The table in ■ PERG 8 Annex 1 includes examples of when a *firm* is and is not *advising on investments (except P2P agreements)* when it sells products on a website that allows the customer to filter products based on input from the customer.
- (2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.

8.30B Personal recommendations

Purpose of this section

8.30B.1 **G** This section explains what *personal recommendation* means for the purpose of the definition of the *regulated activity of advising on investments (except P2P agreements)*. ■ PERG 8.24.1AG explains when this is relevant.

Basic definition of personal recommendation

8.30B.2 **G** A *personal recommendation* means a recommendation that:

- (1) is made to a *person* in their capacity as:
 - (a) an investor or potential investor; or
 - (b) agent for an investor or a potential investor;
- (2) is for the *person* in (1) to do any of the following (whether as principal or agent):
 - (a) *buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular investment which is a security, a structured deposit or a relevant investment; or*
 - (b) exercise or not exercise any right conferred by such an *investment to buy, sell, subscribe for, exchange or redeem such an investment;*
- (3) is:
 - (a) presented as suitable for the *person* to whom it is made; or
 - (b) based on a consideration of the circumstances of that *person*; and
- (4) is not issued exclusively to the public.

Link to MiFID

8.30B.3 **G**

- (1) The definition of *personal recommendation* in the *Regulated Activities Order* is based on the definition of the *MiFID investment service or activity of making a personal recommendation*.
- (2) *Personal recommendation* should therefore be interpreted for the purpose of the *regulated activity of advising on investments (except P2P agreements)* consistently with *MiFID*.

(3) However the types of *investments* to which the recommendation relates (as listed in ■ PERG 8.30B.2G(2)) are not limited to ones covered by *MiFID*.

8.30B.4 G This section draws on the document “Question & Answers: Understanding the definition of advice under MiFID” (CESR/10-293), published by the Committee Of European Securities Regulators (now *ESMA*).

Examples

8.30B.5 G

(1) ■ PERG 8 Annex 1 sets out some examples of what is and is not a *personal recommendation*.

(2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.

Relevance of the guidance elsewhere in this chapter

8.30B.6 G

(1) ■ PERG 8.25 to ■ PERG 8.30A deal with the meaning of *advising on investments (except P2P agreements)* in ■ PERG 8.24.1G, where it is not relevant whether there is a *personal recommendation*. That material also applies to whether the conditions in ■ PERG 8.30B.2G(1) and (2) are met, as explained in (2) and (3).

(2) If something is regulated advice under ■ PERG 8.25 to ■ PERG 8.30A it meets the conditions in ■ PERG 8.30B.2G(1) and (2). However it is not a *personal recommendation* unless it also meets the conditions in ■ PERG 8.30B.2G(3) and (4).

(3) If something is not regulated advice under ■ PERG 8.25 to ■ PERG 8.30A it is not a *personal recommendation* as it does not meet the conditions in ■ PERG 8.30B.2G(1) and (2).

8.30B.7 G Therefore:

(1) for a communication to be a *personal recommendation* it must:

- (a) relate to an *investment* which is a *security*, a *structured deposit* or a *relevant investment*, as described in ■ PERG 8.25;
- (b) be about a particular *investment*, as described in ■ PERG 8.26;
- (c) be given to *persons* in their capacity as investors or potential investors, as described in ■ PERG 8.27 (although the material in ■ PERG 8.27.5G about advice given in a periodical or website is not relevant);
- (d) be advice (that is, not just information), as described in ■ PERG 8.28; and
- (e) relate to the merits of *buying*, *holding* or *selling* the *investment*, as described in ■ PERG 8.29;

(2) the medium used to give advice should make no difference to whether or not the communication comes within ■ PERG 8.30B.2G(1) and (2), as described in ■ PERG 8.30 (but advice given in periodicals, broadcasts and other news or information services will generally not

be a *personal recommendation* for the reasons described in ■ PERG 8.30B.22G to ■ PERG 8.30B.24G);

- (3) the points in ■ PERG 8.30A about whether pre-purchase questioning or filtering involves regulated advice are also relevant to whether the requirements in ■ PERG 8.30B.2G(1) and (2) are met; and
- (4) a communication is not a *personal recommendation* unless it also meets the conditions in ■ PERG 8.30B.2G(3) and (4).

Presenting a recommendation as suitable

8.30B.8 G An *investment* might be presented as suitable for a customer in an explicit way using words such as, for example, “this product would be the best option for you”. This meets the condition in ■ PERG 8.30B.2G(3)(a).

8.30B.9 G

- (1) However, it is not necessary for a *firm* to tell a customer explicitly that a recommendation it is making is suitable for the customer in order for it to be a *personal recommendation*. If the *firm* implicitly presents an *investment* to the customer as suitable, that can still be a *personal recommendation*.
- (2) The following are examples of implicit recommendations of this type:
 - (a) a *firm* may present several *investments*, with one of them highlighted for the customer by a phrase such as “people like you tend to buy this product”; and
 - (b) a *firm* may contact customers that hold units in a particular fund and say “Our research indicates that Fund X is no longer performing as our customers would wish. We have identified Fund Y as a replacement investment, which can be used to achieve the same investment outcomes”.

8.30B.10 G An *investment* can be presented as suitable for an investor even if in fact the *investment* is not suitable or even if the *firm* does not think it is. While a recommendation of an *investment* that is unsuitable for the investor would be a breach of requirements under *MiFID* and the *Handbook*, it would not stop the recommendation from being presented as suitable.

Recommendation based on a consideration of circumstances

8.30B.11 G Information about a *person’s* circumstances for the purposes of ■ PERG 8.30B.2G(3)(b) can include:

- (1) factual information (for example, their address, income or marital status); or
- (2) more subjective information about their wants and needs (for example, their overall risk appetite, short- and long-term investment objectives and their desire for protection from particular risks).

8.30B.12 G Whether or not a *firm* will be viewed as providing a recommendation based on a consideration of a *person’s* circumstances is likely to depend on factors

such as the nature of the information it collects and the way that it presents its questions.

8.30B.13 **G**

- (1) For example, if:
 - (a) a *firm* has collected information from a customer on their investment objectives or financial situation; and
 - (b) the customer returns to the *firm* through the same channel for a follow-on service;

it could be reasonable for the customer to expect that the *firm* will use this information when it makes a recommendation as part of the follow-on service.
- (2) The following factors could also show that it would be reasonable for the customer to expect that the *firm* is using previously given information:
 - (a) the contact point with the *firm* is the same; and
 - (b) the nature of the service is similar to that given in the past.

8.30B.14 **G**

On the other hand, if:

- (1) a customer gives a *firm* information when purchasing a mortgage; and
- (2) the customer later makes use of an execution-only service provided by the *firm* through its online channel to buy *securities*;

the customer cannot reasonably assume that the *firm* makes use of the information in (1) when the *firm* sells the *securities* in (2).

8.30B.15 **G**

- (1) If :
 - (a) a *firm* makes a recommendation to a customer; and
 - (b) the *firm* presents it as being based on the customer's personal circumstances; but
 - (c) the *firm* in fact fails to use information about that customer's circumstances when making that recommendation;

that recommendation is a *personal recommendation*.
- (2) So for example, if:
 - (a) a *firm* has accumulated relevant information on a customer's circumstances (either during a single interview or during the course of an ongoing relationship); and
 - (b) it would be reasonable for the customer to expect that this information is being taken into account (see ■ PERG 8.30B.13G to ■ PERG 8.30B.14G);

any recommendation will be treated as being based on a consideration of the customer's circumstances.

Where the same recommendation is sent to several customers

8.30B.16 **G** If a *firm* makes a recommendation to multiple customers this does not automatically mean that it is not a *personal recommendation*.

8.30B.17 **G** To assess whether a communication made to several customers is a *personal recommendation*, the following factors are relevant:

- (1) the target audience (■ PERG 8.30B.18G);
- (2) the content of the message (■ PERG 8.30B.19G); and
- (3) the language used (■ PERG 8.30B.20G).

8.30B.18 **G** Target audience:

- (1) For example, when the internal procedures of a *firm* specify that an *investment* may only be sold to a sample of customers selected on the basis of certain factors, such as customers under a certain age or who hold no similar products, the selection of the target audience will not automatically mean that the *firm* is providing *personal recommendations*.
- (2) However, highlighting the particular personal circumstances that led the individual to be contacted, for example, is very likely to mean that the *investment* is being presented as suitable for the particular investor.
- (3) The key factor here is how the recommendation would appear to a reasonable investor and in particular whether it would appear to a reasonable investor contacted in this way that:
 - (a) the communication from the *firm* was sent to that investor because the *investment* is suitable for that investor; or
 - (b) the investor was selected because of their circumstances.

8.30B.19 **G** Content of the message:

- (1) If the message contains a solicitation, a recommendation, an opinion or a judgment about the advisability of a transaction, this could mean that it is a *personal recommendation*.
- (2) This factor is also relevant to whether the message meets the requirements in ■ PERG 8.30B.2G(1) and (2) (whether there is a recommendation).

8.30B.20 **G** The tone of the message and the way it could be understood by the customer are important elements when determining whether a communication amounts to a *personal recommendation*.

Disclaimers

8.30B.21 **G** A disclaimer may help a *firm* to avoid inadvertently presenting *investments* as suitable for particular customers or as being based on a consideration of

the customer's circumstances. However it will not always be sufficient. For example a disclaimer is unlikely to be effective if:

- (1) a *firm* states that the *investment* would suit a particular customer's needs; or
- (2) it is reasonable for the customer to expect that the recommendation is based on a consideration of their circumstances.

Recommendation to the public

8.30B.22 G A recommendation is not a *personal recommendation* if it is issued exclusively to the public.

8.30B.23 G Advice about *investments* in a newspaper, a journal, a magazine, a website accessible to the general public or in a radio or television broadcast should not amount to a *personal recommendation*.

8.30B.24 G

- (1) However, use of the internet does not automatically mean that a communication is made to the public and that as a result it is outside the definition of a *personal recommendation*.
- (2) Therefore, for instance, while advice on a generally accessible website is unlikely to be a *personal recommendation*, an email communication provided to a specific *person*, or to several *persons*, may amount to a *personal recommendation*.
- (3) ■ PERG 8.30B.16G to ■ PERG 8.30B.20G (Where the same recommendation is sent to several customers) deal with when a communication, including an email, sent to multiple customers can be a *personal recommendation*.
- (4) See ■ PERG 8.30B.33G(5) for an example of when the output of a website may still be a *personal recommendation* even though the website is accessible to the general public.

Decision trees and filtering

8.30B.25 G

- (1) A *firm* may sell products through its website and that website may allow the customer to filter products based upon factors presented by the website and selected by the customer.
- (2) Someone deciding whether a filtering process meets the requirements in ■ PERG 8.30B.2G(1) and (2) should look at ■ PERG 8.30A (Pre-purchase questioning (including decision trees)).
- (3) However, if a filtering process is treated as giving regulated advice under ■ PERG 8.30A it must also meet the requirements in ■ PERG 8.30B.2G(3) and (4) if it is to be a *personal recommendation*.

8.30B.26 G

- (1) This section ■ PERG 8.30B deals with two basic forms of filtering process.

- (2) The first type involves identifying *investments* based on factual matters, as described in ■ PERG 8.30A.10G.
- (3) The second type involves factors incorporating opinion, judgment or recommendations, as described in ■ PERG 8.30A.11G.

8.30B.27 G A filtering process based on factual matters will generally not involve a *personal recommendation* because it does not meet the requirements in ■ PERG 8.30B.2G(1) and (2) (see ■ PERG 8.30A.6G (as applied by ■ PERG 8.30B.6G)).

8.30B.28 G In the *FCA's* view, a filtering process based on a single subjective factor such as riskiness may meet the requirements in ■ PERG 8.30B.2G(1) and (2) but still not be a *personal recommendation* because it does not meet the requirements in ■ PERG 8.30B.2G(3) and (4). It need not meet those requirements for the following reasons taken together.

- (1) The filter is simple because:
 - (a) the number of inputs by the customer is small;
 - (b) the translation from the customer's input to the list of displayed products does not involve any opinion or complicated processing;
 - (c) if the customer chooses high-risk products there is a pre-existing list of products that are displayed for that customer;
 - (d) if the customer chooses low-risk products there is a pre-existing list of products that are displayed for that customer; and
 - (e) the same results will be displayed for any other customer that chooses that category of risk.
- (2) This sort of filtering is just a form of indexation of pre-existing information.
- (3) It would be perfectly possible to arrange the *investments* the *firm* sells into categories based on riskiness in hard copy form, and to make that hard copy available to the public. However it cannot be said that a hard copy arranged and published in that way is based on the personal circumstances of the *person* reading it.
- (4) The website output from the process does not become a *personal recommendation* just because it is on a website or just because the website screens out information the customer asks not to see.
- (5) All the filtering does is to eliminate *investments* that do not fall within the specified category.

8.30B.29 G ■ PERG 8.30B.28G is based on the nature of the filtering process.

- (1) ■ PERG 8.30B.28G is not based on the view that an investment factor such as riskiness cannot be part of the customer's personal circumstances. The customer's attitude to risk can form part of the customer's personal circumstances.
- (2) ■ PERG 8.30B.28G is not based on the view that there is no *personal recommendation* where the advice is about whether a product meets

the customer's objectives rather than the product being good or bad. A *personal recommendation* may relate to the customer's objectives.

- (3) ■ PERG 8.30B.28G is not based solely on the fact that the website only takes into account a narrow range of factors. The fact that a *firm* has not considered all the customer's circumstances does not necessarily mean that there is no *personal recommendation*.

8.30B.30 G

- (1) The conclusion in ■ PERG 8.30B.28G is given some support by the *ESMA* guidance referred to in ■ PERG 8.30B.4G.
- (2) That guidance states that where the filtering process is limited to assisting the customer to make their own choice of product with particular features which the customer regards as important, then it is unlikely that the process will involve a *personal recommendation*.

8.30B.31 G

- (1) Whether or not a *personal recommendation* is given depends in part on whether the customer is led to think that one is being given.
- (2) Therefore it is important that the customer understands that:
- (a) the *firm* is not advising on whether the products are suitable for the customer; and
 - (b) instead the *firm* is assisting the customer to make their own choice of product with particular features which the customer regards as important.
- (3) If buying the *investments* identified in the website's output is positioned as the appropriate action for the customer to take, the overall service might be viewed as a *personal recommendation*.
- (4) The customer should understand that, because the website takes into account a narrow range of the customer's personal circumstances and preferences and because the customer rather than the *firm* has established what those circumstances and preferences are, the result may be that the customer ends up with products that are unsuitable for them.

8.30B.32 G

- (1) As described in ■ PERG 8.30B.21G, including a disclaimer is not enough on its own to prevent a *personal recommendation*.
- (2) For example, if the *firm* says that the filtered *investments* displayed by the website would suit the customer's needs, the inclusion of a disclaimer saying that this is not advice or a *personal recommendation* would be unlikely to change the nature of the communication.
- (3) A legalistic disclaimer is unlikely to be enough to prevent a *firm* from giving a *personal recommendation*. Instead, the material should prominently and clearly explain the limited nature of the service that the *firm* provides and the risk that the customer will end up with unsuitable *investments*.

8.30B.33 G

- (1) If the filtering is based on more than one factor chosen by the consumer that does not mean that the *firm* is making a *personal recommendation*.
- (2) However the output from the website may be a *personal recommendation* if the way that the customer's inputs interact on the website is more complicated than with a simple filtering system under which:
 - (a) the *firm* assigns a limited number of characteristics (such as levels of riskiness) to each product;
 - (b) the customer chooses the characteristics they want; and
 - (c) the system displays all the products that meet all the characteristics chosen by the customer and does not show the other products.
- (3) As explained in ■ PERG 8.30A.15G (as applied by ■ PERG 8.30B.6G), this type of filtering meets the requirements in ■ PERG 8.30B.2G(1) and (2).
- (4) This type of filtering also meets the requirements in ■ PERG 8.30B.2G(3) and (4) because:
 - (a) the factors in ■ PERG 8.30A.15G mean that the website is going beyond simply indexing pre-existing information as described in ■ PERG 8.30B.28G (so the approach in ■ PERG 8.30B.28G does not apply);
 - (b) if the customer has to input a large range of personal information the *firm* cannot argue that it has not taken into account the customer's personal circumstances and preferences when in fact it actually has; and
 - (c) either explicitly or implicitly the output is presented as meeting the customer's requirements and wishes.
- (5) A recommendation issued exclusively to the public is not a *personal recommendation*. But the output of the website in this paragraph ■ PERG 8.30B.33G is not excluded from being a *personal recommendation* for this reason: the output of the website in this example is tailored to the individual and is only made available to them.

8.30B.34 G

- (1) The approach described in ■ PERG 8.30B.28G only applies if it is clear to the customer that the *firm* is presenting to the customer all the products it sells coming within the category selected by the customer (see ■ PERG 8.28.4G (information presented on a selected basis)).
- (2) For example, if the customer filters the products based on how risky they are, the *firm* should present to the customer all the products it sells falling within the risk category the customer chooses.

8.30B.35 G

- (1) An example of ■ PERG 8.30B.33G is a *firm* that presents a suggested portfolio of investments to the customer.
- (2) For example, if the customer filters the products based on how risky they are, and the *firm* presents a number of investment products and a suggestion of what percentage of the customer's investment should

be invested in each, it is likely that the *firm* will be making a *personal recommendation*.

8.30B.36 **G** The examples in ■ PERG 8 Annex 1 include examples of a *firm* selling products on a website which allows the customer to filter products based on input from the customer.

8.31 Exclusions for advising on investments

- 8.31.1** G The *Regulated Activities Order* contains a number of exclusions which prevent certain activities from being a *regulated activity*.
- 8.31.2** G With regard to article 53(1), the main exclusion relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54: Advice given in newspapers etc). The exclusion applies if the principal purpose of any of these is not to give advice covered in article 53(1) or to lead or enable *persons* to acquire or dispose of *securities* or *contractually based investments*. This exclusion does not apply when the definition of *advising on investments* (except *P2P agreements*) is based on giving a *personal recommendation* (see ■ PERG 8.24.1AG for when this is the case). All this is explained in greater detail, together with the provisions on the granting of certificates, in ■ PERG 7.
- 8.31.3** G It is also possible for advice to be excluded if it is given by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is if it is reasonably to be regarded as necessary for him to give the advice to provide his professional or other services and he is not separately paid for giving the advice (article 67: Activities carried on in the course of a profession or non-investment business). This could arise in the context of advice given by *persons* such as:
- (1) a solicitor, accountant or tax adviser; or
 - (2) a debt counsellor; or
 - (3) an employment agency.
- 8.31.3A** G The exclusion in article 67 will not apply to a *person* who is *advising on investments* when he does so as a *MiFID investment firm* or a *third country investment firm* (see ■ PERG 2.5.4 G to ■ 2.5.5 G (Investment services and activities)).
- 8.31.4** G For example, it may be necessary for a *person* referred to in ■ PERG 8.31.3G (1) or ■ PERG 8.31.3G (2) to advise a client to sell all his assets for tax, legal or debt reduction reasons. However, it may not be necessary for him to recommend selling some *investments* and not others. Whether or not this is the case will depend on the circumstances in which the advice is given.

8.31.5

G

Certain of the exclusions in the *Regulated Activities Order* that apply to the *regulated activity of advising on investments* are not available where the advice either relates to a *contract of insurance* or amounts to *insurance distribution* or *reinsurance distribution*. This results from the requirements of the *IDD* and is explained in more detail in ■ PERG 5 (Guidance on insurance distribution activities).

8.32 Arranging deals in investments

- 8.32.1** **G** Under article 25 of the *Regulated Activities Order*, *arranging deals in investments* covers:
- (1) making arrangements for another *person* (whether as principal or agent) to *buy, sell*, subscribe for or underwrite a particular *investment* which is:
 - (a) a *security* or a *structured deposit*; or
 - (b) a *relevant investment*; or
 - (c) an *investment* of the kind specified by article 86, or article 89 so far as relevant to that article (Lloyd's *syndicate* membership and capacity and rights to or interests in such *investments*); or
 - (2) making arrangements with a view to a *person* who participates in the *arrangements buying, selling*, subscribing for or underwriting *investments* falling within ■ PERG 8.32.1G (1)(a) to ■ (c) (whether as principal or agent).
- 8.32.2** **G** Article 25(1) applies only where the arrangements bring about or would bring about the particular transaction in question. This is because of the exclusion in article 26. In the *FCA's* view, a *person* brings about or would bring about a transaction only if his involvement in the chain of events leading to the transaction is of enough importance that without that involvement it would not take place. The second limb (article 25(2)) is potentially much wider as it does not require that the arrangements would bring about particular transactions. It is this limb which is of potential relevance within the scope of this *guidance*.
- 8.32.3** **G** In the course of their business, people such as publishers or broadcasters, Internet service providers, website operators or telephone marketing companies may provide services for *authorised* or *exempt persons* or other *persons* (such as *overseas persons*) who carry on *regulated activities*. This does not necessarily mean that any arrangements they make with such *persons* will fall within the scope of article 25(2). For that to be the case, the arrangements must be made with a view to the *authorised* or *exempt* (or *overseas*) *person* or that *person's* customers or counter parties or any or all of them *buying* or *selling investments*. This means that a *person* making arrangements must take account of the purpose for which he makes them.
- 8.32.4** **G** The ordinary business of a publisher or broadcaster can involve him in publishing or broadcasting *financial promotions* (for example,

advertisements) on behalf of *authorised* or *exempt persons*. Journalists who write about *investments* or financial services may promote the services of an *authorised* or *exempt person*. In the FCA's opinion, such *persons* would not normally be regarded as making arrangements under article 25(2). This is the case even if any arrangements they may have made may lead their readers or viewers to *buy* or *sell investments* in response to the promotions. In the FCA's view, the publisher or broadcaster may normally be seen to be making arrangements with a view to publishing or broadcasting promotions which may include *financial promotions*. The same may apply to arrangements made by Internet website operators who may allow the promotion on their site of services including *financial promotions* through the setting up of hypertext links or the placing of banner advertisements.

8.32.5 G The *Regulated Activities Order* contains an exclusion (article 27: Enabling parties to communicate) to bring a degree of certainty to this area. This applies to arrangements which might otherwise fall within article 25(2) merely because they provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties. In the FCA's view, the crucial element of the exclusion is the inclusion of the word 'merely'. So that, where a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25(2).

8.32.6 G For example, in the FCA's view a publisher or broadcaster would be likely to be making arrangements within the meaning of article 25(2) and be unable to make use of the exclusion in article 27 if:

- (1) he enters into an agreement with a provider of investment services such as a broker or product provider for the purpose of carrying their *financial promotion*; and
- (2) as part of the arrangements, the publisher or broadcaster does one or more of the following:
 - (a) brands the investment service or product in his name or joint name with the broker or product provider;
 - (b) endorses the service, or otherwise encourages readers or viewers to respond to the promotion;
 - (c) negotiates special rates for his readers or viewers if they take up the offer;
 - (d) holds out the service as something he has arranged for the benefit of his readers or viewers.

8.32.7 G It would also be an indicator that a publisher or broadcaster might be making arrangements falling within article 25(2) if he receives a commission or other form of reward based on the amount of regulated business done as a result of his carrying the promotion. This would be on the basis that the existence of the financial interest will inevitably have a bearing on the purpose for which the arrangements are viewed as having been made by him. However, the article 27 exclusion will apply in cases where there is such a reward provided the arrangements are made merely to allow the communication to be made.

- 8.32.8** **G** So, the same considerations are liable to apply to a website operator or an operator of a similar service (such as an intranet or closed user electronic service) who is carrying banner advertising from, or otherwise setting up links to the sites of, *authorised or exempt persons*.
- 8.32.9** **G** Other *persons* who may benefit from the exclusion in article 27 include *persons* who provide the means for someone to route an order to another *person*. A *person* providing such order routing services would not, in the FCA's view, be merely facilitating communication (of the orders) if he provides added value. This added value could be in the form, for example, of such things as formatted screens, audit trails, checking completeness of orders or matching orders or reconciling trades.
- 8.32.10** **G** Companies providing telephone marketing and related services to investment firms will face similar issues. If their services are entirely passive – for example, answering telephone calls, sending out literature upon request or referring enquirers to representatives of their client – they may simply be regarded as making arrangements with a view to their providing telephone answering services. On the other hand, where a telephone marketing company:
- (1) makes proactive calls to prospective customers of its clients; or
 - (2) is expected proactively to raise the possibility, during a call made by the prospective customer, of a meeting with or visit by a representative of their client or of the caller being sent promotional literature;
- the arrangements are liable to be made with a view to the company's client and its prospective customers *buying or selling investments*. So such arrangements will be likely to fall within article 25(2) unless another exclusion applies (such as that for introductions – see ■ PERG 8.33).
- 8.32.11** **G** The mere provision by a website operator of a bulletin board or chat room ought not to amount to making arrangements under article 25(2) unless making such arrangements is the specific purpose of the facility. However, operators of websites with such facilities will clearly need to be aware of potential implications (such as the service being used by *unauthorised persons* to give advice or make *financial promotions* or to make misleading statements with a view to manipulating market prices). They may wish to consider drawing such matters to the attention of *persons* who use the facility.
- 8.32.12** **G** Where *persons* are making arrangements concerning *contracts of insurance* or are carrying on *insurance distribution or reinsurance distribution* certain exclusions to article 25 are not available. This results from the requirements of the *IDD* and is explained in more detail in ■ PERG 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance).

8.33 Introducing

8.33.1 **G** As with advice, there are various exclusions in the *Regulated Activities Order* which take certain arrangements out of the scope of article 25. Two of these are likely to be particularly relevant to *persons* who are mainly concerned with making or helping others to make communications.

8.33.2 **G** Article 29 of the *Regulated Activities Order* states that certain arrangements are not covered by article 25. These are arrangements made by an *unauthorised person* ('A'). The arrangements must be made for or with a view to a transaction which is or is to be entered into by another *person* (the client) with or through an *authorised person*. It must also be the case that:

- (1) the transaction is or will be entered into on advice given to the client by an *authorised person*; or
- (2) it is clear, in all the circumstances, that the client, in his capacity as an investor, is not seeking and has not sought advice from A on the merits of his entering into the transaction (or, if the client has sought such advice, A has declined to give it but has recommended that the client seek such advice from an *authorised person*).

For article 29 to apply, it is also necessary that, in return for making the arrangements, A does not receive from any *person* other than the client financial reward or other advantage, for which he does not account to the client, arising out of his making the arrangements (■ PERG 8.12.11 G gives *guidance* on when a *person* will be regarded as having received reward from someone other than his client).

8.33.3 **G** This exclusion may apply, for example, where a website operator, without offering any advice, sets up links to the sites of investment firms but does not receive any form of payment from any of the firms for doing so.

8.33.4 **G** Of potentially greater significance is the exclusion in article 33 of the *Regulated Activities Order* which excludes arrangements where:

- (1) they are arrangements under which *persons* will be introduced to another *person*;
- (2) the *person* to whom introductions are to be made is:
 - (a) an *authorised person*; or
 - (b) an *exempt person* acting in the course of business comprising a *regulated activity* in relation to which he is exempt; or

(c) a *person* who is not unlawfully carrying on *regulated activities* in the *United Kingdom* and whose ordinary business involves him in engaging in certain activities; and

(3) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to *investments* generally or in relation to any class of *investments* to which the arrangements relate.

8.33.5 **G** In the *FCA's* view, article 33 will apply, for example, where *persons* are finding potential customers for independent financial advisers, advisory stockbrokers or independent investment managers. In this case, the introducer is allowed to receive a payment for making introductions. However, it will not apply where the introductions are made either to a *person* whose advice or management services would not be independent (for example, a product provider such as a life office or a manager of unit trust schemes or contractual schemes) or for the purposes of execution-only dealing.

8.33.6 **G** The exclusions in articles 29 and 33 of the *Regulated Activities Order* are not available where the *investment* is a *contract of insurance* (unless, as regards article 33, the relevant arrangements meet the requirements of article 33B). However, certain other exclusions do apply. This results from implementation of the requirements of the *IDD* and is explained in more detail in ■ PERG 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance).

8.33.7 **G** The exclusion in article 29 will not apply to a *person* who is carrying on an *arranging* activity when he does so as a *MiFID investment firm* or a *third country investment firm* (see ■ PERG 2.5.4 G to ■ 2.5.5 G (Investment services and activities)).



8.34 The business test

8.34.1 **G** *Persons* who may be carrying on the activity of *advising on investments* or *making arrangements with a view to transactions in investments* will only require *authorisation* or exemption if they are carrying on those activities by way of business. This is the effect of section 22(1) of the Act. Under section 419 of the Act, the Treasury has the power, by order, to require activities which would otherwise be treated as carried on by way of business to be treated as not carried on by way of business and vice versa. The Treasury has used this power to restrict the business test when applied to *regulated activities* such as *advising on investments* or *making arrangements with a view to transactions in investments* to situations where a *person* is carrying on the business of engaging in those activities. This is the effect of article 3 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (as amended).

8.34.2 **G** In the FCA's view, for a *person* to be carrying on the business of *advising on investments* or *making arrangements with a view to transactions in investments*, he will usually need to be carrying on those activities with a degree of regularity. The *person* will also usually need to be carrying on the activities for commercial purposes. That is to say, he will normally be expecting to gain a direct or indirect financial benefit of some kind. Activities carried on out of friendship or for altruistic purposes will not normally amount to a business. However, in the FCA's view, it is:

- (1) not necessary that a *person* be seeking to profit from carrying on activities; for example a *company* set up by a number of other companies operating in a particular area to provide research may simply charge to recover its costs but may still be regarded as carrying on its activities as a business; and
- (2) not necessarily the case that services provided free of charge will not amount to a business; for example, much investment advice is provided free of charge to investors but in the course of a business funded by commission payments; services (particularly advice, information or links) available on a website may also be free of charge to users of the site but be part of a business funded by advertising fees or sponsorship; and free newspapers may well represent a business for similar reasons.

8.34.3 **G** The 'by way of business' test for *insurance distribution activities* is distinguished from the standard test for 'investment business' in article 3 of the *Business Order*. The business test for *persons* carrying on *insurance distribution activities* is in article 3(4) of the *Business Order*. See ■ PERG 5.4 (The business test).

8.35 Authorisation and exemption

8.35.1

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Any *person* who is contemplating carrying on the *regulated activities* of *advising on investments* or *making arrangements with a view to transactions in investments* by way of business will need *authorisation* or exemption. Exemption would usually be obtained by a *person* entering into an agreement with an *authorised person* under section 39 of the Act and the Financial Services and Markets Act 2000 (Appointed Representative) Regulations 2001.



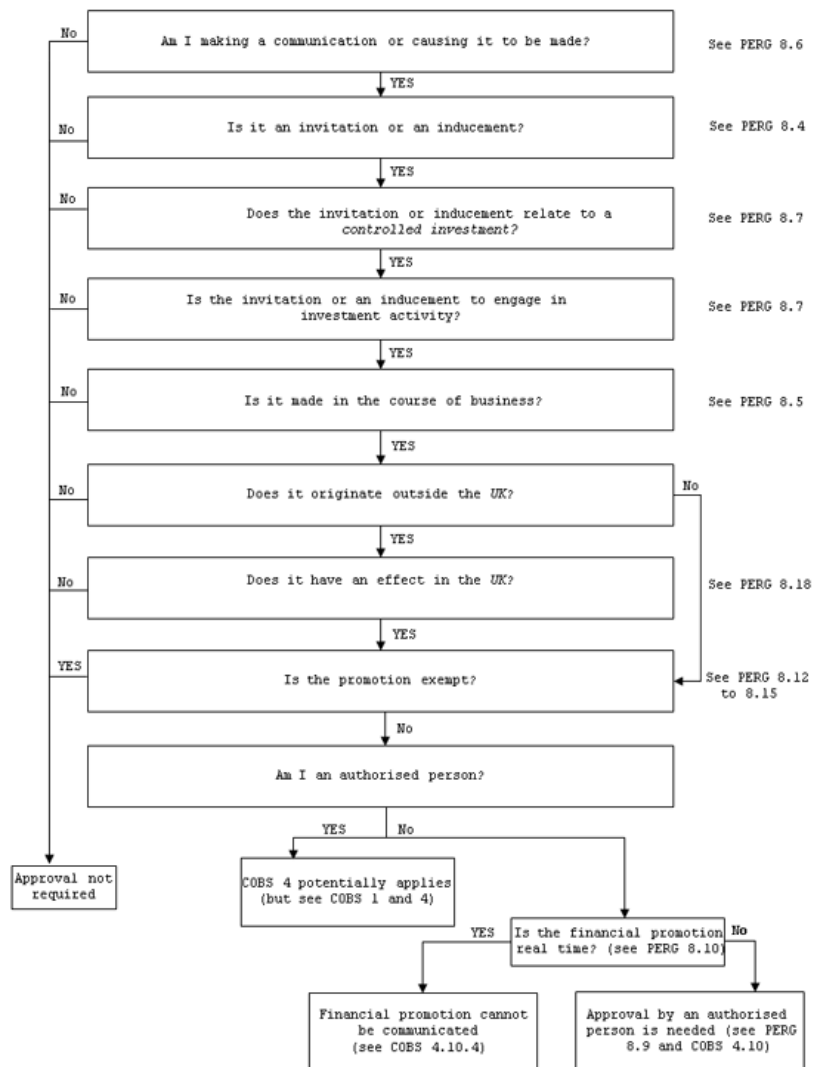
8.36 Illustrative tables

Financial Promotions: flowchart

8.36.1

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This flowchart sets out the matters which a *person* will need to consider to see if the restriction in section 21 of the *Act* applies to his communications. It is referred to in ■ PERG 8.2.5 G.



Controlled activities and controlled investments

8.36.2

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These tables list the activities that are *controlled activities* and the *investments* that are *controlled investments* under the *Financial Promotion Order*. It is referred to in ■ PERG 8.7.2 G.

8.36.3 G Table Controlled activities

1.	Accepting deposits
2.	Effecting and carrying out contracts of insurance
3.	Dealing in securities, structured deposits and contractually based investments
4.	Arranging deals in investments
4A.	Operating a multilateral trading facility
4B.	Credit broking
4C.	Operating an electronic system in relation to lending
4D.	Operating an organised trading facility
5.	Managing investments
5A.	Debt adjusting
5B.	Debt counselling
6.	Safeguarding and administering investments
7.	Advising on investments
8.	Advising on syndicate participation at Lloyd's
9.	Providing funeral plan contracts
10.	Providing qualifying credit
11.	Arranging qualifying credit etc
12.	Advising on qualifying credit etc
12A.	Providing relevant consumer credit
12B.	Providing consumer hire
13.	Providing a home reversion plan
14.	Arranging a home reversion plan
15.	Advising on a home reversion plan
16.	Providing a home purchase plan
17.	Arranging a home purchase plan
18.	Advising on a home purchase plan
18A.	Providing a regulated sale and rent back agreement
18B.	Arranging a regulated sale and rent back agreement
18C.	Advising on a regulated sale and rent back agreement
19.	Agreeing to do anything in 3 to 18C above

8.36.4 G Table Controlled investments

1.	A deposit.
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2.	Rights under a contract of insurance.
3.	Shares etc.
4	Instruments creating or acknowledging indebtedness (referred to in the Glossary as debentures and alternative debentures).
5.	Government and public securities.
6.	Instruments giving entitlement to investments (referred to in the Glossary as warrants).
7.	Certificates representing certain securities.
8.	Units in a collective investment scheme.
9.	Rights under a stakeholder pension scheme or a <i>personal pension scheme</i> .
10.	Options.
11.	Futures.
12.	Contracts for differences etc.
12A.	Emission allowances
13.	Lloyd's syndicate capacity and syndicate membership.
14.	Funeral plan contracts
15.	Agreements for qualifying credit
16.	Rights under a home reversion plan.
17.	Rights under a home purchase plan.
17A.	Rights under a regulated sale and rent back agreement
17B.	Rights under a relevant credit agreement (including rights under a paragraph 4C agreement)
17C.	Rights under a consumer hire agreement
18.	Rights to or interests in anything falling under 1 to 14 above.

Application of exemptions to forms of financial promotion

8.36.5 **G** This table identifies the types of *financial promotion* to which each exemption in the *Financial Promotions Order* applies. It is referred to in ■ PERG 8.11.2 G and ■ PERG 8.14.1 G.

8.36.6 **G** Table Application of Exemptions to Forms of Promotions

Financial Promotion Order		Applies to		
Article No.	Title and PERG 8 reference (where applicable)	Unsolicited real time	Solicited real time	Non-real time (solicited or unsolicited)

Financial Promotion Order		Applies to		
12	Communications to overseas recipients (8.12.2G)	* ¹	*	*
13	Communications from customers and potential customers (8.12.9G)	*	*	*
14	Follow up non-real time communications and solicited real time communications (8.12.10G)		*	*
15	Introductions (8.12.11G)	*	*	*
16	Exempt persons (8.12.12G)	* ²	* ³	* ³
17	Generic promotions (8.12.14G and 8.21.4G)	*	*	*
17A	Communications caused to be made or directed by unauthorised persons (8.6.7AG)	*	*	*
18	Mere conduits (8.12.18G)	*	*	*
18A	Outgoing electronic commerce communications: mere conduits, caching and hosting (8.12.18G)	*	*	*
19	Investment professionals (8.12.21G and 8.21.5G)	*	*	*
20	Communications by journalists (8.12.23G)			*
20A	Promotion broadcast by company director etc (8.12.23G and 8.21.6G)	*	*	*
20B	Incoming electronic commerce communications (8.12.38G)	*	*	*
22	Deposits : non-real time communications (8.13)			*
23	Deposits : real time communications (8.13)	*	*	
24	Relevant insurance activity : non-real time communications (8.13)			*
25	Relevant insurance activity : non-real time communications : reinsurance and large risks (8.13)			*
26	Relevant insurance activity : real time communications (8.13)	*	*	
28	One-off non-real time communications and solicited real time communications (8.14.3G)		*	*
28A	One-off unsolicited real time communications (8.14.11G)	*		

Financial Promotion Order		Applies to		
28B	Real time communications: introductions in connection with qualifying credit (8.17.12G)	*	*	
29	Communications required or authorised by enactments	*	*	*
30	Overseas communicators: solicited real time communications (8.14.15G)		*	
31	Overseas communicators: non-real time communications to previously overseas customers (8.14.17G)			*
32	Overseas communicators: unsolicited real time communications to previously overseas customers (8.14.16G)	*		
33	Overseas communicators: unsolicited real time communications to knowledgeable customers (8.14.16G)	*		
34	Governments, central banks etc		*	*
35	Industrial and provident societies		*	*
36	Nationals of the EEA States other than United Kingdom (8.14.18G)		*	*
37	Financial markets		*	*
38	Persons in the business of placing promotional material	*	*	*
39	Joint enterprises (8.14.19G)	*	*	*
40	Participants in certain recognised collective investment schemes		*	*
41	Bearer instruments: promotions required or permitted by market rules (8.14.42G)		*	*
42	Bearer instruments: promotions to existing holders (8.14.42G)		*	*
43	Members and creditors of certain bodies corporate (8.14.41G and 8.21.8G)		*	*
44	Members and creditors of open-ended investment companies		*	*
45	Group companies	*	*	*
46	Qualifying credit to bodies corporate (8.17.10G)	*	*	*

Financial Promotion Order		Applies to		
46A	Promotions of credit etc. for business purposes (8.17-A.10G)	*	*	*
47	Persons in the business of disseminating information (8.21.10G)	*	*	*
48	Certified high net worth individuals (8.14.21G)		*	*
49	High net worth companies, unincorporated associations etc (8.14.25G)	*	*	*
50	Sophisticated investors (8.14.27G)	*	*	*
50A	Self-certified sophisticated investors (8.14.28AG)	*	*	*
51	Associations of high net worth or sophisticated investors (8.14.29G)		*	*
52	Common interest group of a company (8.14.30G)		*	*
53	Settlors, trustees and personal representatives	*	*	*
54	Beneficiaries of trust, will or intestacy	*	*	*
55	Communications by members of professions (8.15.1G)	*	*	
55A	Non-real time communication by members of the professions. (8.15.5G)			*
56	Remedy following report by Parliamentary Commissioner for Administration	*	*	*
57	Persons placing promotional material in particular publications	*	*	*
58	Acquisition of interest in premises run by management companies		*	*
59	Annual accounts and directors' report (8.21.11G)	*	*	*
60	Participation in employee shares schemes	*	*	*
61	Sale of goods and supply of services		*	*
62	Sale of body corporate (8.14.35G)	*	*	*
64	Takeovers of relevant unlisted companies	*	*	*
65	Takeovers of relevant unlisted companies: warrants etc	*	*	*

Financial Promotion Order		Applies to		
66	Takeovers of relevant unlisted companies: application forms	*	*	*
67	Promotions required or permitted by market rules (8.21.13G)		*	*
68	Promotions in connection with admission to certain EEA markets (8.21.16G)		*	*
69	Promotions of securities already admitted to certain markets (8.21.17G)		*	*
70	Promotions included in listing particulars etc (8.21.20G)			*
71	Material relating to prospectus for public offer of unlisted securities			*
72	Pension products offered by employers (8.14.40AG)	*	*	*
72A	Pension product offers communicated to employees by third parties (8.14.40AAG)	*	*	*
72B	Insurance product offers communicated to employees by employers (8.14.40ABG)	*	*	*
72C	Insurance products offers communicated to employees by third parties (8.14.40ACG)	*	*	*
72D	Staff mortgage offers communicated to employees by employers (8.14.40ADG)	*	*	*
72E	Staff mortgage offers communicated to employees by third parties (8.14.40AEG)	*	*	*
72F	Credit agreements offered to employees by employers	*	*	*
73	Advice centres (8.14.40B)	*	*	*
¹ in limited circumstances only – see article 12(2) of the <i>Financial Promotion Order</i> ² for the purpose of article 16 (2) only ³ for the purpose of article 16 (1) only				

8.37 AIFMD Marketing

Introduction and purpose

8.37.1

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- (1) Part 6 (Marketing) of the *AIFMD UK regulation* contains restrictions on an *AIFM* or an *investment firm marketing an AIF*. Such a *person* may not *market* an *AIF* in the *UK* unless the relevant conditions set out in the *AIFMD UK regulation* are met.
- (2) The purpose of this section is to give *guidance* on:
 - (a) the restrictions on an *AIFM* or *investment firm marketing an AIF* (■ PERG 8.37.2 G and ■ PERG 8.37.3 G);
 - (b) the circumstances in which an *AIFM* or an *investment firm markets an AIF* (■ PERG 8.37.4 G to ■ PERG 8.37.10 G);
 - (c) the exemptions from the *marketing* restrictions (■ PERG 8.37.11 G and ■ PERG 8.37.12 G);
 - (d) the penalties for breach of the *marketing* restrictions (■ PERG 8.37.13 G);
 - (e) the application of the *financial promotion* and *scheme promotion* restrictions (■ PERG 8.37.14 G); and
 - (f) the interaction between the *marketing* of an *AIF* and the *prospectus directive* (see ■ PERG 8.37.15 G).

This section is not intended to have a more general application and, therefore, where *guidance* is given this should be interpreted as being limited to the *marketing* of *AIF* under the *AIFMD UK regulation*.

- (3) No guidance has been provided by the European Commission or *ESMA* on the meaning of *marketing* in *AIFMD* and, therefore, this *guidance* is subject to any future clarification from these (or other) European bodies. This means that other *EEA States* may take a different view on the meaning of *marketing* in *AIFMD*.
- (4) References to regulations in this section are to regulations of the *AIFMD UK regulation*.

Restrictions on an AIFM marketing an AIF

8.37.2

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Regulations 49 and 50 place restrictions on an *AIFM marketing an AIF*. These regulations provide that the following types of *AIFM* may not *market* the following types of an *AIF* in the *UK* unless the conditions summarised below are met.

- (1) The conditions that need to be met vary depending on whether the *AIF* falls within regulation 57(1) or not. An *AIF* falls within this regulation if it is:
 - (a) a *feeder AIF* that is a *UK AIF* or an *EEA AIF*, the *master AIF* of which is managed by a *non-EEA AIFM* or is a *non-EEA AIF*; or
 - (b) a *non-EEA AIF*.

Such *AIFs* are not entitled to benefit from the *marketing passport* under *AIFMD* and are subject to the national private placement provisions in respect of their *marketing*.
- (2) Regulation 49 (Marketing by full scope EEA AIFMs of certain AIFs) provides that a *full-scope EEA AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless:
 - (a) when *marketing* to a *professional client*, the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act* (EEA passport rights); or
 - (b) when *marketing* to a *retail client*:
 - (i) the *FCA* has received a regulator's notice regarding the *marketing* of the *AIF*, in accordance with Schedule 3 to the *Act*; or
 - (ii) the *FCA* has approved the *marketing*, in accordance with regulation 54 (FCA approval for marketing) (see ■ FUND 3.12 (Marketing in the home Member State of the AIFM)) and has not suspended or revoked that approval.
- (3) Regulation 50 (Marketing by AIFMs of other AIFs) provides that:
 - (a) a *full-scope UK AIFM* may not *market* an *AIF* that does not fall within regulation 57(1) in the *UK* unless the *FCA* has approved the *marketing* in accordance with regulation 54; and
 - (b) the following types of *AIFM* may not *market* the following types of *AIF* unless the *AIFM* has complied with the national private placement provisions set out in chapter 3 (National private placement) of Part 6 of the *AIFMD UK regulation* (see FUND 10.5 (National private placement)):
 - (i) a *full-scope UK AIFM* of an *AIF* falling within regulation 57(1);
 - (ii) a *full-scope EEA AIFM* of an *AIF* falling within regulation 57(1); and
 - (iii) a *non-EEA AIFM* (ie a *small non-EEA AIFM* or an *above-threshold non-EEA AIFM*) of a *UK AIF*, an *EEA AIF* or a *non-EEA AIF*.

Restrictions on an investment firm marketing an AIF

8.37.3

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Regulation 51 (Marketing of AIFs by investment firms) places a restriction on an investment firm marketing an AIF. This provides that where regulation 49 or 50 requires a condition to be met before an *AIFM* may *market* an *AIF*, an *investment firm* may not *market* that *AIF* unless that condition is met. However, as explained in ■ PERG 8.37.4G (1)(b), an *investment firm* only *markets* an *AIF* if it does so at the initiative of, or on behalf of, the *AIFM* of that *AIF*.

The circumstances in which an AIFM or an investment firm markets an AIF

8.37.4

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- (1) Regulation 45 (References in this part to an AIFM or an investment firm marketing an AIF) provides that:
- (a) an *AIFM markets an AIF* when the *AIFM* makes a direct or indirect offering or placement of *units* or *shares* of an *AIF* managed by it to an investor domiciled or with a registered office in an *EEA State*, or when another *person* makes such an offering or placement at the initiative of, or on behalf of, the *AIFM*; and
 - (b) an *investment firm markets an AIF* when it makes a direct or indirect offering or placement of *units* or *shares* of the *AIF* to an investor domiciled or with a registered office in an *EEA State* at the initiative of, or on behalf of, the *AIFM* of that *AIF*.
- (2) *Marketing*, therefore, has a specific meaning in the context of the *AIFMD UK regulation* which is, in some respects, different from the ordinary meaning of the term.

The meaning of an offering or placement

8.37.5

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- (1) The terms 'offering' or 'placement' are not defined in the *AIFMD UK regulation* but, in our view, an offering or placement takes place for the purposes of the *AIFMD UK regulation* when a *person* seeks to raise capital by making a *unit* of *share* of an *AIF* available for purchase by a potential investor. This includes situations which constitute a contractual offer that can be accepted by a potential investor in order to make the investment and form a binding contract, and situations which constitute an invitation to the investor to make an offer to subscribe for the investment.
- (2) An 'offering' includes situations where the *units* or *shares* of an *AIF* are made available to the general public and a 'placement' includes situations where the *units* or *shares* of an *AIF* are only made available to a more limited group of potential investors.
- (3) However, an 'offering' or 'placement' does not include secondary trading in the *units* or *shares* of an *AIF*, because this does not relate to the capital raising in that *AIF*, except in situations where there is an indirect offering or placement (see ■ PERG 8.37.7 G). Similarly, the listing of the units or shares of an *AIF* on the official list maintained by the *FCA* in accordance with section 74(1) of the *Act* will not in and of itself constitute an offering or placement, although it may be accompanied by such an offering or placement.

Communications with investors in relation to draft documentation

8.37.6

G

- (1) Under article 31 *AIFMD*, an *AIFM* is required to submit the documentation and information in Annex III to *AIFMD* with its application for permission to *market* an *AIF* managed by it and to notify their *competent authority* of any material changes to this documentation and information. Therefore, the prescribed documentation and information should be in materially final form before the *AIFM* may apply for permission to *market* an *AIF*. Any communications relating to this draft documentation do not, in our

view, fall within the meaning of an 'offer' or 'placement' for the purposes of *AIFMD*, as the *AIFM* cannot apply for permission to market the *AIF* at this point. For example, a promotional presentation or a pathfinder version of the private placement memorandum would not constitute an offer or placement, provided such documents cannot be used by a potential investor to make an investment in the *AIF*. However, a *unit* or *share* of the *AIF* should not be made available for purchase as part of the capital raising of the *AIF* on the basis of draft documentation in order to circumvent the *marketing* restriction.

- (2) In our view, the position for draft documentation set out in (1) should apply to *marketing* under article 32 of *AIFMD* and the national private placement provisions. However, as there is no European guidance on the meaning of *marketing*, other *EEA States* may take a different view.
- (3) Regard should be had to national law in relation to a communication which does not amount to an offering or a placement. In the *UK*, consideration needs to be given to whether such a communication is a *financial promotion* (see ■ PERG 8.37.14 G). If a *UK AIFM* is *marketing* in another *EEA State* using the *marketing* passport in article 32 *AIFMD*, regard should be had to the national law of that *EEA State*, as the arrangements for marketing are a matter for the *Host State* in accordance with article 32(5) of *AIFMD* (unless the communication is an *information society service* in which case regard should be had to the law of the country of origin).

The meaning of indirect offering or placement

8.37.7

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- (1) Marketing may take place by a direct or indirect offering or placement of *units* or *shares* of an *AIF*. The reference to indirect offering or placement would include situations where an *AIFM* distributes *units* or *shares* of an *AIF* through a chain of intermediaries.
- (2) For example, if the *units* or *shares* of an *AIF* are temporarily purchased by a third party (eg, an underwriter or placement agent) with the objective of distributing them to a wider investor base, this could be an indirect offering or placement when those *units* or *shares* are made available for purchase by investors, if the third party is acting at the initiative of, or on behalf of, the *AIFM*.

The meaning of a unit or share of an AIF

8.37.8

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The terms 'unit' and 'share' in the *AIFMD UK regulation* are generic and can be interpreted as encompassing all forms of equity of, or other rights in, an *AIF*. As such, the terms are not limited to *AIFs* which are structured as companies or unitised funds and may include other forms of collective investment undertakings, such as partnerships or non-unitised trusts.

The meaning of investor

8.37.9

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- (1) The reference to 'investor' in the *AIFMD UK regulation* should be regarded as a reference to the *person* who will make the decision to invest in the *AIF*. Where that *person* acts on its own behalf and subscribes directly to an *AIF*, the investor should be considered to be the *person* who subscribes to the *unit* or *share* of the *AIF*.

- (2) However, where that *person* engages another *person* to subscribe to the *AIF* on its behalf, including, for example, where:
 - (a) a nominee company will subscribe as bare trustee for an underlying beneficiary; or
 - (b) a custodian will subscribe on behalf of an underlying investor, the *AIFM* or *investment firm* that is marketing the *AIF* should 'look through' the subscriber to find the underlying investor who will make the decision to invest in the *AIF* and that *person* should be regarded as the investor.
- (3) Where a discretionary manager subscribes, or arranges for another *person* to subscribe, on behalf of an underlying investor to the *AIF* and the discretionary manager makes the decision to invest in the *AIF* on that investor's behalf without reference to the investor, it is not necessary to 'look through' the structure and the discretionary manager should be considered to be the investor for the purposes of the *AIFMD UK regulation*.

Territorial scope of the marketing restrictions

8.37.10

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- (1) The restrictions on the *marketing* of an *AIF* in regulations 49 to 51 only apply to *marketing* that takes place in the *UK*. In addition, under regulation 45, an *AIFM* or an *investment firm* only *markets* an *AIF* if the investor is domiciled in an *EEA State* or has its registered office in an *EEA State*.
- (2) Under regulation 2(2)(a) (Interpretation), the reference to 'domicile' should be construed in line with its meaning in *AIFMD*, ie its meaning under *EU* law. This may be different to the domicile of an investor for tax purposes.

Marketing at the initiative of the investor

8.37.11

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- (1) Regulation 47 (Marketing at the initiative of the investor) states that regulations 49 to 51 do not apply to an offering or placement of *units* or *shares* of an *AIF* to an investor made at the initiative of that investor.
- (2) A confirmation from the investor that the offering or placement of *units* or *shares* of the *AIF* was made at its initiative, should normally be sufficient to demonstrate that this is the case, provided this is obtained before the offer or placement takes place. However, *AIFMs* and *investment firms* should not be able to rely upon such confirmation if this has been obtained to circumvent the requirements of *AIFMD*.

Marketing under the designation "EuSEF" and "EuVECA"

8.37.12

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Regulation 48 (Marketing under the designation "EuSEF" and "EuVECA") provides that regulations 49 to 51 do not apply to the *marketing* of an *AIF* under the designation "EuSEF" and "EuVECA". To be designated as such the *AIFM* of the *AIF* is required to apply for registration of the *AIF* with its *Home State* under the *EuSEF regulation* or the *EuVECA regulation* (and in the *UK* make a notification under regulation 14 (Notification of new funds under the *EuSEF Regulation* or the *EuVECA Regulation*)). Where the *AIFM* is

established in the UK, it must also register as a *small registered UK AIFM* under regulation 10. The *AIFM* of an *AIF* is then entitled to *market* the *AIF* to *professional clients* and certain categories of *retail clients* (see article 6 of the *EuSEF regulation* and article 6 the *EuVECA regulation*) under those regulations.

Contravention of the marketing restrictions

8.37.13

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An *AIFM* or an *investment firm* that acts in contravention of the *marketing* restrictions in regulations 49 to 51, or an *AIFM* that acts in contravention of a provision of the *EuSEF regulation* or the *EuVECA regulation*, is deemed to have been carrying out "unlawful marketing" under regulations 52 and 53. The consequences of carrying out unlawful marketing vary, depending on whether the *AIFM* or *investment firm* concerned is an *authorised person* or an *unauthorised person*.

- (1) If the *AIFM* or *investment firm* is an *unauthorised person*, regulation 52 (Contravention by an unauthorised person) provides that:
 - (a) section 25 of the *Act* (contravention of section 21) applies to the unlawful marketing as it applies to the contravention of section 21(1) of the *Act* (although under regulation 52(3) the reference in section 25(1)(a) to imprisonment for a term not exceeding six months is to be read as a reference to imprisonment for a term not exceeding three months);
 - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 21 of the *Act* included reference to unlawful marketing; and
 - (c) section 30 of the *Act* (enforceability of agreements resulting from unlawful communications) applies in relation to:
 - (i) controlled agreements entered into in consequence of unlawful marketing, as it applies in relation to controlled agreements entered into in consequence of an unlawful communication; and
 - (ii) the exercise of rights conferred by a *controlled investment* in consequence of unlawful marketing, as it applies in relation to the exercise of such rights in consequence of an unlawful communication.
- (2) If the *AIFM* or *investment firm* is an *authorised person*, regulation 53 (Contravention by an authorised person) provides that:
 - (a) unlawful marketing is actionable at the suit of a private person who suffers loss as a result of such *marketing*, subject to the defences and other incidents applying to actions for breach of statutory duty; and
 - (b) section 168 of the *Act* (appointment of persons to carry out investigations in particular cases) applies as if the reference at section 168(2)(c) to a contravention of section 238 of the *Act* included reference to unlawful marketing.

Application of the financial promotion and scheme promotion restrictions

8.37.14

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- (1) Regulation 46 (Application of the financial promotion and scheme promotion restrictions) provides that where a *person* may *market* an *AIF* under regulation 49, 50 or 51:
 - (a) to the extent that such *marketing* falls within section 21(1) (restrictions on financial promotion) or 238(1) (restrictions on promotion) of the *Act*, the *person* may *market* the *AIF* to a *retail client* only if the *person* does so without breaching the restriction in that section; and
 - (b) to the extent that any activity falling within section 21(1) or 238(1) of the *Act* does not amount to *marketing* by an *AIFM* or an *investment firm* for the purposes of Part 6 of the *AIFMD UK regulations*, the restriction in that section applies to the *person*.
- (2) The effect of the provision referred to at (1)(a) is to require an *AIFM* or an *investment firm* that *markets* an *AIF* to a *retail client* to comply with the *financial promotion* and scheme promotion restrictions in relation to that *marketing*. The provision referred to at (b) is designed to clarify that the *financial promotion* and scheme promotion restrictions continue to apply to communications by an *AIFM* or an *investment firm* that do not constitute *marketing*.
- (3) In addition, the *AIFMD UK regulation* has made amendments to article 29 (Communications required or authorised by enactments) of the *Financial Promotion Order* and article 16 (Communications required or authorised by enactments) of the *Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/2157)*. The effect of which is to exempt communications to *professional clients* which are approved by the *FCA* under regulation 49 or 50 of the *AIFMD UK regulation* from the *financial promotion* and scheme promotion restrictions.
- (4) There is likely to be a considerable overlap between *marketing* and *financial promotion*, and in the case of *marketing* to retail clients, this can only be done if a *financial promotion* can be made to that investor, but the two concepts are not the same. In particular, it is possible for a *person* to make a *financial promotion* without *marketing* an *AIF*. For example, an *AIFM* that makes a communication in relation to an *AIF* would be making a *financial promotion* if that communication was a significant step in the chain of events leading to an agreement to engage in investment activity (see ■ PERG 8.4.7 G (Inducements)), but would not be *marketing* an *AIF* if this communication was in relation to draft documentation (see ■ PERG 8.37.6 G).

The interaction between marketing and the prospectus directive

8.37.15

G

- (1) The *prospectus directive* has not been amended by *AIFMD* and closed-ended AIFs that are making an offer of securities to the public as defined in the *prospectus directive* need to comply with the requirements under both Directives.
- (2) However, where the AIF is required to publish a *prospectus* under section 85 of the *Act* or the equivalent provision implementing article

3 of the *Prospectus Directive* in the AIF's *Home State*, only information referred to in ■ FUND 3.2.2 R and ■ FUND 3.2.3 R that is additional to that contained in the *prospectus* needs to be disclosed, either separately or as additional information in the *prospectus*.

Examples of what is and is not a personal recommendation and advice

- Notes:
- (1) The purpose of this annex is to give examples in general terms of what is and is not *advising on investments (except P2P agreements)*. The examples are relevant both to someone who is not appropriately authorised and someone who is. See paragraph (5) for what appropriately authorised means.
 - (2) If the answer in the column in the table of examples headed 'Is this regulated advice for someone other than a firm with an appropriate authorisation?' is that there is no regulated advice, then the example does not involve *advising on investments (except P2P agreements)* by anyone, whether or not they are appropriately authorised. Where this is the case, the column headed 'Is there a personal recommendation?' is marked 'No' because in those circumstances there is no *personal recommendation* either.
 - (3) If the answer in the column in the table of examples headed 'Is this regulated advice for someone other than a firm with an appropriate authorisation?' is that there is regulated advice:
 - (a) the example involves *advising on investments (except P2P agreements)* for someone who is not appropriately authorised; and
 - (b) the example only involves *advising on investments (except P2P agreements)* for someone who is appropriately authorised if the column headed 'Is there a personal recommendation?' says that there is a *personal recommendation*.
 - (4) Therefore:
 - (a) column (2) of the table (Is there a personal recommendation?) is not relevant to someone who is not appropriately authorised; and
 - (b) all columns of the table are relevant to someone who is appropriately authorised.
 - (5) PERG 8.24.1AG explains what appropriately authorised means.
 - (6) The examples should be read together with PERG 8.24 to PERG 8.30B.
 - (7) Except where stated otherwise, the examples all involve *firms* and so they are most relevant to a *firm* wanting to know whether it is *advising on investments (except P2P agreements)*.
 - (8) The examples assume that the *person* in the example is not doing anything else relevant that is not described in the scenario set out in column (1) of the table.
 - (9) The tables do not consider whether the examples involve *financial promotions*.

(A) Website with generic information without filtering

(1) Example	header Is there a personal recommendation?	header Is this regulated advice for someone other than a firm with an appropriate authorisation?
Firm A has a website through which it provides a range of information about the world of investments. This includes generic explanations of the different asset classes available and	No	Not regulated advice because simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make does not involve ad-

(A) Website with generic information without filtering		
(1) Example	header Is there a personal recommendation?	header Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>the likely risks that may attach to each, the benefits of diversification and the different types of investment strategies used in the market. The information does not have a bias towards a particular type of investment, strategy or asset allocation. There is no interactivity.</p> <p>The website provides lists of <i>investments</i> for purchase without additional comment (but has links to the relevant disclosure material for the individual products).</p>		<p>vising on investments (see PERG 8.28.2G).</p>

(B) Website without filtering but which classifies the available products		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>In each example the categorisation by <i>Firm B</i> is not interactive. The investments are not displayed or filtered in accordance with information input by the customer. The ranking is set out in the way it would be in a hard copy document.</p>		
<p>(1) <i>Firm B</i> ranks the products it sells into risk categories. One set of categories could be Low Risk, Low-Medium Risk, Medium Risk, Medium-High Risk and High Risk. <i>Firm B</i> allocates each investment using its own opinion on the level of risk of each product (i.e. it is self-generated and not drawn directly from each product's disclosure material). For example a list of funds' riskiness based on the <i>firm's</i> analysis and metrics.</p> <p>The website also has material elsewhere explaining investment risk and material to help customers self-determine the level of risk they are willing and able to take. Each risk category description includes notional customer attitudes, the types of investments that may be found within funds/portfolios matching this risk level and also historic factual data on the volatility of such investments.</p>	<p>Not a <i>personal recommendation</i>.</p> <p>The recommendation is not presented as suitable for the customer or based on a consideration of their personal circumstances. The customer reads both sets of information (list of products and explanatory material) and makes any investment decision on that basis.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice.</p> <p>Please see the reasons in PERG 8.30A.14G.</p> <p>Although that <i>guidance</i> refers to an Internet-based filtering process, this example (B1) is also based on value judgments about the relative merit of specific <i>investments</i> given to someone interested in buying or selling them.</p> <p>As explained in PERG 8.30A.14G(6) classifying products based on risk categories need not be regulated advice outside the sales context.</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(B) Website without filtering but which classifies the available products</p> <p>Customers are prompted to read the risk category descriptions and to use this material to think about which category best fits their circumstances.</p> <p>(2) <i>Firm B</i> classifies the products it sells by reference to a number of factors:</p> <ul style="list-style-type: none"> ● Riskiness, as in example (B1). ● High-level investment objectives, for example capital growth, income, or a balance of both. ● Whether the <i>investments</i> are designed for long- or short-term investment. <p>For example, each fund may have three boxes next to it on the website. One box has a riskiness rating. One is about the investment objectives. The other is about whether it is designed for long- or short-term investment.</p> <p>There is material elsewhere on the website to help customers self-determine what their investment objectives should be.</p> <p>Each customer that uses the website sees the same information. The groups and investment objectives do not change based on information that the customer has provided to the <i>firm</i>.</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (B1).</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>
<p>(3) Same as example (B2), except that the products are manufactured and issued by the <i>firm</i> itself and the website is describing the specific investment objectives for those products.</p>	<p>No</p>	<p>May not be regulated advice, for the reasons in PERG 8.30A.12G.</p>
<p>(4) <i>Firm B</i> gives each fund it lists a star rating based on whether the fund is good value. The star rating is supplied by an external unconnected party and does not reflect past performance. The rating is not exclusive to <i>Firm B</i></p>	<p>Even if this involves regulated advice under column (3) of this example, it is not a <i>personal recommendation</i>, for the same reason as in example B1.</p>	<p>If the <i>firm</i>:</p> <ul style="list-style-type: none"> (a) is not providing its 'self-generated assessment of riskiness'; (b) is only providing the star rating supplied by a third party; and (c) is not endorsing the rating;

(B) Website without filtering but which classifies the available products		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>and is widely used in the industry. This might be something like the Morningstar Analysts' Rating.</p> <p>(5) <i>Firm B</i> gives each fund it lists a star rating based on whether it thinks that the fund is good value. <i>Firm B</i> uses skill and expertise in putting together the ranking by, for example, adjusting figures from the product providers to take into account the different ways that the product providers calculate growth and the different reporting periods and by taking into account management charges.</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example B1.</p>	<p>the <i>firm</i> is, depending on the circumstances, unlikely to be giving regulated advice. It will only be giving information.</p> <p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice. The term 'good value' is itself implicit advice on the merits of buying.</p> <p>In addition, the reason in example (B1) applies to this example too. Good value is a strong example of a classification factor based on judgment and skill rather than simple objective facts.</p>

(C) Website with pop-up boxes		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>Same as example (A). In addition the website has pop-up boxes that come up when the customer picks an <i>investment</i> to buy. They prompt the customer to think about the customer's circumstances, such as health, financial circumstances and retirement date. The pop-up boxes have links to website material explaining the importance of those factors.</p> <p>(This example may be particularly relevant to firms who wish to offer pension related products without a <i>personal recommendation</i>).</p>	<p>No</p> <p>(The pop-up box only prompts the customer to think about various factors rather than advising the customer based on the customer's personal circumstances.)</p>	<p>Not likely to be regulated advice as long as the pop-up boxes contain objective information on what should be considered when making investment decisions. The reason is the same as for example (A).</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
(D) Website with filtering		
<p><i>Firm D</i> decides to make its list of the investment products it sells easier to search. The website allows the customer to filter products based upon specified factors. Only products that meet the search criteria input by the customer are displayed.</p> <p>(1) The website enables the customer to filter the products by reference to objective factors of the type in section (A) of this table (e.g. 'UK Equity funds').</p>	<p>No</p>	<p>Not likely to be regulated advice as the filtering tool is based on objective factors.</p> <p>The reason is explained in PERG 8.30A.10G.</p>
<p>(2) The filtering is based on riskiness as described in example (B1).</p>	<p>Not a <i>personal recommendation</i>, for the reasons in PERG 8.30B.28G.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>
<p>(3) The filtering is based on a number of factors as described in example (B2).</p>	<p>Not a <i>personal recommendation</i>, for the reasons in example PERG 8.30B.28G.</p> <p>The customer's inputs are filtered in a straightforward way and so the approach in PERG 8.30B.33G (multiple customer inputs means that there is a <i>personal recommendation</i>) does not apply.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>
<p>(4) The filtered results are ranked by the <i>firm</i> manufacturing the investment in accordance with the investment objectives as described in example (B3).</p>	<p>No</p>	<p>Likely not to be regulated advice, for the reasons in example (B3)</p>
<p>(5) The filtered results are ranked in accordance with the ratings of a third party as described in example (B4).</p>	<p>No</p>	<p>Likely not to be regulated advice, for the reasons in example (B4)</p>
<p>(6) The filtered results are ranked based on the <i>firm's</i> judgment about how good value they are, in the way described in example (B5).</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (D2).</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the reasons in example (B5).</p>
<p>(7) Materials including narrative on investment risk alongside a risk profiling tool are used to help educate a customer make a decision on their investment.</p>	<p>No</p>	<p>Not likely to be regulated advice. The reason is the same as in example (A).</p>
<p>(8) A <i>firm</i> runs a <i>personal pension scheme</i>. It provides a filtering process of the type described in example (D4).</p> <p>In addition, it provides an on-line calculation tool that allows its customers to calculate what</p>	<p>No</p>	<p>Likely not to be regulated advice.</p> <p>The contribution calculator is not regulated advice taken on its own. It does not recommend that the customer buy any particular investment.</p>

(D) Website with filtering		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>their regular contribution rates would need to be to meet a level of income that the customer wishes to have in retirement.</p> <p>The tool also allows the customer to calculate their spare income, as in example (F17).</p> <p>The <i>firm</i> makes available information, from a neutral third party source like the Pensions Advisory Service, about suggested contribution rates.</p>		<p>It should also not involve regulated advice taken with the other customer tools in this example, for the following reasons taken together. The contribution calculator just helps the customer decide how much they want to invest and not whether they should invest. The contribution calculator provides additional information about the way that the <i>firm</i> has designed its funds to perform (see PERG 8.30A.12G).</p>

(E) Guided sales and limited advice		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(1) The filtering process is not based solely on the customer's risk appetite and preferences in relation to other factors. The filtering process is also based on facts relating to the customer's life and situation. For example, it might take into account:</p> <ul style="list-style-type: none"> ●the customer's current use of tax wrappers; ●the customer's financial resources and commitments; ●whether the customer is in a long-term relationship and the customer's marital status; ●the customer's age; ●the customer's plans for their family in the short- and long-term (e.g. a new car, work on the family home or school fees); ●what other investments and assets the customer has; and ●the customer's career and retirement plans. <p>(2) <i>Firm E</i> provides advice on a limited straightforward issue at the request of the customer, such as which <i>ISA</i> product to in</p>	<p>This is likely to be a <i>personal recommendation</i>, for the reasons in PERG 8.30B.33G.</p> <p>This is a <i>personal recommendation</i>.</p> <p>This example is not about structured sales. Its purpose is to il-</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, as all the elements in PERG 8.24.2G are met. See PERG 8.30A.15G.</p> <p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, as all the elements in PERG 8.24.2G are met.</p>

(E) Guided sales and limited advice		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>vest in. The wider financial situation is not covered. The advice is limited to the specific issue in hand and the information collected on that basis. The treatment of suitability reflects that narrower customer objective.</p>	<p>illustrate that the answer to example E1 is not based on the view that there is no <i>personal recommendation</i> unless the advice takes into account a wide range of factors. The point in example (E1) is that the range of the factors taken into account is relevant in the specific context of filtered sales, as explained in PERG 8.30B.29G.</p>	

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(1) Towards the end of the tax year, a <i>firm</i> sends a communication to all of its customers who hold <i>investments</i> in their <i>ISA</i> with the <i>firm</i> and who have not used their entire <i>ISA</i> allowance for the year.</p> <p>The <i>firm</i> informs each customer of the amount of unused allowance that they have remaining and when they must transact by to use this allowance. The communication also describes the general tax benefits of the <i>ISA</i> wrapper.</p>	<p>No</p>	<p>Not likely to be regulated advice.</p> <p>The first reason is that, as long as the information is presented neutrally, the information is factual (the amount of the unused <i>ISA</i> allowance and the tax benefits of <i>ISAs</i>).</p> <p>The same answer would apply whether the <i>firm</i> has a single <i>ISA</i> product or several. As long as the information is presented neutrally, the communication does not implicitly recommend that the customer buy an <i>ISA</i> from the <i>firm</i>. There may also be a second reason. If the customer can choose what <i>investments</i> go into the <i>ISA</i> wrapper, the <i>firm</i> will not be advising about a particular <i>investment</i>. Therefore the <i>firm</i> will be giving generic advice rather than regulated advice (see PERG 8.26 (The investment must be a particular investment)).</p>
<p>(2) A <i>firm</i> sends a communication to all of its existing customers who hold a self-invested <i>personal pension scheme</i> with the <i>firm</i> and who have not increased their monthly contribu-</p>	<p>No</p>	<p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information is factual or generic (the benefits of pensions generally).</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>tions over the previous five years.</p> <p>The communication alerts the customers to this fact and includes generic information about the benefits of pension investment and recommends that they contact an adviser to discuss their contribution rate.</p> <p>The <i>firm</i> does not highlight any particular product or pressure the customer into any course of action.</p>	<p>No</p>	<p>A factor that would normally point towards this being regulated advice for someone who is not appropriately authorised is that the communication is made in the context of a possible purchase of a particular <i>investment</i> (e.g. a new payment into the customer's existing pension fund). However, in this example:</p> <ul style="list-style-type: none"> ● The customer was not asking for advice. Instead the <i>firm</i> has contacted the customer on its own initiative. ● The information is presented neutrally. ● The <i>firm</i> tells the customer to get advice elsewhere and that the <i>firm</i> is not advising the customer. ● The information is general and not detailed. ● The information is about the benefits of pensions generally not the benefit of this particular <i>personal pension scheme</i>. <p>This general context means that a reasonable customer would not think that this was an implicit recommendation.</p> <p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information does not identify any particular <i>investment</i> to be bought or sold.</p> <p>The risk of poor diversification is generic advice about investment strategy and is not linked to particular investments. It does not recommend anyone to buy or sell particular <i>investments</i>.</p>
<p>(3) A <i>firm</i> sends a general communication to its customer base suggesting that they review the products that they hold on a regular basis.</p> <p>This communication explains the general risks of poor diversification and of underperforming products in a way that is not linked to any particular product.</p> <p>The communication also explains certain criteria that customers can look out for e.g. how a fund has performed against its benchmark.</p>		

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(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>It suggests that if customers do have any concerns then they should speak to an adviser.</p> <p>(4) A <i>firm</i> has a number of its customers that it believes are invested in products that do not align with their needs.</p> <p>The <i>firm</i> contacts those customers to inform them that based on a review of the customers' holdings, the <i>firm</i> believes that the products that they hold may not be suitable for their needs. It explains that:</p> <ul style="list-style-type: none"> ●the products the customer holds are poorly diversified; ●the portfolio of products has underperformed compared to the products' benchmarks; and ●the portfolio of products is not suitable for what the <i>firm</i> understands the customer's investment purpose to be (e.g. a high proportion of cash funds in a pension wrapper). <p>The <i>firm</i> invites the customers to contact an adviser with whom the customer may discuss alternative options.</p>	<p>If this does involve regulated advice under column (3) of this example it will also involve a <i>personal recommendation</i>.</p> <p>This is because the communication refers to the customer's individual portfolio and investment purposes. The fact that the communication may in fact be standardised across a large number of customers does not mean that it is not a <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> does not identify either what part of the customer's portfolio should be sold or how the customer should reinvest the proceeds, the <i>firm</i> is giving advice but as that advice does not relate to particular <i>investments</i> it is not regulated advice.</p>
<p>(5) A <i>firm</i> sends a 'markets outlook and investment information' communication to its customers. This includes a summary of the <i>firm's</i> views of markets outlooks together with an appendix setting out high level 'house views' on specific investment products.</p>	<p>Publishing 'house views' would not, in itself, normally be regarded as a <i>personal recommendation</i>.</p>	<p>The markets outlook part of the communication is not likely to be regulated advice taken on its own.</p>
<p>This information is sent to customers on a general basis. It is not targeted on the basis that the customers hold specific products which are covered in the appendix.</p>	<p>The communication is not addressed to a <i>person</i> as such but rather to the <i>firm's</i> entire customer base. It is not therefore presented as suitable for a particular <i>person</i> and is not based on a consideration of the circumstances of a particular <i>person</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, the house view appendix is likely to be regulated advice, as it is about the merits of specific identified products. All the elements in PERG 8.24.2G are met.</p>
<p>(6) A <i>firm</i> makes the communication in example (F5) avail-</p>	<p>The <i>firm</i> has incorporated that communication into its <i>personal</i></p>	<p>If the <i>firm</i> is not appropriately authorised, this will be regu-</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
able to a customer and later goes on to make a <i>personal recommendation</i> to that customer, basing that recommendation in part on the communication.	<i>recommendation</i> so it forms part of that <i>personal recommendation</i> .	lated advice, as all the elements in PERG 8.24.2G are met.
(7) A <i>firm</i> advises on <i>personal pension schemes</i> . It has a list of 'Best Buy' funds for investors with different risk appetites in which its pension customers can invest. It takes a fund off that list because of persistent underperformance and then replaces the fund on its list with an alternative fund. It writes to each of its customers who have invested in that fund telling them that it has done this.	This is a <i>personal recommendation</i> , for the reason in PERG 8.30B.9G(2).	If the <i>firm</i> is not appropriately authorised, this is regulated advice for the reasons in example (B5).
(8) A <i>firm</i> regularly publishes a newsletter on its website which among other things contains its most recent 'Best Buy' list of funds, including details of which funds have come on and off the list. It sends the list to its customers, who may include customers who have invested in those funds. In contrast to example (F7), the <i>firm</i> does not send the newsletter under cover of an email or letter that links the revised 'Best Buy' list to the customer's circumstances.	This is not a <i>personal recommendation</i> . A recommendation included in a newsletter available to the general public does not become a <i>personal recommendation</i> just because some of the people who read it are existing customers affected by its recommendation. A customer reading it would not think that it addresses their personal circumstances.	If the <i>firm</i> is not appropriately authorised, this is regulated advice for the reasons in example (B5).
(9)(a) A <i>firm</i> (<i>firm</i> F) increases the annual management charge for a fund it manages. It informs investors in the fund that it has done so. A distributor (<i>firm</i> G) also sends a letter to its customers who hold this fund to inform them of the change. No other information is included in either communication.	No	Neither <i>firm</i> F nor <i>firm</i> G gives regulated advice by telling the customers of the change in management charges. They are giving information about the terms of the fund of the type described in PERG 8.28.3G.
(b) <i>Firm</i> G decides to remove the fund from its 'Best Buy' list.	If this does involve regulated advice under column (3) of this ex-	<i>Firm</i> G does not necessarily give regulated advice. Whether or

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(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>It tells its customers it has done so in the letter informing them of the increase in the charge.</p>	<p>ample it is likely also to involve a <i>personal recommendation</i>.</p>	<p>not there is a suggestion that the customer should sell any part of their holding in the fund would depend on the wording of the letter and the basis on which the 'Best Buy' products are selected by the <i>firm</i>.</p>
<p>(10) A customer is speaking with a <i>firm</i>. The customer tells the <i>firm</i> that they have a number of small <i>personal pension scheme</i> pots with a range of providers that they would like to consolidate into a single <i>personal pension scheme</i> with the <i>firm</i>.</p> <p>The <i>firm</i> informs the customer that it is possible to consolidate pensions and that this can be done through the <i>firm</i> or another provider. The <i>firm</i> tells the customer that this might make it easier for the customer to consider their pension holistically. However the <i>firm</i> also tells the customer that they should take advice from a financial adviser beforehand as the adviser will be able to consider whether any existing pensions have valuable benefits that could be lost if transferred.</p>	<p>No</p>	<p>Consolidating <i>personal pension scheme</i> pots involves <i>buying and selling investments</i>.</p> <p>This is similar to example (F2) as the information is factual or generic (the benefits of consolidating pensions generally). It is different as the communication is made in the context of an individual discussion with a single customer.</p> <p>However although the context of the communication is not quite the same, the answer is the same as it is for the example in (F2) as long as it is clear to the customer that they are not getting advice about whether to consolidate.</p>
<p>(11) A customer contacts a <i>firm</i> to purchase a specific investment fund from the <i>firm</i> on an execution- only basis. Over the course of their discussions with the <i>firm</i>, the customer mentions that they are purchasing the product because they would like to receive an income from it. However the fund in question has been designed for growth and all income is re-invested.</p> <p>The <i>firm</i> informs the customer that the fund is an accumulation fund and does not provide any income. The <i>firm</i> further informs the customer that the customer can proceed with the</p>	<p>No</p>	<p>This will normally not be regulated advice.</p> <p>As explained in PERG 8.28.3G, an explanation of the terms of an investment need not be regulated advice.</p> <p>The fact that the <i>firm</i> gives the information pre-emptively should not change this.</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>transaction if the customer wishes or the <i>firm</i> can provide the customer with information about the income funds that the <i>firm</i> offers.</p> <p>(12) A customer over the age of 55 contacts a <i>firm</i> because they would like to take out an annuity with the <i>firm</i>. However they only have a very small <i>personal pension scheme</i> fund which will only generate an annuity income of a few pounds a month. In the <i>firm's</i> opinion this means that the transaction would not be a worthwhile thing to do.</p> <p>The <i>firm</i> tells the customer how much income an annuity bought with the customer's fund is likely to generate. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity.</p>	No	<p>The <i>firm</i> does not identify any particular <i>investment</i> that the customer should buy. This aspect of what the <i>firm</i> says should not be regulated advice.</p> <p>The next question is whether the <i>firm</i> is giving the customer regulated advice not to buy the annuity.</p> <p>It is likely that this will not be regulated advice if the <i>firm</i> tells the customer that they should not buy the annuity but makes it clear that this is not because this particular annuity is unsuitable but because it is likely that it will not be worthwhile for the customer to buy any annuity issued by any issuer. It is not regulated advice because it is generic advice rather than advice about a specific <i>investment</i>, as described in PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment)).</p> <p>The <i>firm</i> will also not give regulated advice in these circumstances if it tells the customer that it will not sell an annuity to the customer. The <i>FCA</i> thinks that the definition of <i>advising on investments (except P2P agreements)</i> should not be interpreted in such a way that would require a <i>firm</i> to apply to include this <i>regulated activity</i> in its <i>permission</i> in order to turn down business it does not want to carry out. Refusing to do business with someone is not consistent with an advisory relationship with them.</p>
<p>(13) The <i>firm</i> in example (F12) also gives the customer alternative options, such as taking the</p>	No	<p>The answer in example (F12) applies. Presenting the range of alternative options in a neutral</p>

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(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>whole amount in cash. The <i>firm</i> explains the effect of each option and signposts sources of information on them. The <i>firm</i> includes taking advice as one of the options. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>		<p>way should not involve regulated advice.</p>
<p>(14) A customer with a short life expectancy (due to ill health) is seeking to buy from a <i>firm</i> a single life one-year guaranteed annuity with their <i>personal pension scheme</i> fund monies which is likely to provide very poor value for money.</p> <p>The <i>firm</i> tells the customer how much income their pension policy is likely to pay and that the customer may be able to take out a tax-free sum from the pension fund. The <i>firm</i> explains the other options and signposts sources of information on them, including an option to take advice. The <i>firm</i> explains the effect of each option. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>	<p>The <i>firm</i> may give a <i>personal recommendation</i> if it recommends an alternative option.</p> <p>The answers in examples (F12) and (F13) apply.</p>	<p>If the <i>firm</i> is not appropriately authorised, it may give regulated advice if it recommends an alternative option.</p> <p>The answers in examples (F12) and (F13) apply.</p>
<p>(15) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer approaches the <i>firm</i> to draw out some money from that <i>personal pension scheme</i>. The <i>firm</i> wishes to draw the customer's attention to the tax consequences of what the customer wants to do. For example:</p> <p>(a) The customer wants to cash in their pension fund in one go, facing a significant tax bill</p>	<p>No</p>	<p>An explanation of the tax consequences of a proposed transaction need not be regulated advice, in the same way that, as explained in PERG 8.29.5G, advice on how to structure a transaction to comply with taxation requirements need not be.</p> <p>A <i>firm</i> does not necessarily give advice by bringing an obviously relevant fact to the attention of a customer who wants to buy an investment, even if that fact</p>

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(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>when a more tax-effective option is available.</p> <p>(b) The customer wants to withdraw some of their uncrystallised funds pension as a lump sum (UFPLS). Doing that reduces their 'Money Purchase Annual Allowance'. On the other hand a single lump sum payment will not reduce that allowance.</p> <p>(c) The customer wants to take a full lump sum from an 'old style' pension which does not allow for tax-free redemptions. The more tax-efficient option would be to transfer to a scheme that allows such redemptions.</p> <p>In each case, the <i>firm</i> explains the other options and signposts sources of information on them, including an option to take advice. The <i>firm</i> explains the effect of each option and leaves the customer to decide what to do. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>	<p>The <i>firm</i> may give a <i>personal recommendation</i> if it recommends an alternative option.</p>	<p>shows that the purchase would be a poor investment, as long as this information is presented neutrally and the <i>firm</i> also mentions any other relevant facts.</p> <p>This is the case even if the customer chooses to go ahead with one of the options described by the <i>firm</i> and the <i>firm</i> carries out the transaction with the customer.</p>
<p>(16) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer tells the <i>firm</i> that they wish to draw down part of that <i>personal pension scheme</i> as a lump sum and then set up the rest as income.</p> <p>The customer does not specify the amount that they wish to draw down. The customer's current <i>personal pension scheme</i> product also does not offer the facility to set up an income.</p> <p>The <i>firm</i> informs the customer that the customer is able to draw down up to 25% of their pension pot tax free. The <i>firm</i></p>	<p>No</p>	<p>If the <i>firm</i> is not appropriately authorised, it may give regulated advice if it recommends an alternative option.</p> <p>This will generally not be regulated advice.</p> <p>As explained in PERG 8.29.5G, an explanation of the terms of an investment or of how to meet tax requirements need not be regulated advice.</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>further informs the customer that if they wish to set up a regular income they will need to transfer to a different <i>personal pension scheme</i> product which allows this. The <i>firm</i> tells the customer that this can either be done through the <i>firm</i> or with another provider. The <i>firm</i> does not highlight any particular product or pressure the customer into any course of action.</p> <p>(17) A <i>firm</i> offers an online affordability calculator that helps a customer determine what their surplus income is once all their outgoings are taken into consideration. The website suggests a list of possible outgoings but allows the customer to add figures for others.</p> <p>There is a link to material that gives guidance on what a prudent size of someone's surplus income could be, taking into account both outgoings and payments for <i>investments</i>. The website suggests that the consumer takes this into account when deciding whether the <i>investment</i> is affordable for them.</p> <p>The calculator has its own page on the website which can be linked to using a ribbon at the top of the page from which the <i>firm</i> sells its products.</p>	<p>No</p>	<p>This will generally not be regulated advice because:</p> <ul style="list-style-type: none"> ● the advice about a prudent level of surplus income is not regulated advice on its own; ● the customer makes up their own mind what they can afford; ● the information that the customer inputs is purely factual; ● the calculator is straightforward as it just adds up the outgoings; and ● the calculator is in effect a method of organising information that the customer already has.
<p>(18) A <i>firm</i> operates a platform through which customers can purchase a range of funds from different providers.</p> <p>Its website includes a 'Best Buys' list of products which the <i>firm</i> believes to be of particularly high quality. The list appears on a side bar.</p> <p>This information appears in a consistent way to all users of the website.</p>	<p>Publishing a list of 'best products' or 'funds of the month' would not, in itself, normally be regarded as a <i>personal recommendation</i>:</p> <ul style="list-style-type: none"> ● As with example (F5), the communication is not personalised. ● As the information is provided on a public page of a website and appears in a consistent way to all users of the website, it can be seen as issued exclusively to the public. 	<p>If the <i>firm</i> is not appropriately authorised, the 'Best Buys' list is likely to be regulated advice, for the same reason as in example (B5).</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(19) A <i>firm</i> operates a platform through which customers can purchase a range of funds from different providers.</p> <p>The website includes a banner at the top which includes details of sponsored products and other offers where the <i>firm</i> has managed to negotiate a discount to product charges.</p> <p>This information appears in a consistent way to all users of the website.</p>	No	<p>Providing a list of products for which the <i>firm</i> has negotiated a discount is not, by itself, regulated advice, in the same way that an explanation of the terms of an <i>investment</i> is not (as explained in PERG 8.28.3G).</p>
<p>(20) <i>Firm F</i> is a <i>personal pension scheme</i> provider. It provides a number of products into which pensioners can invest pension monies on retirement.</p> <p>It has a product specially designed for investors who cannot or will not take advice on what to do with their pension monies. The sales literature specifically explains this.</p>	No	<p><i>Firm F</i> will generally not be giving regulated advice, for the same reason as in PERG 8.30A.12G.</p>
<p>A distributor (<i>Firm G</i>) sets out this information alongside these products on its platform.</p>		<p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in PERG 8.30A.13G.</p>
<p>(21) A product provider (<i>Firm F</i>) designs its products for a particular target market, which may be the same for each product or different.</p> <p>The target market is defined by reference to high level characteristics such as investment duration, risk profile and investment objectives.</p>	No	<p><i>Firm F</i> will generally not be giving regulated advice, for similar reasons to the ones in examples (D4) and (F20).</p>
<p>A distributor (<i>Firm G</i>) sets out this information alongside these products on its platform.</p>	No	<p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in example (F20).</p>
<p>(22)(a) A <i>firm</i> runs a <i>personal pension scheme</i>. The <i>firm</i> has a range of <i>lifestyling options</i> for investors with different intentions at retirement. For example, those options could be ones designed for investors who want to buy an annuity,</p>	No	<p>This will generally not be regulated advice, for the same reasons as in example (F21).</p> <p>If the <i>firm</i> uses sales material of the kind described in paragraphs (b) or (c) of example (F23) there will generally not be regulated advice for the</p>

(F) Miscellaneous		
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<p>draw down income and take the sum in cash. The <i>firm</i> has a website through which a customer can invest in the scheme and choose which of these options they wish to be applied.</p> <p>(b) The <i>firm</i> currently runs the scheme based on a single life-style investment strategy, based on moving customer into cash over time in advance of an expected retirement date. The <i>firm</i> writes to investors in the scheme informing them of the new options in (a).</p>	No	<p>reasons described in those paragraphs.</p> <p>This example is different from the one in paragraph (a) of this example as the information is sent to customers who already hold investments in the scheme and the customers may be prompted to consider whether they should adjust their investment.</p> <p>However this need not be regulated advice, for the reasons in paragraph (a) of this example. A description of investment objectives does not become regulated advice just because the description is given to customers for whom the information is particularly relevant.</p>
<p>(23) A <i>firm</i> runs a <i>personal pension scheme</i>. It has a number of funds within that scheme designed to run different levels of risk. A customer has been in one of the higher risk funds but is now coming up to retirement. This means that the customer may be in an unsuitable fund: a lower risk fund could be more appropriate in these circumstances.</p> <p>In all the scenarios in this example (F23) the <i>firm</i> does not pressure the customer into any course of action.</p>	No	<p>This will generally not be regulated advice, for the first of the reasons in example (F1).</p>
<p>(a) The <i>firm</i> reminds the customer that they need to keep their funds under review and points the customer to literature that explains what factors an investor should think about at different stages of their working life leading up to retirement. For example it might say:</p>		

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>●During the first part of an investor’s working life an investor will generally look for capital growth and as a result invest in higher risk funds.</p> <p>●When moving towards retirement an investor generally looks for capital protection and as a result will generally invest in lower risk funds.</p>		
<p>(b) The <i>firm</i> combines the information in (a) with information about the investment strategy of the different funds in its scheme and how they are designed to work through a typical lifecycle of a customer. This information is contained in standardised written information, either in hard copy or online.</p>	No	<p>This will generally not be regulated advice, because describing the investment objectives of a fund is not itself regulated advice (see PERG 8.30A.12G).</p>
<p>(c) The <i>firm</i> has case studies to help their investors decide the funds into which they are to invest and the amount of their contribution. The examples are based on age, salary, attitude to risk and intentions about what they will do with the pension fund on retirement.</p>	No	<p>This will generally not be regulated advice. It involves presentation of the information in (b) and the contribution calculator in example (D8) in a different format and so the same answer should apply.</p>
<p>(d) The <i>firm</i> gives the information in (a) to (c) to the customer on a one-to-one basis.</p>	See the answer to example (F24)	See the answer to example (F24)
<p>(e) The <i>firm</i> tells the customer that it thinks that their present fund is unsuitable given how near to retirement they are and that they should get out of it and go into another fund.</p>	This is a <i>personal recommendation</i> to sell.	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice to sell.</p>
<p>(24) A <i>firm</i> sells <i>investments</i> using the processes described in examples (D2) to (D8) except that the filtering process takes place face-to-face or over the telephone and is carried out by the <i>firm</i>’s representative asking questions.</p>	<p>Where examples (D2) to (D8) say that there is regulated advice under the definition in PERG 8.24.1G (definition of advice that does not refer to a <i>personal recommendation</i>) but no <i>personal recommendation</i>, there may be a <i>personal recommendation</i> in this example (F24).</p>	<p>The one-to-one format is more likely to lead a customer to think that they have received advice on the merits of investing in a particular <i>investment</i>, both because of the more personal nature of the interaction between the <i>firm</i> and customer and because what happens during the conversa</p>

(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(25) A <i>firm</i> operates funds. It classifies its funds on the basis of riskiness as described in example (D4). A customer completes an online questionnaire on their attitude to risk. The <i>firm</i> follows this up with a telephone call to provide details of funds matching the customer's risk tolerance as established by the questionnaire.</p> <p>The only subject discussed during the telephone call is the terms and conditions of the fund. The customer can agree to buy the fund during the conversation although the formal subscription document will be sent by post later. The <i>firm</i> does not discuss the personal circumstances of the customer. The <i>firm</i> does pressure the customer into any course of action.</p>	<p>For the reasons in column (3) of this example, it is more likely that a customer will think that an <i>investment</i> identified by the process is being presented as suitable for them or based on a consideration of their circumstances.</p> <p>Also, an online filtering process of the type in PERG 8.30B.28G is different from the filtering process in this example as the customer can:</p> <ul style="list-style-type: none"> •stop and start the online process at any time; •repeat it when and as often as they like; and •put in different figures or answers either to check the result of different scenarios or just out of curiosity. <p>No</p>	<p>tion cannot always be as tightly controlled as an online process. The factors in PERG 8.30A.8G are relevant to what impression the customer is given.</p> <p>In principle (as with example (D4)), if the scope of the conversation is narrowly restricted in the way described in the example, the <i>firm</i> should not be giving regulated advice as long as it is made clear to the customer that no advice is being given.</p> <p>However, the answer in example (F24) applies. The answer in a particular case depends on exactly what is said and the surrounding circumstances, as described in PERG 8.30A.8G.</p>
<p>(26) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer takes tax-free cash from that <i>personal pension scheme</i> at 55 and enters into drawdown with the remainder</p>	<p>No</p>	<p>A <i>firm</i> that is not appropriately authorised is not likely to give regulated advice merely by prompting a customer to think about options, for the first reason in example (F1).</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>of their pot in cash. The <i>firm</i> has provided them with additional material about options available but the money remains in cash. The <i>firm</i> prompts the customer to consider basic questions about what they want to do upon eventual retirement, and describes the different options the customer can take with their pension pot. The <i>firm</i> does not highlight any particular option, does not pressure the customer into any course of action and does not repeatedly contact the customer.</p>		<p>Describing the different options need not be regulated advice, because describing the investment objectives of a fund is not itself regulated advice (see PERG 8.30A.12G).</p>
<p>(27) The <i>firm</i> in example (F26) tells the customer that it has selected the options presented to the customer by selecting those relevant to people with a similar age and risk profile as the customer.</p>	<p>If there is regulated advice it is likely that the <i>firm</i> will be giving a <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, this may involve regulated advice.</p> <p>It may be reasonable for a customer to take the material as implicit advice that the identified products are suitable for them.</p>
<p>(28) An <i>unauthorised person</i> that is a professional services business (F) has a customer approaching retirement. The customer wants to decide whether to use their <i>personal pension scheme</i> fund to buy an annuity. F advises the customer whether or not this is a good idea. This advice is given about annuities generally and not a particular annuity.</p> <p>If F advises that buying an annuity is a good idea, it does not advise on what annuity to buy.</p> <p>If F advises that buying one would be a bad idea it does not advise on the alternative options and in particular does not recommend whether the customer should do nothing or should crystallise or realise their benefits in some other way.</p> <p>F does not itself sell <i>investments</i> and the customer will go to another adviser if they de</p>	<p>No</p>	<p>This is not likely to be regulated advice. It is generic advice of the type described in PERG 8.26.4G.</p>

(F) Miscellaneous		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>side to buy an annuity or an alternative product.</p> <p>(29) A <i>firm</i> advises a customer whether to exercise an option under their <i>personal pension scheme</i> to take a lump sum or whether they should leave their <i>personal pension scheme</i> untouched for the moment.</p> <p>(30) A <i>firm</i> makes available an online questionnaire to potential customers. It contains questions on their:</p> <ul style="list-style-type: none"> •personal circumstances; •investment knowledge; •personal investment objectives; •trading experience; and •financial circumstances, with a view to establishing what level of losses they can bear. <p>On the basis of the information provided, an algorithm creates a suggested model portfolio.</p>	<p>This is a <i>personal recommendation</i>.</p> <p>If the <i>firm</i> gives regulated advice under column (3) of this example, this is a <i>personal recommendation</i> (see PERG 8.30B.35G).</p>	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice (see Q16 and Q17 in PERG 12.3 (Rights under a <i>personal pension scheme</i>)).</p> <p>If the <i>firm</i> is not appropriately authorised, this is regulated advice (see PERG 8.30A.15G).</p> <p>If however the customer just receives a suggestion which lists different asset classes or industries, given in percentages, without naming any specific <i>investments</i>, the <i>firm</i> is giving unregulated generic advice.</p>

