

PERIMETER GUIDANCE INSTRUMENT 2005

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of its powers under section 157(1) (Guidance) of the Financial Services and Markets Act 2000 (“the Act”).

Commencement

- B. This instrument comes into force on 1 July 2005.

Perimeter guidance

- C. General guidance on FSA regulatory perimeter issues, in the form set out in the Annex to this instrument, is made. This general guidance does not form part of the Handbook.

Citation

- D. This instrument may be cited as the Perimeter Guidance Instrument 2005.

By order of the Board
16 June 2005

Annex
Perimeter guidance

The following is new text and is not underlined. It is general guidance which is closely based on the text which previously appeared as AUTH Chapters 2 and 7, and AUTH Appendices 1, 2, 3, 4, 5 and 6.

INTRODUCTION TO THE PERIMETER GUIDANCE MANUAL

1 Introduction to the Perimeter Guidance manual

1.1 Application and purpose

Application

1.1.1 G This manual applies to:

- (1) a *person* who is considering carrying on activities in the *United Kingdom* which may fall within the scope of the *Act* and is seeking *guidance* on whether he needs to be an *authorised person*;
- (2) a *person* who seeks to become an *authorised person* under the *Act* and who is, or is considering, applying to the *FSA* for *Part IV* permission to carry on *regulated activities* in the *United Kingdom*;
- (3) a *person* who is seeking *guidance* on whether any communication he may be seeking to make or cause to be made will be a *financial promotion* and be subject to the restriction in section 21 of the *Act*; and
- (4) *persons* generally.

Purpose

- 1.1.2 G The purpose of this manual is to give *guidance* about the circumstances in which *authorisation* is required, or *exempt person* status is available, including *guidance* on the activities which are regulated under the *Act* and the exclusions which are available.

1.2 Introduction

- 1.2.1 G (1) The Financial Services and Markets Act 2000 (the *Act*) is the *UK* legislation under which *bodies corporate, partnerships, individuals* and unincorporated associations are permitted by the *FSA* to carry on various financial activities which are subject to regulation (referred to as *regulated activities*).
- (2) The activities which are *regulated activities* are specified in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*): for example, *accepting deposits, managing investments, effecting contracts of insurance, dealing in investments as agent*. In general terms, a *regulated activity* is an activity, specified in the *Regulated Activities Order*, carried on by way of business in relation to one or more of the *investments* specified in the

Regulated Activities Order. PERG 2 gives further general guidance on regulated activities and specified investments.

- 1.2.2 G (1) The *Act*, and the secondary legislation made under the *Act*, is complex. Although *PERG* gives *guidance* about *regulated activities* and *financial promotions*, it does not aim to, nor can it, be exhaustive.
- (2) References have been made to relevant provisions in the *Act* or secondary legislation. However, since reproducing an entire statutory provision would sometimes require a lengthy quotation, or considerable further explanation, many provisions of the *Act*, or secondary legislation made under the *Act*, are summarised. For the precise details of the legislation, readers of the manual should, therefore, refer to the *Act* and the secondary legislation itself, as well as the manual.
- (3) The *Act* and the secondary legislation made under it can be obtained from HMSO at <http://www.legislation.hmso.gov.uk/legislation/uk.htm> or can be accessed through the Treasury's website (www.hm-treasury.gov.uk).

1.2.3 G *PERG* uses words and phrases that have specific meanings in the *Handbook* or in legislation; these may be different from, or more precise than, their usual dictionary meanings. Defined terms used in the text of the *Handbook* are shown in italics (see Chapter 7 of the Reader's Guide to the *Handbook* at <http://fsahandbook.info/FSA/pdf/rguide.pdf>). For the meanings of defined terms used in *PERG*, see the *Glossary*. It is essential that readers refer to these definitions.

1.2.4 G *PERG* 1.4.1G (General guidance to be found in *PERG*) summarises the general *guidance* contained in *PERG*. Readers should note that in a cross-reference, as explained in paragraph 40 of the Readers' Guide, the code letters of the manual or sourcebook immediately precede the chapter number. For example, *PERG* 1 is the first chapter of the Perimeter Guidance manual. *PERG* 1.5 provides details of and links to other general *guidance* on perimeter issues that is available on the *FSA* website.

1.3 Status of guidance

1.3.1 G This *guidance* is issued under section 157 of the *Act* (Guidance). It represents the *FSA*'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 150 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 relevant secondary legislation 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 *FSA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

1.4 General guidance to be found in PERG

1.4.1 G *PERG* 1.4.2G has a table setting out the general *guidance* to be found in *PERG*.

1.4.2 G Table: list of general guidance to be found in *PERG*.

| Chapter: | Applicable to: | About: |
|--|---|--|
| <i>PERG</i> 2: Authorisation and regulated activities | <ul style="list-style-type: none"> • an <i>unauthorised person</i> wishing to find out whether he needs to be <i>authorised</i> or <i>exempt</i> • an <i>authorised person</i> wishing to know whether he needs to vary his <i>Part IV permission</i> | <ul style="list-style-type: none"> • the regulatory scope of the <i>Act</i> • the <i>Regulated Activities Order</i> • the <i>Exemption Order</i> • the <i>Business Order</i> |
| <i>PERG</i> 3: Issuing e-money | <p>a <i>person</i> who needs to know</p> <ul style="list-style-type: none"> • whether a particular electronic payment product is <i>e-money</i> and whether the <i>person</i> issuing it needs to be <i>authorised</i> under the <i>Act</i> • whether any communications about the product will be restricted | <ul style="list-style-type: none"> • the scope of the <i>regulated activity</i> of <i>issuing e-money</i> • the application of the restriction in section 21 of the <i>Act</i> (Restrictions on financial promotion) to <i>communications</i> about <i>e-money</i> |

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| <i>PERG 4:</i> Regulated activities connected with mortgages | any <i>person</i> who needs to know whether the activities he conducts in relation to mortgages are subject to <i>FSA</i> regulation. This is likely to include: <ul style="list-style-type: none"> • lenders • administration service providers • mortgage brokers and advisers | the scope of relevant orders (in particular, the <i>Regulated Activities Order</i>) as respects activities concerned with mortgages |
| <i>PERG 5:</i> Insurance mediation activities | any <i>person</i> who needs to know whether he carries on <i>insurance mediation activities</i> and is, thereby, subject to <i>FSA</i> regulation. This is likely to include: <ul style="list-style-type: none"> • insurance brokers • insurance advisers • <i>insurance undertakings</i> • other <i>persons</i> involved in the sale or administration of <i>contracts of insurance</i>, where these activities are secondary to their main business. | the scope of relevant orders (in particular, the <i>Regulated Activities Order</i>) as respects activities concerned with the sale or administration of insurance |
| <i>PERG 6:</i> Identification of contracts of insurance | any <i>person</i> who needs to know whether a contract with which he is involved is a <i>contract of insurance</i> | the general principles and range of specific factors that the <i>FSA</i> regards as relevant in deciding whether any arrangement is a <i>contract of insurance</i> |

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| <p><i>PERG 7:</i> Periodical publications, news services and broadcasts: application for certification</p> | <p>any <i>person</i> who needs to know whether he will be regulated for providing advice about investments through the medium of a periodical publication, a broadcast or a news service</p> | <ul style="list-style-type: none"> • the circumstances in which such <i>persons</i> will be carrying on the <i>regulated activities</i> of <i>advising on investments</i> or <i>advising on regulated mortgage contracts</i> (including where a request for a certificate may be appropriate) • how the <i>FSA</i> will exercise its power to grant certificates |
| <p><i>PERG 8:</i> Financial promotion and related activities</p> | <p>any <i>person</i> who needs to know</p> <ul style="list-style-type: none"> • whether his communications are <i>financial promotions</i> or are subject to the restriction in section 21 of the <i>Act</i> or both • whether his activities in making or helping others to make <i>financial promotions</i> are <i>regulated activities</i>. | <ul style="list-style-type: none"> • the scope of the restriction on <i>financial promotion</i> under section 21 of the <i>Act</i> and the main exemptions provided • the circumstances in which <i>persons</i> who are primarily involved in making or helping others to make <i>financial promotions</i> may themselves be conducting <i>regulated activities</i> requiring <i>authorisation</i> or exemption |
| <p><i>PERG 9:</i> Meaning of open-ended investment</p> | <p>any <i>person</i> who needs to know whether a <i>body corporate</i> is an <i>open-ended</i></p> | <p>the circumstances in which a <i>body corporate</i> will be an <i>open-ended</i></p> |

| | | |
|---|--|---------------------------|
| company | <i>investment company</i> as defined in section 236 of the <i>Act</i> (Open-ended investment companies) and is therefore a <i>collective investment scheme</i> . | <i>investment company</i> |
| <i>PERG 10</i> : Activities related to pension schemes | [to be added] | |

1.5 What other guidance about the perimeter is available from the FSA?

1.5.1 G General *guidance* on the perimeter is also contained in various *FSA* documents (mainly fact sheets and frequently asked questions) that are available on the *FSA* website at www.fsa.gov.uk. These documents, and the URL on which they may be accessed, include:

- (1) *guidance* about the position under the *Insurance Mediation Directive* and the *Regulated Activities Order* of group risk managers and co-participants in a *joint enterprise* - <http://www.fsa.gov.uk/pages/doing/info/mgi/topics/risk.shtml>;
- (2) *guidance* about the scope of the exclusion in article 72B of the *Regulated Activities Order* (Activities carried on by a provider of relevant goods or services) as it applies to services related to travel - <http://www.fsa.gov.uk/Pages/Doing/Info/MGI/FAQs/travel.shtml>;
- (3) *guidance* about the position under the *Insurance Mediation Directive* and the *Regulated Activities Order* of persons who provide freight forwarding services - <http://www.fsa.gov.uk/pages/Doing/Info/MGI/FAQs/freight.shtml>;
- (4) *guidance* about the position under the *Insurance Mediation Directive* and the *Regulated Activities Order* of property owners and tenants - <http://www.fsa.gov.uk/Pages/Doing/Info/MGI/FAQs/property.shtml>;
- (5) *guidance* about the scope of the exclusion in article 72C of the *Regulated Activities Order* (Provision of information on an incidental basis)

<http://www.fsa.gov.uk/pages/doing/info/mgi/faqs/exclusion.shtml>;

- (6) *guidance* on passporting for insurers and insurance intermediaries -
<http://www.fsa.gov.uk/Pages/Doing/Info/MGI/FAQs/insurers.shtml>;
- (7) *guidance* about the position under the *Insurance Mediation Directive* and the *Regulated Activities Order* of the company appointed to manage a PPP or similar construction and operation project -
http://www.fsa.gov.uk/pubs/other/letter_pppforum.pdf;
- (8) *guidance* about the position under the *Insurance Mediation Directive* and the *Regulated Activities Order* of property managing agents -
http://www.fsa.gov.uk/pages/doing/info/mgi/pdf/property_guidance_note.pdf; and
- (9) *guidance* for employers about how to provide advice and information to their employees on pension matters without contravening the *Act* -
<http://www.fsa.gov.uk/pubs/other/guide4employers.pdf>.

1.5.2 G Any *person* who, having read relevant general *guidance* and, where appropriate, taken legal advice, remains uncertain about whether his activities amount to *regulated activities* or his communications will be subject to the restriction in section 21 of the *Act*, may seek individual *guidance* from the *FSA*. Requests for individual *guidance* should be made in line with *SUP 9*.

1.5.3 G In addition, the *FSA* has established a team to provide general assistance and guidance to persons generally about the scope of the *Act*. Enquiries of this kind may be made:

- (1) by authorised firms, to either the Firm Contact Centre (email fcc@fsa.gov.uk, Tel 0845 606 9966) or their normal supervisory contact; or
- (2) by individuals or non-authorised firms, to the Consumer Contact Centre (email ccc@fsa.gov.uk, Tel 0845 606 1234) or the Perimeter Enquiries Team (email authorisationenquiries@fsa.gov.uk, Tel 020 7066 0082).

1.5.4 G The *FSA* will review its general *guidance* from time to time and may need to amend or withdraw published or written *guidance* in the light of changing circumstances, developing business practices, or case law. For the status of *guidance* issued by the *FSA*, see *PERG 1.3.1G*.

AUTHORISATION AND REGULATED ACTIVITIES

- 2 Authorisation and regulated activities
- 2.1 Application and purpose
- Application
- 2.1.1 G This chapter is relevant to any *person* who needs to know what activities fall within the scope of the *Act*.
- Purpose
- 2.1.2 G The purpose of this chapter is to provide *guidance*:
- (1) to *unauthorised persons* who wish to find out whether they need to be *authorised* and, if so, what *regulated activities* their *permission* needs to include; and
 - (2) to *authorised persons* who may have questions about the scope of their existing *permission*.
- 2.2 Introduction
- 2.2.1 G Under section 23 of the *Act* (Contravention of the general prohibition), a *person* commits a criminal offence if he carries on activities in breach of the *general prohibition* in section 19 of the *Act* (The general prohibition) (see *AUTH 1.2.2G*). Although a *person* who commits the criminal offence is subject to a maximum of two years imprisonment and an unlimited fine, it is a defence for a *person* to show that he took all reasonable precautions and exercised all due diligence to avoid committing the offence.
- 2.2.2 G Another consequence of a breach of the *general prohibition* is that certain agreements could be unenforceable (see sections 26 to 29 of the *Act*). This applies to agreements entered into by *persons* who are in breach of the *general prohibition*. It also applies to any agreement entered into by an *authorised person* if the agreement is made as a result of the activities of a *person* who is in breach of the *general prohibition*.
- 2.2.3 G Any *person* who is concerned that his proposed activities may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form in the decision tree in *PERG 2 Annex 1G*):
- (1) Will I be carrying on my activities by way of business (see *PERG 2.3*)?

- (2) Will I be managing the assets of an *occupational pension scheme* (see *PERG 2.3.2G(3)*)?
- (3) If the answer is 'Yes' to (1) or (2), will my activities involve *specified investments* in any way (see *PERG 2.6*)?
- (4) If so, will my activities be, or include, *regulated activities* (see *PERG 2.7*)?
- (5) If so, will I be carrying them on in the *United Kingdom* (see *PERG 2.4*)?
- (6) If so, will my activities be excluded (see *PERG 2.8* and *PERG 2.9*)?
- (7) If not, will I be exempt (see *PERG 2.10.5G* to *PERG 2.10.8G*)?
- (8) If not, am I allowed to carry on *regulated activities* without *authorisation* (see *PERG 2.10.9G* to *PERG 2.10.16G*)?
- (9) If not, do I benefit from the few provisions of the *Act* that *authorise* me without a *permission* under Part IV of the *Act* (see *AUTH 1.2.4G(1)*)?
- (10) If not, what is the scope of the *Part IV permission* that I need to seek from the *FSA* (see *PERG 2 Annex 2G* and *AUTH 3*)?

2.2.4 G The rest of this chapter provides a high level guide through the questions set out in *PERG 2.2.3G*. It aims to give an overall picture but in doing so it necessarily relies on the reader referring to statutory provisions to fill in the detail (which can be extensive).

2.2.5 G The process of applying for *Part IV permission* is described in *AUTH 3*. But a list of the activities for which *permission* may be given is annexed to this chapter (see *PERG 2 Annex 2G*). You may find this helpful in providing an overview of the activities that are regulated. The list is included here because, with some exceptions, the *investments* and activities for which *permission* may be given are the same as the investments and activities specified in the *Regulated Activities Order*. The exceptions (which are explained in *AUTH 3.4* and *AUTH 3.5*) involve distinctions being drawn within each of several activities and *investments* so specified. This creates a few additional categories for which *permission* must be sought.

2.3 The business element

2.3.1 G Under section 22 of the *Act* (Regulated activities), for an activity to be a *regulated activity* it must be carried on 'by way of business'.

- 2.3.2 G There is power in the *Act* for the Treasury to change the meaning of the business element by including or excluding certain things. They have exercised this power (see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177), the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003 (SI 2003/1476) and the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2005 (SI 2005/922)). The result is that the business element differs depending on the activity in question. This in part reflects certain differences in the nature of the activities:
- (1) The activity of *accepting deposits* will not be regarded as carried on by way of business by a *person* if he does not hold himself out as *accepting deposits* on a day-to-day basis and if the *deposits* he accepts are accepted only on particular occasions. In determining whether *deposits* are accepted only on particular occasions, the frequency of the occasions and any distinguishing characteristics must be taken into account.
 - (2) Except as stated in *PERG* 2.3.2G(2A) and (3), the business element is not to be regarded as satisfied for any of the *regulated activities* carried on in relation to *securities* or *contractually based investments* (or for those *regulated activities* carried on in relation to 'any property') unless a *person* carries on the business of engaging in one or more of the activities. This also applies to the *regulated activities* of *arranging* in relation to a *regulated mortgage contract* and *advising on regulated mortgage contracts*. This is a narrower test than that of carrying on *regulated activities* by way of business (as required by section 22 of the *Act*), as it requires the *regulated activities* to represent the carrying on of a business in their own right.
 - (2A) A *person* who carries on an *insurance mediation activity* will not be regarded as doing so by way of business unless he takes up or pursues that activity for remuneration. *PERG* 2.3.3G gives *guidance* on the factors that are relevant to the meaning of 'by way of business' in section 22 of the *Act*. *PERG* 5.4 (The business test) gives further *guidance* on the business element as applied to *insurance mediation activities*.
 - (3) A *person* managing assets on a discretionary basis while acting as *trustee* of an *occupational pension scheme* may in certain circumstances be regarded as acting by way of business even if he would not, in the ordinary meaning of the phrase, be regarded as doing so. The Financial Services and Markets Act (Carrying on Regulated Activities by Way of Business) Order 2001 (as amended) contains some exceptions

from this (see article 4).

- (4) The business element for all other *regulated activities* is that the activities are carried on by way of business. This applies to the activities of *effecting or carrying out contracts of insurance*, certain activities relating to the Lloyd's market, *entering as provider into a funeral plan contract* and *entering into or administering regulated mortgage contracts* (see *PERG 2.7.20G*).

- 2.3.3 G Whether or not an activity is carried on by way of business is ultimately a question of judgement that takes account of several factors (none of which is likely to be conclusive). These include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same *person* but which are not regulated. The nature of the particular *regulated activity* that is carried on will also be relevant to the factual analysis.

2.4 Link between activities and the United Kingdom

- 2.4.1 G Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to activities that are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a client is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on.

- 2.4.2 G Even with a cross-border element a *person* may still be carrying on an activity 'in the *United Kingdom*'. For example, a *person* who is situated in the *United Kingdom* and who is *safeguarding and administering investments* will be carrying on activities in the *United Kingdom* even though his *client* may be overseas.

- 2.4.3 G Section 418 of the *Act* (Carrying on regulated activities in the United Kingdom) takes this one step further. It extends the meaning that 'in the *United Kingdom*' would ordinarily have by setting out five additional cases. The *Act* states that, in these five cases, a *person* who is carrying on a *regulated activity* but who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.

- (1) The first case is where a *UK-based person* carries on a *regulated activity* in another *EEA State* in exercise of rights under a *Single Market Directive*.

- (2) The second case consists of the *marketing* in another *EEA State* of a *UK-based collective investment scheme* by the *scheme's manager* where the *scheme* in question is one to which the *UCITS Directive* applies.
- (3) The third case is where a *regulated activity* is carried on by a *UK-based person* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
- (4) The fourth case is where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment in the *United Kingdom*. This might occur when each of the stages that make up a *regulated activity* (such as *managing investments*) takes place in different countries. For example, a *person's* management is in country A, the assets are held by a nominee in country B, all transactions take place in country B or country C but all decisions about what to do with the investments are taken from an office in the *United Kingdom*. Given that the investments are held, and all dealings in them take place, outside the *United Kingdom* there may otherwise be a question as to where the *regulated activity* of *managing investments* is taking place. For the purposes of the *Act*, it is carried on in the *United Kingdom*.
- (5) The fifth case, inserted by the *ECD Regulations* is, in effect, where an *electronic commerce activity* is carried on, from an *establishment* in the *United Kingdom*, in another *EEA State*. The *ECO* includes *rules* and *guidance* that apply to *ECA providers* based in the *United Kingdom*.

2.4.4 G The application of the third and fourth cases will depend on how the activities carried on from the *UK* establishment are set up and operated.

2.4.5 G A *person* who is based outside the *United Kingdom* but who sets up an establishment in the *United Kingdom* must therefore consider the following matters. First, he must not, unless he is *authorised*, carry on *regulated activities* in the *United Kingdom*. Second, unless he is *authorised*, the day-to-day management of the carrying on of the *regulated activity* must not be the responsibility of the *UK* establishment. This may, for example, affect those *UK* establishments that in the context of *deposit-taking* activities were, before the *commencement* of the *Act*, treated as representative offices of overseas institutions. Such institutions will need to seek *authorisation* if the responsibility for the day-to-day management of the accepting of *deposits* by them outside the *United Kingdom* is nevertheless effectively that of their *UK* establishment. Third, such a *person* will need to ensure that he does not contravene other provisions of the *Act*

that apply to *persons* who are not *authorised*. These include the controls on *financial promotion* (section 21 of the *Act* (Financial promotion)), and on giving the impression that a *person* is *authorised* (section 24).

2.4.6 G A *person* based outside the *United Kingdom* may also be carrying on activities in the *United Kingdom* even if he does not have a place of business maintained by him in the *United Kingdom* (for example, by means of the internet or other telecommunications system or by occasional visits). In that case, it will be relevant to consider whether what he is doing satisfies the business test as it applies in relation to the activities in question. In addition, he may be able to rely on the exclusions from certain *regulated activities* that apply in relation to *overseas persons* (see *PERG 2.9.15G*).

2.4.7 G *Electronic commerce activities*, other than *insurance business* falling within the scope of the *Insurance Directives*, provided by an *incoming ECA provider* will not be *regulated activities* (see *PERG 2.9.18G(2)*).

2.5 Investments and activities: general

2.5.1 G In addition to the requirements as to the business test and the link to the *United Kingdom*, two other essential elements must be present before a *person* needs *authorisation* under the *Act*. The first is that the *investments* must come within the scope of the system of regulation under the *Act* (see *PERG 2.6*). The second is that the activities, carried on in relation to those *specified investments*, are regulated under the *Act* (see *PERG 2.7*). Both *investments* and activities are defined in the *Regulated Activities Order* made by the Treasury under section 22 of the *Act*.

2.5.2 G The *Regulated Activities Order* contains exclusions. Exclusions may exist in relation to both the element of investment and the element of activity. Each should therefore be checked carefully. The exclusions that relate to *specified investments* are considered in *PERG 2.6*, together with the outline of the *specified investments*. The exclusions that relate to activities are considered separately from the outline of activities (see *PERG 2.8* and *PERG 2.9*).

Modification of certain exclusions as a result of Investment Services and Insurance Mediation Directives

2.5.3 G The application of certain of the exclusions considered in *PERG 2.8* (Exclusions applicable to certain regulated activities) and *PERG 2.9* (Regulated activities: exclusions applicable to certain circumstances) is modified in relation to *persons* who are subject to the *Investment Services Directive* or the *Insurance Mediation Directive*. The reasons for this and the consequences of it are explained in *PERG 2.5.4G* as respects the *Investment Services Directive*, and *PERG 5* (Insurance

mediation activities), as respects the *Insurance Mediation Directive*.

Investment services

- 2.5.4 G It remains the Government's responsibility to ensure the proper implementation of the *Investment Services Directive*. In this *Directive*, persons (called 'investment firms') who are caught by the *Directive* must be brought within the scope of regulation under the *Act*. An *investment firm* is any person whose ordinary business involves the provision to third parties on a professional basis of *core investment services* (these services are described in the extract from the *Directive* in Schedule 2 to the *Regulated Activities Order*). The *Investment Services Directive* does not apply in the circumstances described in the extract from the *Directive* in Schedule 3 to the *Regulated Activities Order*. A person will need to consider whether he is an *investment firm* to which the *Directive* applies, having due regard to the provisions in Schedule 3 to the *Regulated Activities Order*.
- 2.5.5 G For persons who are *investment firms*, the activities that must be caught by the *Regulated Activities Order* are those that are caught by the *Investment Services Directive*. To achieve this result, some of the exclusions in the *Order* (that will apply to persons who are not caught by the *Directive*) have been made unavailable to *investment firms*. Article 4(4) of the *Regulated Activities Order* (Specified activities: general) lists a number of exclusions that must be disregarded. These relate to the exclusions concerned with:
- (1) the absence of holding out (see *PERG 2.8.4G(1)*);
 - (2) transactions or arrangements with or through certain persons (see *PERG 2.8.4G(2)*, *PERG 2.8.5G(1)* and *PERG 2.8.6G(4)*);
 - (3) risk management (see *PERG 2.8.4G(5)* and *PERG 2.8.5G(2)*);
 - (4) persons acting under powers of attorney (see *PERG 2.8.7G*);
 - (5) sale of goods (see *PERG 2.9.7G*);
 - (6) groups and joint enterprises (see *PERG 2.9.9G*); and
 - (7) sale of a *body corporate* (see *PERG 2.9.11G*).

Insurance mediation or reinsurance mediation

- 2.5.6 G The *Insurance Mediation Directive* has in part been implemented through various amendments to the *Regulated Activities Order*. These include article 4(4A) (Specified activities: general) which precludes a person who, for remuneration, takes up or pursues *insurance mediation* or *reinsurance mediation* in relation to a risk or

commitment situated in an *EEA State* from making use of certain exclusions. In other cases, some of the exclusions provided in relation to particular *regulated activities* are unavailable where the activity involves a *contract of insurance*. This is explained in more detail in *PERG 5* (Insurance mediation activities).

2.6 Specified investments: a broad outline

- 2.6.1 G The following paragraphs describe the various *specified investments*, taking due account of any exclusion that applies.

Deposits

- 2.6.2 G A *deposit* is defined in article 5(2) of the *Regulated Activities Order*. This focuses on a sum of *money* paid by one *person* to another on terms that it will be repaid when a specified event occurs (for example, a demand is made).

- 2.6.3 G Certain transactions are excluded. The definition of *deposit* itself excludes money paid in connection with certain transactions such as advance payments for the provision of goods or services and sums paid to secure the performance of a contract. The circumstances in which payments are excluded from the definition itself are exhaustively stated in article 5(3) of the *Regulated Activities Order* (Accepting deposits). In addition, there is a separate exclusion in article 9 of the Order (Sums received in consideration for the issue of debt securities) and another in article 9A (Sums received in exchange for electronic money). *PERG 3.2.15G* to *PERG 3.2.19G* contain *guidance* on the exclusion relating to *electronic money*.

- 2.6.4 G In addition, several separate exclusions focus on the identity of the *person* paying the *money* or the *person* receiving it (or both).

- (1) Payments by certain *persons* are excluded if they are made by specified *persons* (such as local authorities or national, or supranational, bodies) or by *persons* acting in the course of a business consisting wholly or partly of lending money.
- (2) Exclusions apply for sums paid between certain *persons* who are linked in a specified way (such as *group companies* or *close relatives*).
- (3) Exclusions apply to sums received by *persons* acting for specified purposes. This covers sums received by a practising solicitor acting in the course of his profession or by *authorised* or *exempt persons* carrying on one of a specified range of *regulated activities* and acting within the scope of their *permission* or exemption.

Electronic money

- 2.6.4A G *Electronic money* is specified as an *investment* in article 74A of the *Regulated Activities Order* (as amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2002 (SI 2002/682)). It is defined, in article 2 of that Order, as monetary value, as represented by a claim on the issuer, which is stored on an electronic device, issued on receipt of funds and accepted as a means of payment by *persons* other than the issuer. Further *guidance* is given in *PERG 3* (Guidance on the scope of the regulated activity of issuing e-money).

Rights under a contract of insurance

- 2.6.5 G *Contract of insurance* is defined to include certain things that might not be considered a *contract of insurance* at common law. Examples of such additions include *capital redemption* contracts or contracts to pay annuities on human life. Detailed *guidance* on identifying a *contract of insurance* is in *PERG 6* (Guidance on the Identification of Contracts of Insurance).
- 2.6.6 G There are two main sorts of *contracts of insurance*. These are *general insurance contracts* and *long-term insurance contracts*. The *Regulated Activities Order* provides that, in certain specified circumstances, a contract is to be treated as a *long-term insurance contract* notwithstanding that it contains supplementary provisions that might also be regarded as relating to a *general insurance contract* (see article 3(3)).
- 2.6.7 G The *Regulated Activities Order* uses two further terms in relation to *contracts of insurance* to identify those contracts under which rights are treated as *contractually based investments*.
- (1) The first term is 'qualifying contracts of insurance' (referred to as *life policies* in the *Handbook*). This identifies those *long-term insurance contracts* under which rights are treated as *contractually based investments*. This term does not cover *long-term insurance contracts* which are contracts of reinsurance or, if specified conditions are met, contracts under which benefits are payable only on death or incapacity.
 - (2) The second term is '*relevant investments*'. This term applies to:
 - (a) *contractually based investments*, which includes rights under *life policies*, and rights to or interests in such *investments* under article 89 of the *Regulated Activities Order* (Rights to or interests in investments); and
 - (b) rights under *contracts of insurance* other than *life policies*

(but not rights to or interests in such rights).

This term is used in connection with the treatment, under various parts of the *Regulated Activities Order*, of persons carrying on *insurance mediation activities* (see *PERG 5* (Insurance mediation activities) for further *guidance* on such activities).

- 2.6.8 G Certain arrangements in relation to funeral plans are specifically excluded from being *contracts of insurance* if they would otherwise be so. The exclusion applies to arrangements that fall within the definition of a *funeral plan contract* (see *PERG 2.6.26G*) as well as arrangements that are excluded from the *regulated activity of entering as provider into funeral plan contracts* (see *PERG 2.8.14G*).

Shares etc

- 2.6.9 G *Shares* are defined in the *Regulated Activities Order* as shares or stock in a wide range of entities; that is, any *body corporate* wherever incorporated and unincorporated bodies formed under the law of a country other than the *United Kingdom*. They include deferred shares issued by *building societies* as well as transferable shares in *industrial and provident societies*, *credit unions* and equivalent *EEA* bodies. These shares are transferable and negotiable in a way similar to other shares or stock and are treated as such for the purposes of defining *regulated activities*. They are specifically mentioned as being within the *specified investment* category of *shares* because other types of share issued by these mutual bodies are not transferable and are expressly excluded (see *PERG 2.6.10G*).
- 2.6.10 G The following are excluded from the *specified investment* category of *shares*. Shares or stock in all *open-ended investment companies* are excluded from being treated in this particular category (but see *PERG 2.6.17G*). Exclusions from this category also apply to shares or stock in the share capital of certain mutuals or in equivalent *EEA* bodies. This takes out *building society* or *credit union* accounts and non-transferable shares in *industrial and provident societies*. These may nevertheless be *specified investments* in another category (such as *deposits* in the case of *building society* accounts).

Debt instruments

- 2.6.11 G Two categories of *specified investments* relating to debt instruments are dealt with under this heading. They broadly split into private debt and public sector debt.
- (1) The first category of 'instruments creating or acknowledging indebtedness' (defined in article 77 of the *Regulated Activities Order* and referred to in the *Handbook* as *debentures*) expressly refers to a range of *instruments* such as *debentures*, bonds and

loan stock and contains a catch-all reference to 'any other instrument creating or acknowledging indebtedness.'

- (2) The second category (defined in article 78 of the *Regulated Activities Order* and referred to in the *Handbook* as *government and public securities*) refers to loan stock, bonds and other instruments creating or acknowledging indebtedness which are issued by or on behalf of any government, the assemblies for Scotland, Wales or Northern Ireland, a local authority or an international organisation.

An instrument cannot fall within both categories of *specified investments* relating to debt instruments. 'Instrument' is defined to include any record whether or not in the form of a document (see article 3(1) of the *Regulated Activities Order*).

- 2.6.12 G Certain instruments are excluded from both these categories of *specified investments*. These include trade bills, specified banking documents (such as cheques and banknotes though not bills of exchange accepted by a banker) and *contracts of insurance*. There is a further exclusion from this category of *specified investment* dealing with public debt for National Savings deposits and products.

Warrants

- 2.6.13 G The category of *specified investment* of instruments giving entitlements to investments (referred to in the *Handbook* as *warrants*) covers warrants and other instruments which confer an entitlement to subscribe for *shares*, *debentures* and *government and public securities*. This is one of several categories of *specified investments* that are expressed in terms of the rights they confer in relation to other categories of *specified investment*. The rights conferred must be rights to 'subscribe' for the relevant investments. This means that they are rights to acquire the investments directly from the *issuer* of the *investments* and by way of the *issue* of new investments (rather than by purchasing investments that have already been issued).
- 2.6.14 G To keep clear distinctions between the different *specified investment* categories, instruments giving entitlements to investments are not to be regarded as *options*, *futures* or *contracts for differences*.

Certificates representing securities

- 2.6.15 G The *specified investment* category of *certificates representing certain securities* covers certificates or other instruments which confer rights in relation to *shares* and *debt securities*. It includes depositary receipts.
- 2.6.16 G There is an exclusion for any instrument that would otherwise fall within the *specified investment* category of *units* in a *collective*

investment scheme. But the exclusion does not apply where the underlying investments covered by the certificate are issued by the same (non-public sector) *issuer* or constitute a single issue of public sector debt (such as a single issue of gilts). Certificates or other instruments conferring rights in respect of investments in these two cases continue to be treated as *certificates representing certain securities*.

Units

- 2.6.17 G The *specified investment* category of *units* in a *collective investment scheme* includes *units* in a *unit trust scheme*, *shares* in *open-ended investment companies* and rights in respect of most limited *partnerships*. *Shares* in or *securities* of an *open-ended investment company* are treated differently from *shares* in other *companies*. They are excluded from the *specified investment* category of *shares*. This does not mean that they are not investments but simply that they are uniformly treated in the same way as *units* in other forms of *collective investment scheme*. The effect is that an *open-ended investment company* will, in issuing its *shares*, be subject to the restrictions on promotion of *collective investment schemes* in section 238 of the *Act* (rather than to restrictions, such as those in the Public Offers of Securities Regulations 1995, that apply to other forms of body corporate). For exclusions from the restrictions on the provisions of *collective investment schemes*, see the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060). *Guidance* on the meaning of *open-ended investment company* is in *PERG 9* (Meaning of open-ended investment company).
- 2.6.18 G There are no exclusions in the *Regulated Activities Order* for this *specified investment* category. This is because '*collective investment scheme*' is defined in section 235 of the *Act* (Collective investment schemes) for the purposes of the *Act* generally. But there is a separate power to provide for exemptions from that definition and the Treasury have exercised it (see the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062)). The result is that *units* in certain arrangements are excluded from being *collective investment schemes* (for example, closed-ended *bodies corporate*, franchise arrangements, timeshare schemes).

Rights under a stakeholder pension scheme

- 2.6.19 G A *stakeholder pension scheme* is defined in section 1 of the Welfare Reform and Pensions Act 1999. Regulations made under that section set out detailed rules under which such schemes will operate (see the Stakeholder Pension Scheme Regulations 2000). Schemes must be registered with The Pensions Regulator and approved by the Board of HM Revenue and Customs. Rights under such *schemes* are *specified*

investments for the purposes of the *Regulated Activities Order*. There are no exclusions in the Order.

Options

- 2.6.20 G The *specified investment* category of *options* is limited to *options* to acquire or dispose of *securities* or *contractually based investments*, currency and certain precious metals and *options* to acquire or dispose of such *options*. *Options* to buy or sell other types of *commodity* will only fall within this *specified investment* category if they are *options* to buy or sell *futures*, or *options* to buy or sell *contracts for differences*, which are based on other *commodities*. But *options* to buy or sell other types of *commodity* may be *contracts for differences* (see PERG 2.6.23G).

Futures

- 2.6.21 G *Futures* is the name given to rights under a contract for the *sale* of a *commodity*, or of property of any other description, under which delivery is to be made at a future date and at a price agreed on when the contract is made.
- 2.6.22 G The key issue in determining whether something is an investment in this category for the purposes of the *Regulated Activities Order* is whether the contract is made for investment purposes rather than commercial purposes. Contracts which are made for commercial purposes are excluded from this *specified investment* category and the *Regulated Activities Order* contains several tests as to when that is, or is not, the case (some are conclusive, others only indicative).

Contracts for differences

- 2.6.23 G The *specified investment* category of *contracts for differences* covers rights under *contracts for differences* and rights under other contracts whose purpose or pretended purpose is to secure a profit or avoid a loss by reference to fluctuations in certain factors. In addition to fluctuations in the value or price of property of any description or in an index, those factors also include fluctuations in any 'other factor designated in the contract'. This catches a wide range of factors. All contracts in this category are cash-settled instruments (as opposed to being settled by way of delivering something other than cash). Many would be unenforceable as gaming contracts were it not for section 412 of the Act (Gaming contracts). Examples of things that count as *specified investments* under this category are *spread bets* and interest rate swaps.
- 2.6.24 G There are a number of exclusions. These include a case where the parties intend that the profit is to be secured or the loss to be avoided by taking delivery of property. This avoids overlap with the *specified investment* categories of *options* and *futures*. Also excluded are

index-linked *deposits* and rights under certain contracts connected with the National Savings Bank or National Savings products. There is also provision to ensure that the *specified investment* category of *contracts for differences* does not include rights under *life policies*.

Lloyd's investments

- 2.6.25 G Two types of *specified investment* are relevant. These are the *underwriting capacity of a Lloyd's syndicate* and a *person's membership of a Lloyd's syndicate*. There are no exclusions from these *specified investment* categories.

Rights under a funeral plan

- 2.6.26 G Rights under a *funeral plan contract* are the rights to a funeral obtained by a *person* who pays for the funeral before the death of the *person* whose funeral it will be.

Rights under a regulated mortgage contract

- 2.6.27 G In accordance with article 61(3)(a) of the *Regulated Activities Order*, a *regulated mortgage contract* is a contract which, at the time it is entered into, satisfies the following conditions:
- (1) the contract is one where the lender provides credit to an individual or trustees (the "borrower");
 - (2) the obligation of the borrower to repay is secured by a first legal charge on land (other than timeshare accommodation) in the *United Kingdom*; and
 - (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower (or, where trustees are the borrower, by an individual who is a beneficiary of the trust) or by a related *person*.

Detailed guidance on this is set out in *PERG 4.4* (Guidance on regulated activities connected with mortgages).

Rights to or interests in investments

- 2.6.28 G Rights to, or interests in, all the *specified investments* in *PERG 2.6* (except rights to, or interests in, rights under a *regulated mortgage contract*) are themselves treated as *specified investments*. The effect is that, in most cases, an activity carried on in relation to rights or interests derived from any of those *investments* is also a *regulated activity* if the activity would be regulated if carried on in relation to the investment itself. The exception is where the rights or interests relate to a *pure protection contract* or a *general insurance contract*.

2.6.29 G There are several things that are not covered by this category (other than rights to, or interests in, rights under a mortgage contract). Anything that is covered by any other *specified investment* category is excluded, as are interests under the trusts of an *occupational pension scheme*. Finally, where a contract is excluded from the scope of the *regulated activity of entering as provider into a funeral plan contract* (see *PERG 2.8.14G*), then rights to, or interests in, the *contracts of insurance* or interests under the trusts, to which the *contracts* relate are also excluded from this *specified investment* category.

2.7 Activities : a broad outline

2.7.1 G The following paragraphs describe the various specified activities. The exclusions relating to activities are dealt with in *PERG 2.8* and *PERG 2.9*.

Accepting deposits

2.7.2 G Whether or not *accepting deposits* is a *regulated activity* depends on the use to which the money is put. The activity is caught if money received by way of *deposit* is lent to others or if any other activity of the *person* accepting the *deposit* is financed wholly (or to a material extent) out of the capital of, or interest on, money received by way of *deposit*.

Issuing e-money

2.7.2A G *Guidance* on the *regulated activity of issuing e-money* is given in *PERG 3*.

Effecting or carrying out contracts of insurance as principal

2.7.3 G The activities of *effecting a contract of insurance* or *carrying out a contract of insurance* are separate *regulated activities*, each requiring *authorisation*. But this only applies where they are carried on by a *person* who is acting as principal. This means that the activities of agents, such as loss adjusters, will not constitute this *regulated activity*. The activities of some agents may, however, be regulated as *insurance mediation activities* (see *PERG 5* (Guidance on insurance mediation activities)).

2.7.4 G In addition, certain other activities carried on in relation to rights under *contracts of insurance* are *regulated activities*. These are where the activity is carried on in relation to:

(1) *life policies*, where the *regulated activities* concerned are:

(a) *dealing in investments as principal* (see *PERG 2.7.5G*);

- (b) *managing investments* (see *PERG 2.7.8G*);
 - (c) *safeguarding and administering investments* (see *PERG 2.7.9G*); and
 - (d) agreeing to carry on any of those activities (see *PERG 2.7.21G*); and
- (2) rights under any *contract of insurance*, where the *regulated activities* concerned are:
- (a) *dealing in investments as agent* (see *PERG 2.7.5G*);
 - (b) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments* (see *PERG 2.7.7AG*);
 - (c) *assisting in the administration and performance of a contract of insurance* (see *PERG 2.7.8AG*);
 - (d) *advising on investments* (see *PERG 2.7.15G*); and
 - (e) agreeing to carry on any of those activities (see *PERG 2.7.21G*).

PERG 5 (Insurance mediation activities) has more *guidance* on these *regulated activities* where they are *insurance mediation activities*.

Dealing in investments (as principal or agent)

- 2.7.5 G In relation to *securities* or *life policies* (or rights or interests in either), *dealing as principal* is only a *regulated activity* if certain conditions are satisfied (see *PERG 2.8.4G(1)*).
- 2.7.6 G Both the activities of *dealing in investments as principal* and *dealing in investments as agent* are defined in terms of 'buying, selling, subscribing for or underwriting' certain *investments*. These *investments* are:
- (1) for *dealing in investments as principal, securities* or *contractually based investments* (except rights under a *funeral plan contract*); and
 - (2) for *dealing in investments as agent, securities* and *relevant investments* (except rights under a *funeral plan contract*).
- 2.7.6A G Because of the different nature of the *specified investments* in relation to which these activities are carried on, 'buying' and 'selling' are

defined terms that have an extended meaning. For example, some of the *specified investments* listed in *PERG 2.6* are particular things that can be bought and sold in the ordinary meaning of the words. Others fall outside the ordinary meaning of 'buy' and 'sell' because their transfer involves an assumption of a potential liability under a bilateral contract (*contracts for differences* are an example of this). To deal with the possible range of circumstances, '*buying*' is defined in the *Regulated Activities Order* to include acquiring for valuable consideration. '*Selling*' is defined to include disposing for valuable consideration and '*disposing*' is itself given a specified meaning that covers a range of possible transactions according to the nature of the investment being transferred (including, for example, surrendering a life insurance contract).

Arranging deals in investments and arranging regulated mortgage activities

2.7.7 G [not used]

2.7.7A G There are four arranging activities that are *regulated activities* under the *Regulated Activities Order*. These are:

- (1) *arranging (bringing about) deals in investments* which are *securities, relevant investments* or the *underwriting capacity of a Lloyd's syndicate* or *membership of a Lloyd's syndicate* (article 25(1));
- (2) *making arrangements with a view to transactions in investments* which are *securities, relevant investments* or the *underwriting capacity of a Lloyd's syndicate* or *membership of a Lloyd's syndicate* (article 25(2));
- (3) *arranging (bringing about) regulated mortgage contracts*, which includes arranging for another *person* to vary the terms of a *regulated mortgage contract* entered into before 31 October 2004 (article 25A(1)); and
- (4) *making arrangements with a view to regulated mortgage contracts* (article 25A(2)).

2.7.7B G The activity of *arranging (bringing about) deals in investments* is aimed at arrangements that would have the direct effect that a particular transaction is concluded (that is, *arrangements* that bring it about). The activity of *making arrangements with a view to transactions in investments* is aimed at cases where it may be said that the transaction is "brought about" directly by the parties. This is where this happens in a context set up by a third party specifically with a view to the conclusion by others of transactions through the use of that third party's *facilities*. This will catch the activities of *persons* such as exchanges, *clearing houses* and *service companies*

(for example, *persons* who provide communication facilities for the routing of orders or the negotiation of transactions). A *person* may be carrying on this *regulated activity* even if he is only providing part of the *facilities* necessary before a transaction is brought about.

- 2.7.7C G Further *guidance* on the arranging activities as they relate to *regulated mortgage contracts* and *contracts of insurance* is in *PERG* 4.5 (Arranging regulated mortgage contracts) and *PERG* 5.6 (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance) respectively.

Managing investments

- 2.7.8 G The *regulated activity* of *managing investments* includes several elements.
- (1) First, a *person* must exercise discretion. Non-discretionary portfolio management (where the manager *buys* and *sells*, as principal or agent, on the instructions of some other *person*) is not caught by this activity, although it may be caught by a different *regulated activity* such as the activity of *dealing in investments as principal* or *dealing in investments as agent*. The discretion must be exercised in relation to the composition of the portfolio under management and not in relation to some other function (such as proxy voting) carried on by the manager.
 - (2) Second, the property that is managed must belong beneficially to another *person*. This excludes from the *regulated activity* the management by a *person* of his own property. But discretionary management of assets by a *person* acting in his capacity as trustee will be caught even though he is the legal owner of the assets.
 - (3) Third, the property that is managed must consist of (or include) *securities* or *contractually based investments*. Alternatively, discretionary management will generally be caught if it is possible that the property could consist of or include such *securities* or investments. This is the case even if there never has been any investment in *securities* or *contractually based investments*, as long as there have been representations that there would be.

Assisting in the administration and performance of a contract of insurance

- 2.7.8A G The activity of *assisting in the administration and performance of a contract of insurance* is a *regulated activity* that is identified in the *Insurance Mediation Directive*. Further *guidance* on this activity is in *PERG* 5.7 (The regulated activities: assisting in the administration

and performance of a contract of insurance).

Safeguarding and administering investments

2.7.9 G The activity of *safeguarding and administering investments* belonging to another is regulated, as is providing a service under which a *person* undertakes to arrange on a continuing basis for others actually to carry out the safeguarding and administering. In each case, both the elements of safeguarding and administering must be present before a *person* will be said to carry on the activity.

(1) Safeguarding is acting as custodian of the property, for example, holding any documents evidencing the investments such as the share certificate (although it is worth noting that there is express provision that an uncertificated investment may be safeguarded and administered).

(2) Administration covers services provided to the owner or manager of the property, such as settlement of sale transactions relating to an investment, dealing with income arising from the investment and carrying out corporate actions such as voting. The nature of administration services must be such that the custodian has no discretion (otherwise he is likely to be caught by the *regulated activity* of *managing investments* (see *PERG 2.7.8G*)).

2.7.10 G The property that is safeguarded and administered must belong beneficially to another *person*. It must consist of (or include) *securities* or *contractually based investments*. Alternatively, safeguarding and administration will generally be caught if it is possible that the property could consist of (or include) such *securities* or investments. This is the case even if the property in question has never consisted of (or included) such *securities* or investments, as long as there have been representations that it would do.

Sending dematerialised instructions

2.7.11 G The *regulated activities* relating to *sending dematerialised instructions* relate to the operation of the system for electronic transfer of title to *securities* or *contractually based investments*. This is the system maintained under the Uncertificated Securities Regulations 2001 (SI 2001/3755) (and currently operated by CREST). Sending instructions on behalf of another is a *regulated activity*, as is causing such instructions to be sent if the *person* causing the sending is a system-participant, as defined in those Regulations. A system-participant is the *person* who has the computer and network connection to CREST.

Establishing etc collective investment schemes

2.7.12 G The *regulated activities* carried on in relation to a *collective investment scheme* generally are the *establishing, operating or winding up a collective investment scheme*. Acting as the *depository* and acting as sole director of an *open-ended investment company* are also separate *regulated activities*. In all these cases, the activities are regulated where the schemes themselves are authorised schemes for the purposes of the *UK* product regulation regime under Part XVII of the *Act* (Collective investment schemes) as well as where the schemes are unregulated schemes. The process for applying for authorisation of a *collective investment scheme* is described in *COLL 2* (Authorised fund applications) and *CIS 16* (Application and notification).

2.7.13 G In addition, express provision is included in the *Regulated Activities Order* to make *acting as trustee of an authorised unit trust scheme* a *regulated activity*. The full picture for authorised schemes (that is, schemes that can be promoted to the public) is as follows:

- (1) *Acting as trustee of an authorised unit trust scheme* is expressly included as a *regulated activity*.
- (2) *Acting as depository of an open-ended investment company* that is authorised under regulations made under section 262 of the *Act* (Open-ended investment companies), is a *regulated activity*.
- (3) Acting as a sole director of such a *company* is a *regulated activity*.
- (4) Managing an *authorised unit trust scheme* will amount to operating the scheme and so will be a *regulated activity*. A *person* acting as *manager* is also likely to be carrying on other *regulated activities* (such as *dealing* (see *PERG 2.7.5G*) or *managing investments* (see *PERG 2.7.8G*)).
- (5) An *open-ended investment company* will, once it is authorised under regulations made under section 262 of the *Act*, become an *authorised person* in its own right under Schedule 5 to the *Act* (Persons concerned in Collective Investment Schemes). Under ordinary principles, a company operates itself and an *authorised open-ended investment company* will be operating the *collective investment scheme* constituted by the *company*. It is not required to go through a separate process of *authorisation* as a *person* because it has already undergone the process of product authorisation.
- (6) *Operators, trustees or depositaries* of *UCITS schemes* constituted in other *EEA States* are also *authorised persons* under Schedule 5 of the *Act* if those *schemes* qualify as

recognised *collective investment schemes* for the purposes of section 264 of the Act.

Establishing etc stakeholder pension schemes

- 2.7.14 G The *regulated activities* carried on in relation to *stakeholder pension schemes* are the *establishment, operating or winding up of a stakeholder pension scheme*. Managers of such schemes will require *authorisation* as they will be operating the schemes.

Providing basic advice on stakeholder products

- 2.7.14A G This activity covers advice in the form of a recommendation given to a retail *consumer*. The recommendation must relate to a *stakeholder product* and certain conditions must be met. These conditions are based on the need for the adviser to make an assessment of the *consumer's* needs based on the answers that the *consumer* provides to a series of pre-scripted questions. A fuller description of the activity is given in *PERG 2.7.14BG* and explains what is meant by "retail customer". This activity is separate to the *regulated activity of advising on investments* (see *PERG 2.7.15G* (Advising on investments)). The existence of this separate advising activity does not prevent a *person* from giving advice on *stakeholder products* in circumstances that do not satisfy the conditions set out in *PERG 2.7.14BG*. But such advice is likely to amount to *advising on investments* unless the *stakeholder product* is a *deposit*. Neither does the existence of the activity prevent a *person* from selling *stakeholder products* in any other manner provided the *person* has the appropriate *permission*.

- 2.7.14B G A *person* ('P') carries on the *regulated activity of providing basic advice on a stakeholder product* when:
- (1) P gives the advice:
 - (a) to a *person* ('C') who does not receive the advice in the course of a business that he carries on; and
 - (b) in the course of a business that P carries on;
 - (2) the advice is on the merits of C opening or *buying a stakeholder product*;
 - (3) the following conditions are met:
 - (a) P asks C questions to enable P to assess whether a *stakeholder product* is appropriate for C;
 - (b) if P, relying solely on the information provided by C in response to the questions referred to in (a), assesses that a *stakeholder product* is appropriate for C, P:
 - (i) describes that product to C; and

- (ii) gives a recommendation of that product to C; and
- (4) C has indicated to P that he has understood the description and recommendation referred to in (3)(b).

Advising on investments

- 2.7.15 G The *regulated activity* of *advising on investments* under article 53 of the *Regulated Activities Order* applies to advice on *securities* or *relevant investments*. It does not, for example, include giving advice about *deposits*, or about things that are not *specified investments* for the purposes of the *Regulated Activities Order* (such as interests under the trusts of an *occupational pension scheme*). Giving advice on certain other *specified investments* is, however, regulated under other parts of the *Regulated Activities Order* (see *PERG 2.7.16AG* and *PERG 2.7.17G(2)*). Giving a *person* generic advice about *specified investments* (for example, invest in Japan rather than Europe) is not a *regulated activity* nor is giving information as opposed to advice (for example, listings or company news). However, the context in which something is communicated may affect its character; for example, if a *person* gives information on share price against the background that, when he does so, that will be a good time to sell, then this will constitute *advising on investments*.
- 2.7.16 G The advice must also be given to someone who holds *specified investments* or is a prospective investor (including trustees, nominees or discretionary fund managers). This requirement excludes advice given to a *person* who receives it in another capacity. An example of this might be a tax professional to whom advice is given to inform the practice of his profession or advice given to an employer for the purposes of setting up a *group personal pension scheme*. Further *guidance* on the meaning of *advising on investments* is in *PERG 8.24* (Advising on investments).
- 2.7.16A G In certain circumstances, the activity of *advising on investments* can also amount to *providing basic advice on a stakeholder product* (see *PERG 2.7.14A* (Providing basic advice on stakeholder products)).

Advising on regulated mortgage contracts

- 2.7.16B G Under article 53A of the *Regulated Activities Order*, giving advice to a *person* in his capacity as borrower or potential borrower is a *regulated activity* if it is advice on the merits of the *person*:
- (1) entering into a particular *regulated mortgage contract*; or
 - (2) varying the terms of a *regulated mortgage contract*.

Advice on varying terms as referred to in (2) comes within article 53A only where the borrower entered into the *regulated mortgage*

contract on or after 31 October 2004 and the variation varies the borrower's obligations under the contract. Further *guidance* on the scope of the *regulated activity* under article 53A is in *PERG 4.6* (Advising on regulated mortgage contracts).

Lloyd's activities

- 2.7.17 G Certain activities carried on in connection with business at Lloyd's will be regulated. In addition to those already mentioned (*arranging deals in the underwriting capacity of a Lloyd's syndicate or membership of a Lloyd's syndicate*), there are three other *regulated activities* as follows.
- (1) *Managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's* is a *regulated activity*. 'Managing agent' is defined in article 3(1) of the *Regulated Activities Order*.
 - (2) *Advising on syndicate participation at Lloyd's*, that is advising a *person* to become, or continue or cease to be, a member of a particular *syndicate* is also caught. Giving advice about *syndicate* participation (such as how members should use their capital within the market and arrange their *syndicate* participation) is a separate *regulated activity* to that of providing advice in relation to *securities* and *contractually based investments* (see *PERG 2.7.15G*). Appropriate *permission* will be needed.
 - (3) *Arranging deals in contracts of insurance written at Lloyd's* is also a *regulated activity* for the *Society* of Lloyd's itself.

Entering funeral plan contracts

- 2.7.18 G *Entering as provider into a funeral plan contract* is a *regulated activity*. The 'provider' is the *person* to whom the pre-payments are made and who undertakes to provide, or secure the provision of, the funeral at some future point. He may be the funeral director or a third party who arranges for another *person* to provide the funeral. Certain types of *funeral plan contract* are excluded (see *PERG 2.8.14G*).
- 2.7.19 G In addition, other activities carried on in relation to rights under certain *funeral plan contracts* are regulated (see *PERG 2.7.5G* to *PERG 2.7.11G* and *PERG 2.7.15G* and *PERG 2.7.16G*). This is because such rights are classified as *contractually based investments*.

Entering into and administering a regulated mortgage contract

- 2.7.20 G *Entering into as lender, and administering, a regulated mortgage contract* are *regulated activities* under article 61 of the *Regulated Activities Order* (Regulated mortgage contracts). *Guidance* on these

regulated activities is in *PERG 4.7* (Entering into a regulated mortgage contract) and *PERG 4.8* (Administering a regulated mortgage contract).

Agreeing

- 2.7.21 G Agreeing to carry on most *regulated activities* is itself a *regulated activity*. But this is not the case if the underlying activities to which the agreement relates are those of *accepting deposits, issuing e-money, effecting or carrying out contracts of insurance* or carrying on any of the activities that are regulated in relation to *collective investment schemes* and *stakeholder pension schemes*. A person will need to make sure that he has appropriate *authorisation* at the stage of agreement and before he actually carries on the underlying activity (such as the *dealing or arranging*).

2.8 Exclusions applicable to particular regulated activities

- 2.8.1 G Most *regulated activities* are subject to exclusions that are set out in the *Regulated Activities Order* directly following each activity.

Accepting deposits

- 2.8.2 G Only one exclusion applies to the *regulated activity* of *accepting deposits*. A deposit taker providing its services as an *electronic commerce activity* from another *EEA State* into the *United Kingdom* (see *PERG 2.9.18G*) does not carry on a *regulated activity*. In addition to the situations that are excluded from being '*deposits*' (see *PERG 2.6.2G* to *PERG 2.6.4G*), several *persons* are *exempt persons* in relation to the *regulated activity* of *accepting deposits* (see *PERG 2.10.8G(2)*).

Issuing e-money

- 2.8.2A G Certain '*small issuers*' of *e-money* may apply to the *FSA* for a certificate to be excluded from the *regulated activity* of *issuing e-money*. To be eligible, the issuer must be a *body corporate* or a *partnership* (other than a *full credit institution*) with its head office in the *United Kingdom* and it must meet certain conditions. The *FSA* must give that issuer a certificate if it appears to the *FSA* that the issuer meets those conditions. Further *guidance* on those conditions and how the application is made is given in *ELM 8.4* (The conditions for giving a small e-money issuer certificate).

Effecting and carrying out contracts of insurance

- 2.8.3 G The following activities are excluded from both the *regulated activities* of *effecting and carrying out contracts of insurance*.

- (1) In specified circumstances, the activities of an *EEA firm* when participating in a Community co-insurance operation are excluded. A Community co-insurance operation is defined in the *Community Co-insurance Directive*.
- (2) Activities that are carried out in connection with the provision of on-the-spot accident or breakdown assistance for cars and other vehicles (such as repairs, vehicle retrieval, delivery of parts or fuel) are excluded.
- (3) *Electronic commerce activities* provided by an *incoming ECA provider* where those activities are outside the scope of the *Insurance Directives* (see *PERG 2.9.18G*).

Dealing in investments as principal

2.8.4 G The *regulated activity of dealing in investments as principal* applies to specified transactions relating to any security or to any *contractually based investment* (apart from rights under *funeral plan contracts* or rights to or interests in such contracts). The activity is cut back by exclusions as follows.

- (1) Of particular significance is the exclusion in article 15 of the *Regulated Activities Order* (Absence of holding out etc). This applies where *dealing in investments as principal* involves entering into transactions relating to any security or assigning rights under a *life policy* (or rights or interests in such a contract). In effect, it superimposes an additional condition that must be met before a *person's* activities become *regulated activities*. The additional condition is that a *person* must hold himself out as making a market in the relevant *specified investments* or as being in the business of dealing in them, or he must regularly solicit members of the public with the purpose of inducing them to deal. This exclusion does not apply to dealing activities that relate to any *contractually based investment* except the assigning of rights under a *life policy*.
- (2) Entering into a transaction relating to a *contractually based investment* is not regulated if the transaction is entered into by an *unauthorised person* and it takes place in either of the following circumstances (a transaction entered into by an *authorised person* would be caught). The first set of circumstances is where the *person* with whom the *unauthorised person* deals is either an *authorised person* or an *exempt person* who is acting in the course of a business comprising a *regulated activity* in relation to which he is exempt. The second set of circumstances is where the *unauthorised person* enters into a transaction through a non-UK office (which could be his own) and he deals with or through a *person* who is based outside the

United Kingdom. This non-UK person must be someone who, as his ordinary business, carries on any of the activities relating to securities or contractually based investments that are generally treated as regulated activities.

- (3) A *person* (for example, a bank) who provides another *person* with finance for any purpose can accept an instrument acknowledging the debt (and as security for it) without risk of *dealing as principal* as a result.
- (4) A *company* does not *deal* as principal by issuing its own *shares* or *share warrants* and a *person* does not *deal* as principal by issuing his own *debentures* or *debenture warrants*.
- (4A) A *company* does not carry on the activity of *dealing in investments as principal* by purchasing its own *shares* where section 162A of the Companies Act 1985 (Treasury shares) applies to the *shares* purchased or by dealing in its own *shares* held as Treasury shares, in accordance with section 162D of that Act (Treasury shares: disposal and cancellation).
- (5) Risk-management activities involving *options, futures* and *contracts for differences* will not require *authorisation* if specified conditions are met. The conditions include the *company's* business consisting mainly of *unregulated activities* and the sole or main purpose of the risk management activities being to limit the impact on that business of certain kinds of identifiable risk.
- (6) A *person* will not be treated as carrying on the activity of *dealing in investments as principal* if, in specified circumstances (outlined in *PERG 2.9*), he enters as principal into a transaction:
 - (a) while acting as bare trustee (or, in Scotland, as nominee);
 - (b) in connection with the sale of goods or supply of services;
 - (c) that takes place between members of a *group* or *joint enterprise*;
 - (d) in connection with the sale of a *body corporate*;
 - (e) in connection with an employee share scheme;
 - (f) as an *overseas person*;
 - (g) as an *incoming ECA provider* (see *PERG 2.9.18G*).

2.8.4A G *Persons* who enter as principal into transactions involving rights under a *contract of insurance* of any kind will need to consider whether they may, as a result, be carrying on the *regulated activity* of:

- (1) *arranging (bringing about) deals in investments*; or
- (2) *making arrangements with a view to transactions in investments*; or
- (3) agreeing to do (1) or (2).

2.8.4B G The possibility referred to in *PERG 2.8.4AG* will only arise where it is not the case that the *person* who enters into the transaction as principal either:

- (1) is the only *policyholder*; or
- (2) as a result of the transaction, would become the only *policyholder*.

Dealing in investments as agent

2.8.5 G The *regulated activity of dealing in investments as agent* applies to specified transactions relating to any *security* or to any *relevant investment* (apart from rights under *funeral plan contracts* or rights to or interests in such rights). In addition, the activity is cut back by exclusions as follows.

- (1) An exclusion applies to certain transactions entered into by an agent who is not an *authorised person* which depend on him dealing with (or through) an *authorised person*. It does not apply if the transaction relates to a *contract of insurance*. There are certain conditions which must be satisfied for the exclusion to apply. These are that the agent must not give any relevant advice on the transaction and that he must not receive any remuneration from the transaction unless account is made to his client.
- (2) There is an exclusion for risk-management transactions where the agent is dealing on behalf of a *group company* or a co-participant in a *joint enterprise*.
- (3) In addition, exclusions apply in specified circumstances (outlined in *PERG 2.9 (Regulated activities: exclusions available in certain circumstances)*) where a *person* enters as agent into a transaction:
 - (a) in connection with the carrying on of a profession or of a

business not otherwise consisting of *regulated activities* (see *PERG 2.9.5G*);

- (b) in connection with the sale of goods or supply of services (see *PERG 2.9.7G*);
- (c) that takes place between members of a *group* or *joint enterprise* (see *PERG 2.9.9G*);
- (d) in connection with the sale of a *body corporate* (see *PERG 2.9.11G*);
- (e) in connection with an employee share scheme (see *PERG 2.9.13G*);
- (f) as an *overseas person* (see *PERG 2.9.15G*);
- (g) as an *incoming ECA provider* (see *PERG 2.9.18G*);
- (h) as a provider of non-motor goods or travel services where the transaction involves a *general insurance contract* that satisfies certain conditions (see *PERG 2.9.19G*);
- (i) that involves a *contract of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*).

More detailed *guidance* on the exclusions that relate to *contracts of insurance* is in *PERG 5* (Insurance mediation activities).

Arranging deals in investments and arranging regulated mortgage contracts

2.8.6 G The exclusions in relation to the *regulated activities* of *arranging* are of particular relevance in the context of raising corporate finance. Many of the exclusions outlined below relate to both the elements of the activity; that is, *arranging (bringing about) deals in investments* (under article 25(1) of the *Regulated Activities Order*) and *making arrangements with a view to transactions in investments* (under article 25(2) of the *Regulated Activities Order*). But several exclusions relate only to one of those activities.

- (1) Under article 26, arrangements that do not or would not bring about the transaction to which they relate are excluded from article 25(1) and article 25A(1) only. A *person* will bring about an investment transaction only if his involvement in the chain of events leading to a transaction is of sufficient importance that, without that involvement, the transaction would not take place. This will require something more than the mere giving of advice (although giving such advice may be the *regulated*

activity of advising on investments).

- (2) Under article 27, simply providing the means by which parties to a transaction (or possible transaction) are able to communicate with each other is excluded from article 25(2) and article 25A(2) only. This will ensure that *persons* such as Internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to be arrangements made with a view to the participants entering into transactions). If a *person* makes arrangements that go beyond providing the means of communication, and add value to what is provided, he will lose the benefit of this exclusion.
- (3) Under article 28, arranging investment transactions to which the *arranger* is to be a party is excluded from both article 25(1) and (2). The main purpose is to ensure that a *person* is not regarded as arranging deals for another when the transaction in question is one to which he intends to be a party. As a result, a *person* cannot both be engaging in a dealing activity (as principal or agent) and arranging *deals* for another as regards any particular transaction. But where the transaction involves a *contract of insurance*, article 28 will not apply if the *person* making the arrangements:
 - (a) is the only *policyholder*; or
 - (b) as a result of the transaction, would become the only *policyholder*.

Under article 28A, a *person* is excluded from article 25A(1) and (2) if he is to enter into the contract to which the *arrangements* relate. The article also excludes from article 25A(1) a *person* who arranges a variation to a contract to which he is or is to become a party.

- (4) Under article 29, an *unauthorised person* who arranges investment transactions, with a view to a transaction between a third party and an *authorised person*, is excluded from article 25(1) and (2) and article 25A(1) and (2) if specified conditions as to advice and remuneration are satisfied. For example, the exclusion is dependent on the third party not receiving any *advice* on the *transactions* from the *unauthorised person* making the arrangements. The exclusion does not apply where the *investment* is a *contract of insurance*.
- (5) Under article 29A, an *unauthorised person* is excluded from the *regulated activity of arranging* for another *person* to vary the terms of a *regulated mortgage contract* entered into after 31 October 2004 (article 25A(1)(b)). This is if the *arranging* is the

result of:

- (a) anything done in the course of the administration of a *regulated mortgage contract* by an *authorised person* under article 62(a); or
 - (b) anything done by the *person* making the arrangements in connection with the administration of a *regulated mortgage contract* under article 62(b).
- (6) Under article 30, arranging investment transactions in connection with lending on the security of *contracts of insurance* is excluded, from article 25(1) and (2) but only where a *person* is not carrying on *insurance mediation* or *reinsurance mediation*.
- (7) Under article 31, making arrangements for finance (in whatever form) to be supplied to a *person* by a third party is excluded from article 25(1) and (2) if the finance is given in exchange for an instrument acknowledging the debt. This mirrors the exclusion from *dealing in investments as principal* in similar circumstances (see *PERG 2.8.4G(3)*).
- (8) Under article 32, arrangements the only purpose of which is to provide finance to enable *persons* to enter into investment transactions are excluded from article 25(2) only. There is no equivalent exemption from article 25(1). But arrangements for the provision of finance will only be caught by that provision if the arrangements actually bring about the transaction.
- (9) Under article 33, making arrangements under which *clients* will be introduced to third parties who will provide independent services (consisting of *advice* or the exercise of discretion in relation to certain investments) is excluded from article 25(2) and article 25(2A) only. The *person* to whom the introduction is made must be of a specified standing (including that of an *authorised person*). The exclusion does not apply where the arrangements relate to a *contract of insurance*.
- (10) Under article 33A, making arrangements for introducing *persons* to:
- (a) an *authorised person* who has *permission* to carry on certain *regulated activities* concerned with *regulated mortgage contracts*; or
 - (b) an *appointed representative* who is able to carry on any of those activities without breaching the *general prohibition*;
or

- (c) an *overseas person* who carries on any of those activities;
- is excluded from article 25A(2) subject to certain conditions related to the holding of *client money* and the disclosure of certain information.
- (11) Under article 34, a *company* is not carrying on a *regulated activity* under article 25(1) or (2) of the *Regulated Activities Order* (Arranging deals in investments) by arranging for the issue of its own *shares* or *share warrants* and a *person* is not doing so by arranging for the issue of his own *debentures* or *debenture warrants*.
- (12) Under article 35, a body carrying out international securities business of a specified type can apply to the Treasury for approval as an international securities self-regulating organisation (ISSRO). Arrangements made in order to carry out the functions of an ISSRO are excluded from article 25(1) and (2). The exclusion applies whether the arrangements are made by the ISSRO or by a *person* acting on its behalf.
- (13) The following exclusions from both article 25(1) and (2) (outlined in *PERG 2.9*) apply in specified circumstances where a *person* makes arrangements:
- (a) while acting as trustee or personal representative (see *PERG 2.9.3G*);
 - (b) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see *PERG 2.9.5G*);
 - (c) in connection with the sale of goods or supply of services (see *PERG 2.9.7G*);
 - (d) in connection with certain transactions by a *group member* or by a participator in a *joint enterprise* (see *PERG 2.9.9G*);
 - (e) in connection with the sale of a *body corporate* (see *PERG 2.9.11G*);
 - (f) in connection with an employee share scheme (see *PERG 2.9.13G*);
 - (g) as an *overseas person* (see *PERG 2.9.15G*);
 - (h) as an *incoming ECA provider* (see *PERG 2.9.18G*);

- (i) as a provider of non-motor goods or services related to travel (see *PERG 2.9.19G*);
- (j) involving the provision, on an incidental basis, of information to *policyholders* or potential *policyholders* about *contracts of insurance* (see *PERG 2.9.19G*);
- (k) that involve a *contract of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*).

More detailed *guidance* on the exclusions that relate to *contracts of insurance* is in *PERG 5* (Insurance mediation activities).

Managing investments

2.8.7 G The activities of *persons* appointed under a power of attorney are excluded under article 38 of the *Regulated Activities Order*, from the *regulated activity of managing investments*, if specified conditions are satisfied. The exclusion only applies where a *person* is not carrying on *insurance mediation* or *reinsurance mediation*. In addition, the following exclusions (outlined in *PERG 2.9*) apply in specified circumstances where a *person* manages assets:

- (1) while acting as trustee or personal representative; or
- (2) in connection with the sale of goods or supply of services; or
- (3) that belong to a *group* member or participator in a *joint enterprise*; or
- (4) as an *incoming ECA provider* (see *PERG 2.9.18G*).

Assisting in the administration and performance of a contract of insurance

2.8.7A G *Assisting in the administration and performance of a contract of insurance* is excluded under article 39B where it is carried on by a *person* acting in the capacity of:

- (1) an expert appraiser; or
- (2) a loss adjuster acting for a relevant insurer; or
- (3) a claims manager acting for a relevant insurer.

The term 'relevant insurer' is defined in article 39B(2).

- 2.8.7B G The following exclusions from *assisting in the administration and performance of a contract of insurance* also apply to a person in specified circumstances:
- (1) while acting as trustee or personal representative (see *PERG 2.9.3G*); or
 - (2) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see *PERG 2.9.5G*); or
 - (3) as an *incoming ECA provider* (see *PERG 2.9.18G*); or
 - (4) as a provider of non-motor goods or services related to travel (see *PERG 2.9.19G*); or
 - (5) that involve the provision, on an incidental basis, of information to *policyholders* or potential *policyholders* about *contracts of insurance* (see *PERG 2.9.19G(2)*); or
 - (6) that involve a *contract of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*).

Safeguarding and administering investments

- 2.8.8 G The exclusions from the *regulated activity of safeguarding and administering investments* are as follows.
- (1) Safeguarding and administration activities carried on by one *person* are excluded if a specified third party undertakes a responsibility for the assets which is no less onerous than it would have been if he were doing the safeguarding and administration himself. The effect of this is that an *authorised person* with *permission* to carry on this *regulated activity* (or in certain circumstances an *exempt person*) can delegate all or part of the activities without the delegate needing to be *authorised* and without loss of protection to the owner of the assets.
 - (2) Introductions to an *authorised person*, or to an *exempt person* acting within the scope of his exemption and in the course of a business, are excluded from that aspect of this *regulated activity* which consists of *arranging safeguarding and administration of assets* by another *person* (see *PERG 2.7.9G*).
 - (3) Certain specified activities (such as currency conversion and document handling) are excluded from being the administration of investments. A *person* who safeguards and administers assets will not be carrying on *regulated activities* if these are the only administration activities in which he engages. This is

because a *person* must be carrying on both the activity of safeguarding and that of administration, or be arranging for both to be carried on by another, before he requires *authorisation* (see *PERG 2.7.9G*).

- (4) The following exclusions apply in specified circumstances where a *person* safeguards and administers assets (or arranges for another to do so):
- (a) while acting as trustee or personal representative (see *PERG 2.9.3G*);
 - (b) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see *PERG 2.9.5G*);
 - (c) in connection with the sale of goods or supply of services (see *PERG 2.9.7G*);
 - (d) which belong to a *group* member or participator in a *joint enterprise* (see *PERG 2.9.9G*);
 - (e) in connection with an employee share scheme (see *PERG 2.9.13G*);
 - (f) as an *incoming ECA provider* (see *PERG 2.9.18G*); and
 - (g) that are *contracts of insurance* and, in so doing, provides information to *policyholders* or potential *policyholders* on an incidental basis in the course of his carrying on a business or profession not otherwise consisting of *regulated activities* (see *PERG 2.9.19G(2)*).

Sending dematerialised instructions

2.8.9 G Exclusions from the *regulated activity* of *sending dematerialised instructions* apply in relation to certain types of instructions sent in the operation of the system maintained under the Uncertificated Securities Regulations 2001 (SI 2001/3755). The various exclusions relate to the roles played by participating issuers, settlement *banks* and network providers (such as Internet service providers) and to instructions sent in connection with takeover offers (as long as specified conditions are met). In addition, the following exclusions (outlined in *PERG 2.9*) apply in specified circumstances where a *person* sends dematerialised instructions:

- (1) while acting as trustee or personal representative (see *PERG 2.9.3G*);

- (2) on behalf of a *group* member (see *PERG 2.9.3G*);
- (3) as an *incoming ECA provider* (see *PERG 2.9.18G*).

Establishing etc collective investment schemes

- 2.8.10 G There is only one exclusion from the range of activities specified as being regulated in relation to *collective investment schemes*. This exclusion relates to *incoming ECA providers* (see *PERG 2.9.18G*). In other cases, the key issue is whether or not what is being done relates to something that is a *collective investment scheme*. Exclusions exist in relation to that issue (see *PERG 2.6.18G*).

Establishing etc stakeholder pension schemes

- 2.8.11 G The only exclusion from the range of activities specified as being regulated in relation to *stakeholder pension schemes* relates to *incoming ECA providers* (see *PERG 2.9.18G*).

Advising on investments

- 2.8.12 G In certain circumstances, advice that takes the form of a regularly updated news or information service and advice which is given in one of a range of different media (for example, newspaper or television) is excluded from the *regulated activities* of *advising on investments* and *advising on regulated mortgage contracts* (see *PERG 7* (Periodical publications: news services and broadcasts: applications for certification)). Advice given in the course of the administration of a *regulated mortgage contract* by an *authorised person* is also excluded subject to certain conditions. In addition:

- (1) the following exclusions apply in specified circumstances where a *person* is *advising on investments* or *regulated mortgage contracts*:
 - (a) while acting as trustee or personal representative (see *PERG 2.9.3G*);
 - (b) in connection with the carrying on of a profession or of a business not otherwise consisting of *regulated activities* (see *PERG 2.9.5G*); and
 - (c) as an *incoming ECA provider* (see *PERG 2.9.18G*);
- (2) the following exclusions apply in specified circumstances where a *person* is *advising on investments*:
 - (a) in connection with the sale of goods or supply of services (see *PERG 2.9.7G*);

- (b) to a *group* member or participator in a *joint enterprise* (see *PERG 2.9.9G*);
- (c) in connection with the sale of a *body corporate* (see *PERG 2.9.11G*);
- (d) as an overseas *person* (see *PERG 2.9.15G*);
- (e) that are limited to certain *contracts of insurance* covering risks to non-motor goods or related to travel (see *PERG 2.9.19G*);
- (f) that are *contracts of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*).

More detailed *guidance* on certain of these exclusions is in *PERG 4* (Regulated activities connected with mortgages) and *PERG 5* (Insurance mediation activities).

Lloyd's activities

- 2.8.13 G *Electronic commerce activities* provided by an *incoming ECA provider* are excluded from the *regulated activities* that relate expressly to business carried on at Lloyd's (see *PERG 2.9.18G*). Otherwise the only exclusions that apply concern the *regulated activity* of *arranging deals* in its application to business carried on at Lloyd's.

Entering funeral plan contracts

- 2.8.14 G *Entering as provider into a funeral plan contract* is not treated as a *regulated activity* where:
- (1) the contract is one under which the sums received from the customer will be applied towards a *contract of insurance* on the life of the *person* whose funeral is to be provided or be held on trust for the purpose of providing a funeral; in each case certain specified conditions must be met for the exclusion to apply; or
 - (2) the customer and the provider intend or expect that the funeral will be provided within one *month* of the contract being entered into; or
 - (3) it is provided as an *electronic commerce activity* by an *incoming ECA provider* (see *PERG 2.9.18G*).

Administering regulated mortgage contracts

- 2.8.14A G Exclusions from the *regulated activity* of *administering a regulated*

mortgage contract are provided where *persons* arrange for administration by an *authorised person* and where *persons* administer under an agreement with an *authorised person*. These exclusions are subject to certain conditions and are explained in greater detail in *AUTH* 4.8 (Administering a regulated mortgage contract).

Agreeing

- 2.8.15 G A *person* who agrees to carry on certain other *regulated activities* (which is itself a *regulated activity* – see *PERG* 2.7.21G) does not require *authorisation* where the *person* concerned is an *overseas person* and the agreement is reached as a result of a legitimate approach (see *PERG* 2.9.12G). For this exclusion to apply, the agreement must be one to arrange deals, *manage investments*, *assist in the administration and performance of a contract of insurance*, *safeguard and administer investments* or *send dematerialised instructions*. The provision of *electronic commerce activities* by an *incoming ECA provider* is also excluded from the *regulated activity* of agreeing to carry on certain other *regulated activities* (see *PERG* 2.7.21G). But this is not the case where the agreement relates to the *regulated activity* of *effecting or carrying out contracts of insurance* falling under the *Insurance Directives* (see *PERG* 2.8.3G). This is still a *regulated activity* when provided as an *electronic commerce activity*.
- 2.8.16 G To the extent that an exclusion applies in relation to a *regulated activity*, then 'agreeing' to carry on an activity falling within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order*.
- 2.9 Regulated activities: exclusions applicable in certain circumstances
- 2.9.1 G The various exclusions outlined below deal with a range of different circumstances.
- (1) Each set of circumstances described in *PERG* 2.9.3G to *PERG* 2.9.17G has some application to several *regulated activities* relating to *securities*, *relevant investments* or *regulated mortgage contracts*. They have no effect in relation to the separate *regulated activities* of *accepting deposits*, *issuing e-money*, *effecting or carrying out contracts of insurance*, *advising on syndicate participation at Lloyd's*, *managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's* or *entering as provider into a funeral plan contract*. Within each set of circumstances, the *Regulated Activities Order*, in Chapter XVII of Part II of the Order, makes separate provision for each *regulated activity* affected. This is necessary because each exclusion has to be tailored to reflect the different nature of the *regulated activity* involved and the different language required (for example, some activities

involve entering directly into transactions while others relate to the provision of services).

- (2) The exclusion described in *PERG 2.9.18G* relates to *electronic commerce activities* provided by an *incoming ECA provider*. This exclusion applies to all *regulated activities* except *effecting or carrying out contracts of insurance*.

- 2.9.2 G The exclusions grouped together in the *Regulated Activities Order* are described below in this chapter in general terms. The exact terms of each exclusion will need to be considered by any *person* who is considering whether they need *authorisation*. Each description is accompanied by an indication of which *regulated activities* are affected.

Trustees, nominees or personal representatives

- 2.9.3 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal*;
- (2) *arranging (bringing about) deals in investments, arranging (bringing about) regulated mortgage contracts, making arrangements with a view to transactions in investments and making arrangements with a view to regulated mortgage contracts*;
- (3) *managing investments*;
- (4) *assisting in the administration and performance of a contract of insurance*;
- (5) *safeguarding and administering investments*;
- (6) *sending dematerialised instructions*;
- (7) *advising on investments or regulated mortgage contracts*;
- (8) *entering into regulated mortgage contracts*; and
- (9) *administering regulated mortgage contracts*.

The exclusion is, however, disapplied where a *person* is carrying on *insurance mediation* or *reinsurance mediation*. This is due to article 4(4A) of the *Regulated Activities Order*. *Guidance* on exclusions relevant to *insurance mediation activities* is in *PERG 5* (*Insurance mediation activities*).

- 2.9.4 G A *person* carrying on certain *regulated activities* does not require *authorisation* in specified circumstances if he is acting in a representative capacity. The representative capacities covered by the exclusions depend on the *regulated activity* concerned but, in most cases, the focus is on *persons* who are acting as trustee or personal representative. In broad terms, the exclusions apply to specified transactions, or activities, that are part of the discharge of his general obligations by the trustee or representative when he is acting as such. Many of the exclusions require that the trustee or representative must not hold himself out as providing services consisting of the *regulated activity* in question. In addition, he must not receive remuneration that is additional to any he receives for acting in the representative capacity (although a *person* is not to be regarded as receiving additional remuneration merely because his remuneration as trustee or representative is calculated by reference to time spent). The exclusions for *entering into* and for *administering regulated mortgage contracts*, however, work on a different basis. They apply where the activity relates to a *regulated mortgage contract* under which the borrower is a beneficiary.

Professions or business not involving regulated activities

- 2.9.5 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:
- (1) *dealing in investments as agent;*
 - (2) *arranging (bringing about) deals in investments, arranging (bringing about) regulated mortgage contracts, making arrangements with a view to transactions in investments and making arrangements with a view to regulated mortgage contracts;*
 - (3) *assisting in the administration and performance of a contract of insurance;*
 - (4) *safeguarding and administering investments;* and
 - (5) *advising on investments or regulated mortgage contracts.*

The exclusion is, however, disapplied where a *person* is carrying on *insurance mediation* or *reinsurance mediation*. This is due to article 4(4A) of the *Regulated Activities Order*. *Guidance* on exclusions relevant to *insurance mediation activities* is in *PERG 5* (Insurance mediation activities).

- 2.9.6 G The exclusions apply where the *regulated activity* is carried out in the course of a profession or business which does not otherwise consist of the carrying on of *regulated activities* in the *United Kingdom*.

However, activities are only excluded to the extent that they may reasonably be regarded as a necessary part of the other services provided in the course of the profession or business. The exclusion does not apply if separate remuneration is received in respect of any *regulated activity* that is carried on. (See separate *guidance* for *authorised professional firms* in *PROF.*)

Sale of goods and supply of services

- 2.9.7 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:
- (1) *dealing in investments as principal;*
 - (2) *dealing in investments as agent;*
 - (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
 - (4) *managing investments;*
 - (5) *safeguarding and administering investments; and*
 - (6) *advising on investments.*
- 2.9.8 G Broadly speaking, the exclusions focus on cases where the main business of a *person* is to sell goods or supply services but where certain activities may have to be carried on for the purposes of that business which would otherwise be *regulated activities*. The exclusions are not available where the customer to whom goods are sold or services are supplied is an individual. They are also not available where what is at issue is a transaction entered into, or service provided, in relation to rights under a *contract of insurance* or *units* in a *collective investment scheme* (or rights to, or interests in, either).

Group and joint enterprises

- 2.9.9 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:
- (1) *dealing in investments as principal;*
 - (2) *dealing in investments as agent;*
 - (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
 - (4) *managing investments;*

- (5) *safeguarding and administering investments*;
- (6) *sending dematerialised instructions*; and
- (7) *advising on investments*.

2.9.10 G These exclusions apply to intra-group dealings and activities and to dealings or activities involving participators in a joint enterprise which take place for the purposes of, or in connection with, the enterprise. The general principle here is that, as long as activities that would otherwise be *regulated activities* take place wholly within a group of companies, then there is no need for *authorisation*. The same principle applies to dealings or activities that take place wholly within a *joint enterprise* entered into for commercial purposes related to the participators' unregulated business. The exclusions in *PERG* 2.9.9G(2), (3), (4) and (7) are disapplied where they concern a *contract of insurance*. Guidance on exclusions relevant to *insurance mediation activities* is in *PERG* 5 (Insurance mediation activities).

Sale of body corporate

2.9.11 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

- (1) *dealing in investments as principal*;
- (2) *dealing in investments as agent*;
- (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments*; and
- (4) *advising on investments*.

2.9.12 G The exclusions apply in relation to transactions to *buy or sell shares* in a *body corporate* where, in broad terms:

- (1) the transaction involves the acquisition or disposal of a least 50 per cent of the voting shares in the *body corporate* and is, or is to be, between certain specified kinds of *person*; or
- (2) the object of the transaction may otherwise reasonably be regarded as being the acquisition of day-to-day control of the affairs of the *body corporate*.

These exclusions also apply to transactions that are entered into for the purposes of the above transactions (such as transactions involving the offer of *securities* in the offeror as consideration or part consideration for the sale of the *shares* in the *body corporate*). These exclusions do not have effect in relation to shares in an *open-ended investment company*. The exclusions in *PERG* 2.9.11G(2), (3) and (4) are disapplied where they concern a *contract of insurance*.

Guidance on exclusions relevant to insurance mediation activities is in PERG 5 (Guidance on insurance mediation activities).

Employee share schemes

- 2.9.13 G This group of exclusions applies, in specified circumstance, to the *regulated activities* of:
- (1) *dealing in investments as principal;*
 - (2) *dealing in investments as agent;*
 - (3) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
 - (4) *safeguarding and administering investments.*

- 2.9.14 G In broad terms, the exclusions apply to activities which further an employee share scheme, or are carried on in operation of such a scheme. They apply to activities carried on by the *company* whose securities or debentures (which are given an extended meaning for this exclusion) are the subject of the scheme. They also apply to activities of any *company* in the same *group* or of any trustee who holds certain types of securities or debentures under the scheme.

Overseas persons

- 2.9.15 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:
- (1) *dealing in investments as principal;*
 - (2) *dealing in investments as agent;*
 - (3) *arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, arranging (bringing about) regulated mortgage contracts and making arrangements with a view to regulated mortgage contracts;*
 - (4) *advising on investments;*
 - (5) *entering into regulated mortgage contracts;*
 - (6) *administering regulated mortgage contracts; and*
 - (7) *agreeing to carry on the regulated activities of managing investments, arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, assisting in the performance and administration of*

a contract of insurance, safeguarding and administering investments or sending dematerialised instructions.

- 2.9.16 G An *overseas person* is defined as a *person* who carries on what would be *regulated activities* (including any activity that would otherwise be excluded from being a *regulated activity* by virtue of the exclusions for *overseas persons* referred to in *PERG 2.9.15G*) but who does not do so, or offer to do so, from a permanent place of business maintained by him in the *United Kingdom*. Where a *person* does not have a permanent place of business in the *United Kingdom*, he will not, in any event, need to rely on these exclusions unless what he does is regarded as carried on in the *United Kingdom* (see *PERG 2.4*).
- 2.9.17 G The exclusions are available, for *regulated activities* other than those that relate to *regulated mortgage contracts*, in the two broad cases set out below. For some of these *regulated activities*, the exclusions apply in each case. In others, they apply in only one.
- (1) The first case is where the nature of the *regulated activity* requires the direct involvement of another *person* and that *person* is *authorised* or exempt (and acting within the scope of his exemption). For example, this might occur where the *person* with whom an *overseas person* deals is an *authorised person* or where the arrangements he makes are for transactions to be entered into by such a *person*.
 - (2) The second case is where a particular *regulated activity* is carried on as a result of what is termed a 'legitimate approach'. An approach to an *overseas person* that has not been solicited by him in any way, or has been solicited in a way that does not contravene the restrictions on *financial promotion* in section 21 of the *Act*, is a legitimate approach. An approach that is made by him in a way that does not contravene section 21 of the *Act* is also a legitimate approach. In such circumstances, the *overseas person* can, without requiring *authorisation*, enter into deals with (or on behalf of) a *person* in the *United Kingdom*, give advice in the *United Kingdom* or enter into agreements in the *United Kingdom* to carry on certain *regulated activities*. The exemptions to the *financial promotion* restrictions made by the Treasury under section 21 of the *Act* (Restrictions on financial promotion) will be relevant to the question of whether those restrictions have been contravened (see separate *guidance* on *financial promotion* in *PERG 8* (Financial promotion and related activities)).
- 2.9.17A G The exclusions for *overseas persons* who carry on certain *regulated activities* related to *regulated mortgage contracts* work in a different way. They depend on the residency of the borrower or borrowers. *Guidance* on these exclusions is in *PERG 4.11* (Link between

activities and the United Kingdom).

Incoming ECA providers

- 2.9.18 G (1) In accordance with article 3(2) of the *E-Commerce Directive*, all requirements on *persons* providing *electronic commerce activities* into the *United Kingdom* from the *EEA* are lifted, where these fall within the co-ordinated field and would restrict the freedom of such a firm to provide services. The coordinated field includes any requirement of a general or specific nature concerning the taking up or pursuit of *electronic commerce activities*. *Authorisation* requirements fall within the coordinated field. The services affected are generally those provided electronically, for example through the Internet or solicited e-mail.
- (2) The *Regulated Activities Order* was amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157). This Order creates a general exclusion from *regulated activities* (except for the *regulated activities of effecting or carrying out contracts of insurance*). Where activities consist of *electronic commerce activities*, an *incoming ECA provider* will not require *authorisation* for such activities in the *United Kingdom*. This does not extend to the *regulated activity of effecting or carrying out contracts of insurance* falling under the *Insurance Directives* (see *PERG* 2.8.3G). However, services provided off-line in the *United Kingdom* (that is, other than as an *electronic commerce activity*) by such a firm which amount to *regulated activities* still require *authorisation*. *ECO* provides *guidance* and sets out *rules* that are relevant to both *incoming* and *outgoing ECA providers*. *Incoming ECA providers* have also to comply with any *authorisation* requirements in the *country of origin* of the services.
- (3) *Incoming ECA providers* should note that notification requirements under the *Single Market Directives* still apply (see *AUTH* 5).

Insurance mediation activities

- 2.9.19 G The exclusions in this group apply to certain *regulated activities* involving certain *contracts of insurance*. The exclusions and the *regulated activities* to which they apply are as follows.
- (1) The first exclusion of this kind relates to certain activities carried on by a provider of non-motor goods or services related to travel in connection with *general insurance contracts* only. The contracts must be for five years duration or less and have

an annual premium of no more than €500. The contract must cover breakdown or loss of or damage to non-motor goods supplied by the provider or loss of or damage to baggage and other risks linked to travel services booked with the provider. There must not be any liability risk cover other than where this is ancillary to the main risk covered in a travel policy). The insurance must be complementary to the goods or services being supplied by the provider in the course of his carrying on a business or profession not otherwise consisting of *regulated activities*, and the policy must be in standard form. This exclusion applies where the *regulated activities* concerned are:

- (a) *dealing in investments as agent;*
 - (b) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
 - (c) *assisting in the administration and performance of a contract of insurance; and*
 - (d) *advising on investments.*
- (2) The second exclusion applies where information is provided to a *policyholder* by a *person* on an incidental basis in the course of that *person's* profession or business that does not otherwise consist of *regulated activities*. This exclusion applies where the *regulated activities* are:
- (a) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in investments;*
 - (b) *managing investments;*
 - (c) *assisting in the administration and performance of a contract of insurance; and*
 - (d) *safeguarding and administering investments;*
- (3) The third exclusion applies to certain *general insurance contracts* covering large risks where the risk is situated outside the *EEA*. This exclusion applies where the *regulated activities* concerned are:
- (a) *dealing in investments as agent;*
 - (b) *arranging (bringing about) deals in investments and making arrangements with a view to transactions in*

investments;

- (c) *assisting in the administration and performance of a contract of insurance; and*
- (d) *advising on investments.*

Guidance on these and other exclusions relevant to *insurance mediation activities* is in *PERG 5* (Insurance mediation activities).

- 2.10 Persons carrying on regulated activities who do not need authorisation
- 2.10.1 G There are various provisions that disapply the *general prohibition* from specific *persons* in relation to the carrying on by them of particular *regulated activities*. There is, however, no general provision for *persons* to apply for an exemption.
- 2.10.2 G *Persons* may be exempted from the *general prohibition* in relation to one or more particular *regulated activities*. The extent of any exemption may also be limited to specified circumstances (such as where another *person* who is *authorised* and has relevant *permission* has accepted responsibility for the *regulated activities* in question) or subject to specified conditions (such as a requirement that the activity is not carried on for pecuniary gain).
- 2.10.3 G The *Act* provides that *appointed representatives* (see *PERG 2.10.5G*), *recognised investment exchanges* and *recognised clearing houses* (see *PERG 2.10.6G*) and certain other *persons* exempt under miscellaneous provisions (see *PERG 2.10.7G*) are *exempt persons*. Members of Lloyd's and members of the professions are not '*exempt persons*' as such, but the *general prohibition* in section 19 of the *Act* only applies to them in certain circumstances. The distinction is significant in relation to various provisions (such as those in the *Regulated Activities Order*) that apply only to transactions and other activities that involve *exempt persons*.
- 2.10.4 G *Appointed representatives* and the *persons* exempt under miscellaneous provisions cannot be exempt in relation to some *regulated activities* and *authorised* in relation to others. If a *person* is already *authorised*, and proposes to carry on additional *regulated activities* in respect of which he would otherwise be exempt as an *appointed representative* or under miscellaneous provisions, he must seek an extension to his existing *permission* to cover those additional activities. A *person* in either of these categories who would otherwise be exempt in relation to particular activities will, if he becomes *authorised*, no longer be able to rely on the exemption.

Appointed representatives

- 2.10.5 G A *person* is exempt if he is an *appointed representative* of an *authorised person*. See SUP 12 (Appointed representatives). But where an *appointed representative* carries on *insurance mediation* or *reinsurance mediation* he will not be exempt unless he is included on the register kept by the FSA under article 93 of the *Regulated Activities Order* (Duty to maintain a record of unauthorised persons carrying on insurance mediation activities) (see PERG 5.13 (Appointed representatives)).

Recognised Investment Exchanges and Recognised Clearing Houses

- 2.10.6 G Investment exchanges and *clearing houses* can apply for recognition under Part XVIII of the *Act* (Recognised investment exchanges and clearing houses.) See REC.

Particular exempt persons

- 2.10.7 G Various named *persons* are exempted by Order made by the Treasury under section 38 of the *Act* from the need to obtain *authorisation* (the *Exemption Order*). Some of the exemptions are subject to restrictions as to the circumstances in which they apply. For example, a *person* is only exempt when acting in a particular capacity or for particular purposes.
- 2.10.8 G The exemptions apply so as to confer exemption on *persons* from the *general prohibition* in respect of four distinct categories of *regulated activities*.
- (1) The first category is carrying on any *regulated activity*, apart from *effecting* or *carrying out contracts of insurance* (or agreeing to do so). *Exempt persons* here are generally supranational bodies of which the *United Kingdom* or another *EEA State* is a member.
 - (2) The second category is the *regulated activity* of *accepting deposits*. *Exempt persons* here include municipal banks, local authorities, charities and *industrial and provident societies*.
 - (3) The third category is carrying on any of those *regulated activities* relating to *securities* or *relevant investments* or to 'any property' (or agreeing to do so). *Exempt persons* here include *persons* whose activities are subject to a certain degree of control or oversight by the Government.
 - (4) The fourth category is carrying on one or more specified *regulated activities* (or agreeing to do so). *Exempt persons* here cover a range of different *persons*.

Members of Lloyd's

- 2.10.9 G Several activities carried on in connection with business at Lloyd's are *regulated activities* in respect of which *authorisation* must be obtained. These include the *regulated activities* of *advising on syndicate participation at Lloyd's* or *managing the underwriting capacity of Lloyd's syndicate as a managing agent at Lloyd's* or *arranging (bringing about) deals in investments* or *making arrangements with a view to transactions in investments* for another in relation to such participation or underwriting capacity.
- 2.10.10 G But under section 316 of the *Act* (Direction by the FSA) the *general prohibition* does not apply to a *person* who is a member of the *Society of Lloyd's* unless the *FSA* has made a direction that it should apply. The *general prohibition* is disapplied in relation to any *regulated activity* carried on by a member relating to *contracts of insurance* written at Lloyd's. Directions can be made by the *FSA* in relation to individual *members* or the *members* of the *Society of Lloyd's* taken together. Alternatively, instead of being required to obtain *authorisation*, a member of the *Society of Lloyd's* may, as a result of a direction under section 316 of the *Act*, become subject to specific provisions of the *Act* even though he is not an *authorised person*.
- 2.10.11 G A *person* who ceased to be an *underwriting member* at any time on or after 24 December 1996 may, without *authorisation*, *carry out contracts of insurance* he has underwritten at Lloyd's. But this is subject to any requirements or *rules* that the *FSA* may impose under sections 320 to 322 of the *Act* (Former underwriting members).

Members of the professions

- 2.10.12 G The *general prohibition* does not in certain circumstances apply to a *person* providing professional services that are supervised and regulated by a professional body designated by the Treasury under section 326 of the *Act* (Designation of professional bodies) (see *PROF*). Certain of the exclusions from *regulated activities* outlined in *PERG 2.8* and *PERG 2.9* will be relevant to members of *designated professional bodies*. The regime outlined below applies only where no exclusion applies and a *person* will be carrying on a *regulated activity*.
- 2.10.13 G Such a *person* may carry on *regulated activities* if the conditions outlined below are met, that is the *person*:
- (1) is not affected by an order or direction made by the *FSA* under section 328 or 329 of the *Act* (Directions and orders in relation to the general prohibition) which has the effect of re-imposing the *general prohibition* in any particular case;
 - (2) is, or is controlled by, a member of a profession;

- (3) does not receive any pecuniary reward or other advantage from the *regulated activities* which is given to him by any *person* other than his client (or if he does, he must account to his client for it);
- (4) provides any service in the course of carrying on the *regulated activities* in a manner which is incidental to the provision of professional services;
- (5) carries on only those *regulated activities* which are permitted by the rules of the professional body or in respect of which they are an *exempt person*; and
- (6) is not an *authorised person*.

2.10.14 G The *regulated activities* that may be carried on in this way are restricted by an Order made by the Treasury under section 327(6) of the Act (Exemption from the general prohibition) (the *Non-Exempt Activities Order*). Accordingly, under that section, a *person* may not by way of business carry on any of the following activities without *authorisation*:

- (1) *accepting deposits*;
- (2) *effecting or carrying out contracts of insurance*;
- (3) *dealing in investments as principal*;
- (4) *establishing, operating or winding up a collective investment scheme*;
- (5) *establishing, operating or winding up a stakeholder pension scheme*;
- (6) *managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's*;
- (7) *entering as provider into funeral plan contracts*;
- (8) agreeing to do certain of the above activities.

2.10.15 G In addition, there are restrictions on carrying on (or agreeing to carry on) certain other *regulated activities*. These relate to *managing investments, advising on investments or regulated mortgage contracts, advising on syndicate participation at Lloyd's and entering into a regulated mortgage contract or administering a regulated mortgage contract*.

2.10.16 G A *person* carrying on *regulated activities* under the regime for

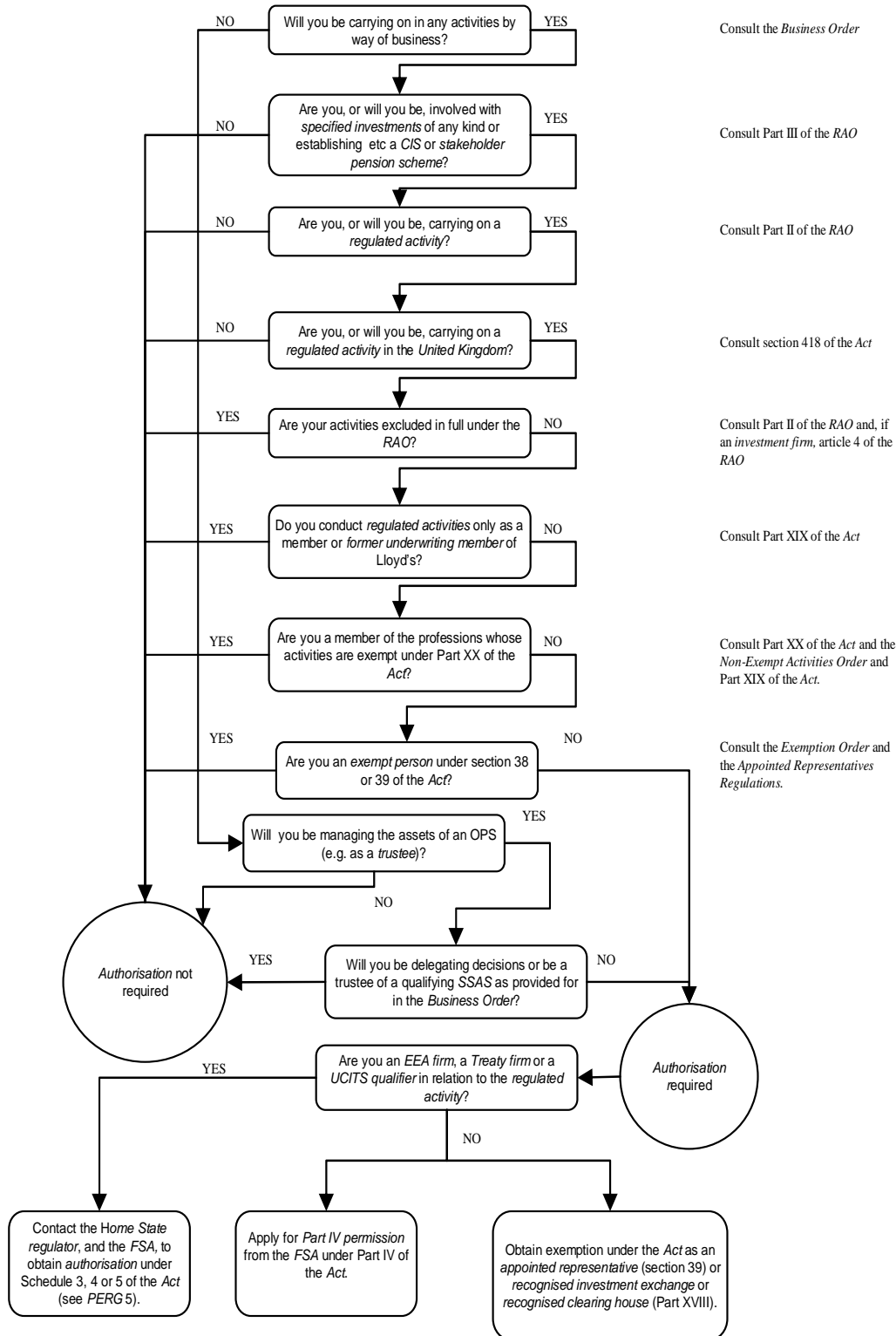
members of the professions will be subject to rules made by the professional body designated by the Treasury. Such bodies are obliged to make rules governing the carrying on by their members of those *regulated activities* that they are able to carry on without *authorisation* under the *Act*. Where such a *person* is carrying on *insurance mediation* or *reinsurance mediation*, he must also be included on the register kept by the *FSA* under article 93 of the *Regulated Activities Order* (Duty to maintain a record of unauthorised persons carrying on insurance mediation activities) (see *PERG 5.10* (Exemptions)).

2.11 What to do now ?

2.11.1 G Any *person* who concludes or is advised that he will need to make an application for *Part IV permission* should look at *PERG 2 Annex 2G* to determine the categories of *specified investment* and *regulated activities* that are relevant to the next step and should then refer to *AUTH 3* for details of the application process.

PERG 2 Annex 1G Authorisation and regulated activities

Do you need authorisation?



PERG 2 Annex 2G

Regulated activities and the permission regime

1 Table

1.1 G Table 1 is designed to relate the *permission* regime to *regulated activities*. Section 42(6) of the *Act* gives the *FSA* the power to describe the *regulated activity* or *regulated activities* for which it gives *permission* in such manner as the *FSA* considers appropriate. Table 1 details how the *FSA* has chosen to describe the *regulated activities* and *specified investments* for the purposes of the *permission* regime.

1.2 G In an application for *Part IV permission*, an applicant will need to state the *regulated activities* it requires *permission* to carry on. This will involve an applicant identifying the *regulated activities* and the *specified investments* associated with those activities for which it requires *Part IV permission*.

1.3 G Part II of the *Regulated Activities Order* (Specified activities) specifies the activities for the purposes of section 22 of the *Act*. This section states that an activity is a *regulated activity* if it is an activity of a specified kind which is carried on by way of business and:

- (1) relates to an *investment* of a specified kind; or
- (2) in the case of an activity specified for the purposes of section 22(1)(b) of the *Act*, is carried on in relation to property of any kind.

Part III of the *Regulated Activities Order* (Specified investments) specifies the *investments* referred to in (1).

1.4 G Column 1 of Table 1 lists the *regulated activities* and column 2 lists the associated *specified investments*. Descriptions of some categories of *specified investments* are expanded in Tables 2 and 3. There are notes to all three tables which provide further explanation where appropriate.

1.5 G A reference to an article in the tables in *PERG 2 Ann 2G* is to the relevant article in the *Regulated Activities Order*.

2 Table

| Table 1: Regulated Activities [See note 1 to Table 1] | |
|---|---|
| Regulated activity | Specified investment in relation to which the regulated activity (in the corresponding section of column one) may be carried on |
| Accepting deposits | |
| (a) <i>accepting deposits</i> (article 5) | <i>deposit</i> (article 74) |
| Issuing electronic money | |
| (aa) <i>issuing electronic money</i> (article 9B) | <i>electronic money</i> (article 74A) |
| Insurance business | |
| (b) <i>effecting contracts of insurance</i> (article 10(1)) | <i>contract of insurance</i> (article 75) [expanded in Table 2] |
| (c) <i>carrying out contracts of insurance</i> (article 10(2)) | |
| Designated investment business [see notes 1A and 1B to Table 1] | |
| (d) <i>dealing in investments as principal</i> (article 14) [see note 2 to Table 1] | (in relation to (d) to (l)) <i>security</i> [expanded in Table 3]; or <i>contractually based investment</i> [expanded in Table 3.] (in relation to (e) to (g) and (j) only) a <i>long-term care insurance contract</i> which is a <i>pure protection contract</i> |
| (e) <i>dealing in investments as agent</i> (article 21) [see notes 1B and 2 to Table 1] | |
| (f) <i>arranging (bringing about) deals in investments</i> (article 25(1)) [see note 1B to Table 1] [also see Sections of Table 1 headed 'The Lloyd's market' and 'Regulated mortgage activity'] | |
| (g) <i>making arrangements with a view to transactions in investments</i> (article 25(2)) [see note 1B to Table 1] [also see Sections of Table 1 headed 'The Lloyd's market' and 'Regulated mortgage activity'] | |
| (h) <i>managing investments</i> (article 37) [see note 3 to Table 1] | |

| | |
|--|--|
| <p>(i) <i>safeguarding and administering investments</i> (article 40) [see note 3 Table 1]</p> <p>For the purposes of the <i>permission</i> regime, this <i>regulated activity</i> is subdivided into:</p> <p>(i) <i>safeguarding and administration of assets (without arranging)</i>; and</p> <p>(ii) <i>arranging safeguarding and administration of assets.</i></p> <p>(j) <i>advising on investments</i> (article 53) [see note 1B to Table 1] [also see Section of Table 1 headed 'Regulated mortgage activity']</p> <p>For the purposes of the <i>permission</i> regime, this <i>regulated activity</i> is subdivided into:</p> <p>(i) <i>advising on investments (except pension transfers and pension opt-outs)</i>; and</p> <p>(ii) <i>advising on pension transfers and pension opt-outs</i> [see note 4 to Table 1]</p> <p>(k) <i>sending dematerialised instructions</i> (article 45(1))</p> <p>(l) <i>causing dematerialised instructions to be sent</i> (article 45(2))</p> | |
| <p>(m) <i>establishing, operating or winding up a collective investment scheme</i> (article 51)</p> <p>For the purposes of the <i>permission</i> regime, this <i>regulated activity</i> is subdivided into:</p> <p>(i) <i>establishing, operating or winding up a regulated collective investment scheme</i>; and</p> <p>(ii) <i>establishing, operating or winding up an unregulated collective investment scheme.</i></p> <p>(n) <i>acting as trustee of an authorised unit trust scheme</i> (article 51)</p> <p>(o) <i>acting as the depositary or sole director of an open-ended investment company</i> (article 51)</p> <p>(p) <i>establishing, operating or winding up a stakeholder pension scheme</i> (article 52)</p> | [see note 5 to Table 1] |
| <p>(pp) <i>providing basic advice on a stakeholder product</i> (article 52B)</p> | those <i>specified investments</i> that are also a <i>stakeholder product</i> [see note 7] |

| Insurance mediation activity [see note 5A to Table 1] | |
|---|--|
| <p>(pa) <i>dealing in investments as agent</i> (article 21)</p> <p>(pb) <i>arranging (bringing about) deals in investments</i> (article 25(1))</p> <p>(pc) <i>making arrangements with a view to transactions in investments</i> (article 25(2))</p> <p>(pd) <i>assisting in the administration and performance of a contract of insurance</i> (article 39A)</p> <p>(pe) <i>advising on investments</i> (article 53)</p> <p>For the purpose of the <i>permission</i> regime, this <i>regulated activity</i> is sub-divided into:</p> <p>(i) <i>advising on investments (except pension transfers or pension opt-outs);</i></p> <p>(ii) <i>advising on pension transfers or pension opt-outs</i> [See note 5E to Table 1].</p> | <p><i>life policy</i> [see note 5B to Table 1]</p> <p><i>pure protection contract</i> [see note 5C to Table 1]</p> <p><i>general insurance contract</i> [see note 5D to Table 1]</p> <p><i>rights to or interests in investments</i> (article 89) in so far as they relate to a <i>life policy</i></p> |
| The Lloyd's market [see note 6 to Table 1] | |
| (q) <i>advising on syndicate participation at Lloyd's</i> (article 56) | membership of a Lloyd's syndicate (article 86(2)) |
| (r) <i>managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's</i> (article 57) | <i>underwriting capacity of a Lloyd's syndicate</i> (article 86(1)) |
| (s) <i>arranging (bringing about) deals in investments</i> (article 25(1)) | <i>underwriting capacity of a Lloyd's syndicate</i> (article 86(1)) |
| (t) <i>making arrangements with a view to transactions in investments</i> (article 25(2)) | <p><i>membership of a Lloyd's syndicate</i> (article 86(2))</p> <p><i>rights to or interests in investments</i> (article 89) in so far as they relate to <i>underwriting capacity of a Lloyd's syndicate</i> or <i>membership of a Lloyd's syndicate</i></p> |
| Funeral plan providers | |
| (u) <i>entering as provider into a funeral plan contract</i> (article 59) [see note 1A to Table 1] | <i>funeral plan contract</i> (article 87) |

| Regulated mortgage activity | |
|---|---|
| (v) <i>arranging (bringing about) regulated mortgage contracts</i> (article 25(A)(1)) | <i>regulated mortgage contract</i> (article 88) |
| (w) <i>making arrangements with a view to regulated mortgage contracts</i> (article 25(A)(2)) | |
| (x) <i>advising on regulated mortgage contracts</i> (article 53A) | |
| (y) <i>entering into a regulated mortgage contract</i> (article 61(1)) | |
| (z) <i>administering a regulated mortgage contract</i> (article 61(2)) | |

3 Table

Notes to Table 1

Note 1:

In addition to the *regulated activities* listed in Table 1, article 64 of the *Regulated Activities Order* specifies that *agreeing to carry on a regulated activity* is itself a *regulated activity* in certain cases. This applies in relation to all the *regulated activities* listed in Table 1 apart from:

- *accepting deposits* (article 5);
- *issuing electronic money* (article 9B);
- *effecting and carrying out contracts of insurance* (article 10);
- *establishing, operating or winding up a collective investment scheme* (article 51(1)(a));
- *acting as trustee of an authorised unit trust scheme* (article 51(1)(b));
- *acting as the sole depositary or sole director of an open-ended investment company* (article 51(1)(c)); and
- *establishing, operating or winding up a stakeholder pension scheme* (article 52).

Permission to carry on the activity of *agreeing to carry on a regulated activity* will be given automatically by the *FSA* in relation to those other *regulated activities* for which an applicant is given *permission* (other than those activities in articles 5, 9B, 10, 51 and 52 detailed above).

Note 1A:

Funeral plan contracts are *contractually based investments*. Accordingly, the following are *regulated activities* when carried on in relation to a *funeral plan contract*: (a) *arranging (bringing about) deals in investments*, (b) *making arrangements with a view to transactions in investments*, (c) *managing investments*, (d) *safeguarding and administering investments*, (e) *advising on investments*, (f) *sending dematerialised instructions* and (g) *causing dematerialised instructions to be sent* (as well as agreeing to carry on each of the activities listed in (a) to (g)). However, they are not *designated investment business*.

Note 1B:

Life policies are *contractually based investments*. Where the *regulated activities* listed as *designated investment business* in (e) to (g) and (j) are carried on in relation to a *life policy*, these activities also count as 'insurance mediation activities'. The full list of *insurance mediation activities* is set out in (pa) to (pe). The *regulated activities* of agreeing to carry on each of these activities will, if carried on in relation to a *life policy*, also come within both *designated investment business* and *insurance mediation activities*.

Notes to Table 1

Note 2:

For the purposes of the *regulated activities* of *dealing in investments as principal* (article 14) and *dealing in investments as agent* (article 21), the definition of *contractually based investments* [expanded in Table 3] excludes a *funeral plan contract* (article 87) and rights to or interests in *funeral plan contracts*.

Note 3:

The *regulated activities* of *managing investments* (article 37) and *safeguarding and administering investments* (article 40) may apply in relation to any assets, in particular circumstances, if the assets being managed or safeguarded and administered include, (or may include), any *security* or *contractually based investment*.

Note 4:

For the purposes of the *permission* regime, the activity in (j)(ii) of *advising on pension transfers and pension opt-outs* is carried on in respect of the following *specified investments*:

- *unit* (article 81);
- *stakeholder pension scheme* (article 82);
- *life policy* (explained in note 5); and
- *rights to or interests in investments* in so far as they relate to a *unit*, a *stakeholder pension scheme* or a *life policy*.

Note 5:

Article 4(2) of the *Regulated Activities Order* specifies the activities (m) to (p) for the purposes of section 22(1)(b) of the *Act*. That is, these activities will be *regulated activities* if carried on in relation to any property and are not expressed as relating to a *specified investment*.

Note 5A:

Where they are carried on in relation to a *life policy*, the activities listed as *insurance mediation activities* in (pa) to (pe) (as well as the *regulated activity* of agreeing to carry on those activities) are also *designated investment business*.

Note 5B:

Life policy is the term used in the *Handbook* to mean 'qualifying contract of insurance' (as defined in article 3(1) of the *Regulated Activities Order*) and, except in *COB 3*, *PERG 5* and *PERG 8* the term also includes a *long term care insurance contract* which is a *pure protection contract*.

Notes to Table 1

Note 5C:

Pure protection contract is the term used in the *Handbook* to mean a *long-term insurance contract* which is not a *life policy*.

Note 5D:

General insurance contract is the term used in the *Handbook* to mean *contract of insurance* within column 1 of Table 2.

Note 5E:

For the purposes of the *permission* regime, the activity in (pe)(ii) of *advising on pension transfers and pension opt-outs* is carried on in respect of the following *specified investments*:

- *life policy* (explained in note 5A); and
- *rights to or interests in investments* in so far as they relate to a *life policy*.

Note 6:

Section 315 of the *Act* (The Society: authorisation and permission) states that the *Society of Lloyd's* has *permission* to carry on the *regulated activities* referred to in that section, one of which is specified in article 58 of the *Regulated Activities Order*. This *permission* is unique to the *Society of Lloyd's*.

Note 7:

A *stakeholder product* is defined in the *Glossary* as:

- an investment of a kind specified in the *Stakeholder Regulations*;
- a *stakeholder pension scheme*; and
- a *stakeholder CTF*.

4 Table

| Table 2: Contracts of insurance | | |
|--|--|---|
| Contract of insurance (article 75 of the RAO) | | |
| (a) <i>general insurance contract</i> (Part I of Schedule 1 to the <i>Regulated Activities Order</i>) | | (b) <i>long-term insurance contract</i> (Part II of Schedule 1 to the <i>Regulated Activities Order</i>) |
| Number | | |
| 1 | <i>Accident</i> (paragraph 1) | <i>life and annuity</i> (paragraph I) |
| 2 | <i>Sickness</i> (paragraph 2) | <i>marriage and birth</i> (paragraph II) |
| 3 | <i>Land vehicles</i> (paragraph 3) | <i>linked long-term</i> (paragraph III) |
| 4 | <i>Railway rolling stock</i> (paragraph 4) | <i>permanent health</i> (paragraph IV) |
| 5 | <i>Aircraft</i> (paragraph 5) | <i>tontines</i> (paragraph V) |
| 6 | <i>Ships</i> (paragraph 6) | <i>capital redemption</i> (paragraph VI) |
| 7 | <i>Goods in transit</i> (paragraph 7) | <i>pension fund management</i> (paragraph VII) |
| 8 | <i>fire and natural forces</i> (paragraph 8) | <i>collective insurance</i> (paragraph VIII) |
| 9 | <i>damage to property</i> (paragraph 9) | <i>social insurance</i> (paragraph IX) |
| 10 | <i>motor vehicle liability</i> (paragraph 10) | |
| 11 | <i>aircraft liability</i> (paragraph 11) | |
| 12 | <i>liability of ships</i> (paragraph 12) | |
| 13 | <i>general liability</i> (paragraph 13) | |
| 14 | <i>credit</i> (paragraph 14) | |
| 15 | <i>suretyship</i> (paragraph 15) | |
| 16 | <i>miscellaneous financial loss</i> (paragraph 16) | |
| 17 | <i>legal expenses</i> (paragraph 17) | |
| 18 | <i>assistance</i> (paragraph 18) | |
| Notes to Table 2 | | |
| Note 1: | | |
| See <i>IPRU(INS)</i> Ann 10.2 Part II for the groups of <i>classes</i> of <i>general insurance business</i> from the Annex to the <i>First non-Life Directive</i> . | | |
| Note 2: | | |
| See <i>IPRU(INS)</i> 11.8 and the definition of <i>ancillary risks</i> in <i>IPRU(INS)</i> and <i>AUTH</i> 3.12.6G to <i>AUTH</i> 3.12.12G for <i>guidance</i> on the treatment of supplementary and ancillary provisions in relation to <i>contracts of insurance</i> . | | |

| Table 3: Securities, contractually based investments and relevant investments [see notes 1 and 2 to Table 3] | | |
|---|--|--|
| Security (article 3(1)) | Contractually based investment (article 3(1)) | Relevant investments (article 3(1)) |
| <p><i>share</i> (article 76)</p> <p><i>debenture</i> (article 77)</p> <p><i>government and public security</i> (article 78)</p> <p><i>warrant</i> (article 79)</p> <p><i>certificate representing certain security</i> (article 80)</p> <p><i>unit</i> (article 81)</p> <p><i>stakeholder pension scheme</i> (article 82)</p> <p><i>rights to or interests in investments</i> (article 89) in so far as they relate to any of the above categories of <i>security</i></p> | <p><i>option</i> (article 83)</p> <p>For the purposes of the <i>permission</i> regime, <i>option</i> is subdivided into:</p> <p>(i) <i>option</i> (excluding a <i>commodity option</i> and an <i>option</i> on a <i>commodity future</i>);</p> <p>(ii) <i>commodity option</i> and <i>option</i> on a <i>commodity future</i>.</p> <p><i>future</i> (article 84)</p> <p>For the purposes of the <i>permission</i> regime, <i>future</i> is subdivided into:</p> <p>(i) <i>future</i> (excluding a <i>commodity future</i> and a <i>rolling spot forex contract</i>);</p> <p>(ii) <i>commodity future</i>;</p> <p>(iii) <i>rolling spot forex contract</i>.</p> <p><i>contract for differences</i> (article 85)</p> <p>For the purposes of the <i>permission</i> regime, <i>contract for differences</i> is subdivided into:</p> <p>(i) <i>contract for differences</i> (excluding a <i>spread bet</i> and a <i>rolling spot forex contract</i>);</p> <p>(ii) <i>spread bet</i>;</p> <p>(iii) <i>rolling spot forex contract</i>.</p> <p><i>life policy</i> (but excluding a <i>long-term care insurance contract</i> which is a <i>pure protection contract</i>) [see note 5B to Table 1]</p> <p><i>funeral plan contract</i> (article 87) [see note 1A to Table 1]</p> <p><i>rights to or interests in investments</i> (article 89) in so far as they relate to any of the above categories of <i>contractually based investment</i>.</p> | <p><i>contractually based investments</i> (article 3(1))</p> <p><i>pure protection contract</i> [see note 5C to Table 1]</p> <p><i>general insurance contract</i> [see note 5D to Table 1]</p> |

Notes to Table 3

Note 1:

Security, contractually based investment and relevant investment are not, in themselves, *specified investments* they are defined as including a number of *specified investments* as set out in Table 3. *Relevant investments* is the term that is used to cover *contractually based investments* together with rights under a *general insurance contract* and a *pure protection contract*.

Note 2:

For the purposes of the *regulated activities of dealing in investments as principal* (article 14) and *dealing in investments as agent* (article 21), the definition of *contractually based investments* excludes a *funeral plan contract* (article 87) and rights to or interests in *funeral plan contracts*.

GUIDANCE ON THE SCOPE OF THE REGULATED ACTIVITY OF ISSUING E-MONEY

3 Guidance on the scope of the regulated activity of issuing e-money

3.1 Application and purpose

Application

- 3.1.1 G This chapter applies to a *person* who needs to know whether a particular electronic payment product is *e-money* and whether the *person* issuing it needs to be *authorised* under the *Act*.
- 3.1.2 G This appendix also applies to a *person* who needs to know the extent to which section 21 of the *Act* (Restrictions on financial promotion) and COB 3 (Financial promotion) apply to *e-money*.

Purpose

- 3.1.3 G There are two main purposes of this *guidance* on the definition of *e-money*. These are:
- (1) to outline the main features of the *regulated activity of issuing e-money*; and
 - (2) to explain the application of the restriction on *financial promotion* under section 21 of the *Act* so far as it concerns *issuing e-money*.
- 3.1.4 G This *guidance* is issued under section 157 of the *Act*. It represents the FSA'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 150 of the *Act* (Action for damages)), or in relation to the enforceability of a contract where there has been a breach of section 19 (The general prohibition) or 21 (Restrictions on financial promotion) of the *Act* (see sections 26 to 30 of the *Act* (Enforceability of agreements)).
- 3.1.5 G 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 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (as amended) (the *Regulated Activities Order*), the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2002 (SI 2002/682) and to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (SI 2001/1335) (as amended) (the *Financial Promotion Order*). These should be used to find out the precise scope and effect of any particular provision referred to in this *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, then the *FSA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

3.2 The regulated activity of issuing e-money

The Regulated Activities Order

- 3.2.1 G Under section 19 of the *Act* (The general prohibition), no *person* may carry on a *regulated activity* in the *United Kingdom*, or purport to do so, unless he is *authorised* or exempt under the *Act*.
- 3.2.2 G A *regulated activity* means an activity of a kind specified in the *Regulated Activities Order* which is carried on by way of business and which (generally) relates to an *investment* of a kind specified in the *Regulated Activities Order*.
- 3.2.3 G Further *guidance* on section 19 and *regulated activities* can be found in *PERG 2*.
- 3.2.4 G Article 9B of the *Regulated Activities Order* says that *issuing e-money* is a specified activity of the kind described in *PERG 3.2.2G*. Article 74A of the *Regulated Activities Order* says that *e-money* is a *specified investment* for that purpose.
- 3.2.5 G *E-money* is defined in article 3(1) of the *Regulated Activities Order*. It says that *e-money* means monetary value, as represented by a claim on the issuer, which is:
- (1) stored on an electronic device;
 - (2) issued on receipt of funds; and
 - (3) accepted as a means of payment by *persons* other than the issuer.

The E-Money Directive

- 3.2.6 G The *E-Money Directive* introduces a framework for the regulation of *e-money* at a European level.
- 3.2.7 G The *Regulated Activities Order* copies out the definition of *electronic money* in the *E-Money Directive*, with one exception.
- 3.2.8 G The exception is that the words “of an amount not less in value than the monetary value issued” in article 1(3)(b)(ii) of the *E-Money Directive* are not reproduced in the *Regulated Activities Order*.
- 3.2.9 G The words in article 1(3)(b)(ii) omitted from the definition in the *Regulated Activities Order* are aimed at stopping *e-money issuers* from *issuing e-money* at a discount. They were omitted from the *Regulated Activities Order* to make it clear that issuing electronic monetary value at a discount is not an unregulated activity. Instead, the prohibition on *issuing e-money* at a discount is left to *FSA rules*.

The *FSA rules* on this are in *ELM 4* (Limitations on activities).

- 3.2.10 G On this basis, the *FSA* believes that the definition of *e-money* in the *Regulated Activities Order* should be interpreted consistently with the *E-Money Directive*.

Exclusions

- 3.2.11 G Article 9C of the *Regulated Activities Order* says that the issuing of *e-money* by a *person* to whom the *FSA* has given a certificate under that article is not a *regulated activity* provided that the certificate has not been revoked. The *FSA* may only issue such certificates to small or local *e-money* schemes. Further *guidance* on this topic can be found in *ELM 8* (Small *e-money* issuers).

The issuer of *e-money*

- 3.2.12 G As explained in *PERG 3.2.4G*, the *regulated activity* relating to *e-money* is *issuing e-money*.
- 3.2.13 G In some *e-money* schemes an originator creates *e-money* and then sells it to *banks* and other distributors. The latter then sell the *e-money* to the public. In the *FSA*'s view, references to the issuer of *e-money* in the *Regulated Activities Order* are to the originator and not the distributors.
- 3.2.14 G The issuer is the issuer of the *e-money* rather than the issuer of the electronic device on which it is stored, if they are different.

Exclusion from the definition of deposit

- 3.2.15 G Article 9A of the *Regulated Activities Order* says that a sum is not a *deposit* if it is immediately exchanged for *e-money*.
- 3.2.16 G Thus if a *customer* pays for *e-money* but the *e-money* is not issued until later, that initial payment will be a *deposit*, as long as the payment comes within the definition of *deposit* in the *Regulated Activities Order*.
- 3.2.17 G *PERG 2.6.2G* to *PERG 2.6.4G* has *guidance* on the meaning of *deposit*.
- 3.2.18 G Some *e-money* products may be charged up by means of scratch cards that can be purchased from shops. The price paid for the card is the monetary value of the *e-money*. The card contains a number. The purchaser then enters the number on a web site to activate the *e-money* account. There is thus a delay between the payment for the *e-money* and its use by the holder. Such a delay does not make the payment for the *e-money* a *deposit*. This is because the means of spending the *e-money* is put into the hands of the purchaser when he purchases the card.
- 3.2.19 G A *person* may also pay for *e-money* by cheque. The *e-money issuer* will not receive the value until the cheque has cleared. This delay

does not make the payment for the *e-money* into a *deposit*. The purchaser has paid for the *e-money*, even though his payment obligation has only been satisfied conditionally.

3.3 Elements of the definition of e-money

Monetary value

- 3.3.1 G The definition of *e-money* says that for a product to be *e-money*, it must be monetary value as represented by a claim on the issuer. *Guidance* on the meaning of issuer can be found at *PERG 3.2.12G* to *PERG 3.2.14G*.

Storage on an electronic device

- 3.3.2 G The definition of *e-money* says that for a product to be *e-money*, it must be stored on an electronic device.
- 3.3.3 G *E-money* is an electronic payment product. The value is held electronically and payments using the value are made electronically.
- 3.3.4 G The fact that the device may be magnetic does not stop it being an electronic device for the purpose of the definition of *e-money*. Thus, for example, value stored on a personal computer does not fall outside the definition merely because it is stored on the computer's magnetic hard disk. Similarly, value stored on a *plastic card* that uses magnetic stripe technology may also fall within the definition if the value is transferred for spending using electronic technology.

Prepayment

- 3.3.5 G The definition of *e-money* says that for a product to be *e-money*, it must be issued on receipt of funds.
- 3.3.6 G This part of the definition means that *e-money* is a prepaid product. That is, unlike credit provided through a credit card, the *customer* pays for the spending power in advance. This is why credit cards are excluded from the definition of *e-money*.
- 3.3.7 G This does not mean that *e-money* paid for with a credit card falls outside the definition. The purchase of the *e-money* represents the purchase of monetary value. The fact that the purchaser is lent the funds to buy the *e-money* does not affect this. There are two contracts, one for the *sale* of *e-money* and one for credit.
- 3.3.8 G Value on a debit card may be *e-money* or a *deposit*. *Guidance* on this is given in *PERG 3.3.14G* to *PERG 3.3.20G*.
- 3.3.9 G The fact that the device on which monetary value is stored is made available on a *plastic card* that also functions as a debit or credit card does not stop that monetary value from being *e-money*.

Multipurpose

- 3.3.10 G For a product to be *e-money*, *persons* other than the issuer must accept it as a means of payment.
- 3.3.11 G *PERG* 3.3.10G means that the *e-money* holder must be able to use it to buy goods and services from *persons* other than the issuer.
- 3.3.12 G Thus, for example, electronic value issued by an employer to its employees that can only be used to buy food and drink from the employer in its canteen is not *e-money*.
- 3.3.13 G If monetary value can be spent with third parties, it does not stop being *e-money* just because the *e-money* can also be spent with the issuer.

Accounted e-money schemes

- 3.3.14 G An electronic payment scheme that involves prepaid monetary value that can be spent without the involvement of the issuer is likely to be *e-money*. However, a product does not cease to be *e-money* merely because the scheme is account based.
- 3.3.15 G The document published by HM Treasury in March 2002 called "Implementation of the Electronic Money Directive: A Response to Consultation" says:
- "An important issue that respondents [to HM Treasury's consultation on the implementation of the E-Money Directive] requested clarification on was whether the Directive's definition should catch account-based schemes (i.e. *e-money* held remote from the owner and spent at the owner's direction) as well as, for example, card-based schemes (i.e. *e-money* in the possession of the owner, whether stored on a personal computer or a smart card, and directly spent by them). The Treasury believes that the Directive's definition does allow for the possibility of account-based schemes being *e-money*. Not allowing account-based *e-money* schemes would effectively create a regulatory gap between the *e-money* and deposit-taking regimes – and a difference of treatment between schemes that pose similar regulatory risks. Rather than attempting to amend the definition in the Order (which is already expressed suitably widely), the Treasury has clarified in the accompanying Explanatory Memorandum that the definition of *e-money* is to be interpreted as covering account-based schemes (so long as they remain distinct from deposit-taking)."
- 3.3.16 G That explanatory memorandum says:
- "The Treasury believes the Directive's definition includes both *e-money* schemes in which value is stored on a card that is used by the bearer to make purchases, and account-based *e-money* schemes where value is stored in an electronic account that the user can access remotely."
- 3.3.17 G Thus monetary value issued under an account-based scheme can be *e-money*. On the other hand, not all monetary value recorded

electronically on an account will be *e-money*. If all such monetary value were *e-money*, any *deposit* recorded in records maintained electronically could be *e-money*, thereby turning most conventional bank accounts into *e-money*. Thus it is necessary to distinguish between an account-based *e-money* scheme and a conventional bank *deposit*.

- 3.3.18 G Recital (3) to the *E-Money Directive* says that "electronic money can be considered an electronic surrogate for coins and banknotes, which is stored on an electronic device such as a chip card or computer memory and which is generally intended for the purpose of effecting electronic payments of limited amounts."
- 3.3.19 G The European Commission published an explanatory memorandum along with its proposal for a *Directive* about *e-money*. It said that it is appropriate to emphasise that *e-money* does not represent a *deposit*. Unlike a depositor, a user does not advance funds to an issuer in order to ensure their safe keeping and handling. Neither the issuer nor the *customer* pursues this objective. The Commission said that the underlying contract between the *customer* and the issuer is that the user will get value for the *e-money* from those merchants that accept it and that the issuer will honour his commitment to give value.
- 3.3.20 G In distinguishing *e-money* and *deposits*, relevant factors include the following.
- (1) As explained in *PERG* 3.3.3G, *e-money* is a purely electronic product. If the monetary value is kept on an account that can be used by non-electronic means, that points towards it being a *deposit*. For example, an account on which cheques can be drawn is unlikely to be *e-money*.
 - (2) If a product is designed in such a way that it is only likely to be used for making payments of limited amounts and not as a means of saving, that feature points towards it being *e-money*. Relevant features might include how long value is allowed to remain on the account, disincentives to keeping value on the account and the payment of interest on it.
 - (3) If an account has features on it in addition to those necessary for a pure payment facility, such as an overdraft or direct debit facility, that points towards it not being *e-money*.
 - (4) One should have regard to whether the product is sold as *e-money* or as a *deposit*.
- 3.3.21 G In other words, a *deposit* involves the creation of a debtor-creditor relationship under which the *person* who accepts the *deposit* stores value for eventual return. *E-money*, in contrast, involves the purchase of a means of payment.

3.4 Financial promotion

- 3.4.1 G *Guidance* on the restrictions on *financial promotion* under section 21 of the *Act* (Restrictions on financial promotion) can be found in *PERG 8*. *PERG 3.4* gives further *guidance* on its application to *e-money*.
- 3.4.2 G As explained in *PERG 8*, section 21 of the *Act* applies to the communication of an invitation or inducement to *engage in investment activity*. Section 21(8) defines *engaging in investment activity* as:
- (1) entering or offering to enter into an agreement the making or performance of which by either party constitutes a *controlled activity*; or
 - (2) exercising any rights conferred by a *controlled investment* to acquire, dispose of, underwrite or convert a *controlled investment*.
- 3.4.3 G *Controlled activity* and *controlled investment* are both defined by reference to Schedule 1 to the *Financial Promotion Order*. *Issuing e-money* is not included as a *controlled activity* and *e-money* is not included as a *controlled investment*.
- 3.4.4 G *Accepting deposits* is however a *controlled activity* and a *deposit* is a *controlled investment*. As explained in *PERG 3.2.15G*, the definition of *deposit* under the *Regulated Activities Order* says that a sum is not a *deposit* for the purposes of the *Regulated Activities Order* if it is immediately exchanged for *e-money*.
- 3.4.5 G The definition of *deposit* in the *Financial Promotion Order* follows the definition of *deposit* in the *Regulated Activities Order*. Therefore the purchase price paid for *e-money* is not a *deposit* for the purposes of the *Financial Promotion Order*.
- 3.4.6 G Hence the provisions in the *Act* and the *Handbook* about *financial promotions* do not apply to *e-money*.
- 3.4.7 G However, if the purchase price for *e-money* is not immediately exchanged for *e-money*, the purchase price may be a *deposit* if the payment comes within the definition of *deposit* in the *Regulated Activities Order*. *PERG 2.6.2G* to *PERG 2.6.4G* has *guidance* on the meaning of *deposit*. In such a case, the provisions in the *Act* and the *Handbook* about *financial promotions* relating to *deposits* apply.

GUIDANCE ON REGULATED ACTIVITIES CONNECTED WITH MORTGAGES

4 Guidance on regulated activities connected with mortgages

4.1 Application and purpose

Application

- 4.1.1 G This chapter applies to any *person* who needs to know whether the activities he conducts in relation to mortgages are subject to *FSA* regulation.

Purpose of guidance

- 4.1.2 G With effect from 31 October 2004 certain activities relating to mortgages have been regulated by the *FSA*. The purpose of this *guidance* is to help *persons* decide whether they need *authorisation* and, if they do, to determine the scope of the *Part IV permission* for which they will need to apply.

Effect of guidance

- 4.1.3 G This *guidance* is issued under section 157 of *Act* (Guidance). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* in the circumstances contemplated by it, then the *FSA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates.

- 4.1.4 G Rights conferred on third parties cannot be affected by *guidance* given by the *FSA*. This *guidance* represents the *FSA's* view, and does not bind the courts, for example, in relation to an action for damages brought by a private *person* for breach of a *rule* (see section 150 of the *Act* (Action for damages)), or in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (Enforceability of agreements)). A *person* may need to seek his own legal advice.

- 4.1.5 G Anyone reading this *guidance* should refer to the *Act* and to the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*.

Guidance on other activities

- 4.1.6 G A *person* may be intending to carry on activities related to other

forms of investment in connection with mortgages, such as advising on and arranging an endowment policy or *ISA* to repay an interest-only mortgage. Such a *person* should also consult the *guidance* in *PERG 2* (Authorisation and regulated activities) and *PERG 8* (Financial promotion and related activities), and *PERG 5* (Mediation of general and pure protection insurance).

4.2 Introduction

Requirement for authorisation or exemption

4.2.1 G In most cases, any *person* who carries on a *regulated activity* in the *United Kingdom* by way of business must either be an *authorised person* or an *exempt person*. Otherwise, the *person* commits a criminal offence and certain agreements may be unenforceable. *PERG 2.2* (Introduction) contains further *guidance* on these consequences. In order to be *authorised*, a *person* must either:

- (1) hold a *Part IV permission* given by the *FSA* (see *AUTH 1.3* (The Authorisation manual) and *AUTH 3* (Application for Part IV permission)); or
- (2) qualify for *authorisation* (see *AUTH 5* (Qualifying for authorisation under the Act)), for example if the *person* is an *EEA firm* or a *Treaty firm*.

Professional firms

4.2.2 G Certain *professional firms* are allowed to carry on some *regulated activities* without *authorisation* so long as they comply with specified conditions (see *PERG 4.14* (Mortgage activities carried on by professional firms)).

Questions to be considered to decide if authorisation is required

4.2.3 G A *person* who is concerned to know whether his proposed activities may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form, in the flowchart in *PERG 4.18*):

- (1) will I be carrying on my activities by way of business (see *PERG 4.3.3G* (The business test))?
- (2) if so, will my *activities* relate to *regulated mortgage contracts* (see *PERG 4.4* (What is a regulated mortgage contract))?
- (3) if so, will I be carrying on any of the *regulated mortgage activities* (see *PERG 4.5* (Arranging regulated mortgage contracts) to *PERG 4.9* (Agreeing to carry on a regulated

activity))?)

- (4) if so, there is the necessary link with the *United Kingdom* (see *PERG* 4.11 (Link between activities and the United Kingdom))?)
- (5) if so, will any or all of my activities be excluded (see *PERG* 4.5 (Arranging regulated mortgage contracts) to *PERG* 4.10 (Exclusions applying to more than one regulated activity))?)
- (6) if it is not the case that all of my activities are excluded, am I a *professional firm* whose activities are exempted under Part XX of the *Act* (see *PERG* 4.14 (Mortgage activities carried on by professional firms))?)
- (7) if not, am I exempt as an *appointed representative* (see *PERG* 4.12 (Appointed representatives))?)
- (8) if not, am I otherwise an *exempt person* (see *PERG* 4.13 (Other exemptions))?)

If a *person* gets as far as question (8) and the answer to that question is 'no', that *person* requires *authorisation* and should refer to *AUTH* 3 (Applications for Part IV permission).

- 4.2.4 G Even if the *person* does not require *authorisation*, he may still require a licence under the Consumer Credit Act 1974 to carry on the activity (see *PERG* 4.17 (Interaction with the Consumer Credit Act 1974)).

Financial promotion

- 4.2.5 G An *unauthorised person* who intends to carry on activities connected with mortgages will also need to comply with section 21 of the *Act* (Restrictions on financial promotion). This *guidance* does not cover *financial promotions* that relate to mortgages. *Persons* should refer to the general *guidance* on *financial promotion* in Appendix 1 to the Authorisation manual, *PERG* 8 (Financial promotion and related activities)) and, in particular, to *PERG* 8.17 (Financial promotions concerning agreements for qualifying credit).

4.3 Regulated activities related to mortgages

- 4.3.1 G There are six *regulated mortgage activities* requiring *authorisation* or exemption if they are carried on in the *United Kingdom*. These are set out in the *Regulated Activities Order*. They are:
- (1) *arranging (bringing about) regulated mortgage contracts* (article 25 A(1) (Arranging regulated mortgage contracts));

- (2) *making arrangements with a view to regulated mortgage contracts* (article 25A(2) (Arranging regulated mortgage contracts));
- (3) *advising on regulated mortgage contracts* (article 53A (Advising on regulated mortgage contracts));
- (4) *entering into a regulated mortgage contract* as lender (article 61(1) (Regulated mortgage contracts));
- (5) *administering a regulated mortgage contract* where that contract is entered into by way of business on or after 31 October 2004 (article 61(2) (Regulated mortgage contracts)); and
- (6) *agreeing to carry on* any of the above (article 64 (Agreeing to carry on specific kinds of activity)).

4.3.2 G The scope of these activities is limited by certain exclusions contained in Parts II and III of the *Regulated Activities Order*. These exclusions are referred to in *PERG* 4.5 (Arranging regulated mortgage contracts) to *PERG* 4.10 (Exclusions applying to more than one regulated activity).

The business test

4.3.3 G A *person* will only need *authorisation* or exemption if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated activities)). There are, in fact, three different forms of business test applied to the *regulated mortgage activities*. In the *FSA*'s view, however, the difference in the business tests should have little practical effect.

4.3.4 G There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. The *Business Order* has been made using this power (partly reflecting differences in the nature of the different activities). The result (which is summarised in *PERG* 4.3.5G) is that:

- (1) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *entering into a regulated mortgage contract*;
- (2) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *administering a regulated mortgage contract*, but another 'by way of business' test arises because the contract being administered by way of business must itself have been entered into by way of business (see *PERG* 4.8.2G); and

- (3) in the case of arranging and advising, the effect of article 3A of the *Business Order* (Arranging and advising on regulated mortgage contracts) is that a *person* is not to be regarded as acting 'by way of business' unless he is 'carrying on the business of engaging in one or more of those activities'.

4.3.5 G Summary of which variant of the business test applies to the different regulated mortgage activities. This table belongs to *PERG* 4.3.4G.

| By way of business | Carrying on the business |
|---|---|
| <i>Entering into a regulated mortgage contract</i> (article 61(1)) | <i>Arranging (bringing about) regulated mortgage contracts</i> (article 25A(1)) |
| <i>Administering a regulated mortgage contract</i> (article 61(2)) (and the contract administered must have been entered into by way of business) | <i>Making arrangements with a view to regulated mortgage contracts</i> (article 25A(2)) |
| | <i>Advising on regulated mortgage contracts</i> (article 53A) |

4.3.6 G The 'carrying on the business' test in the *Business Order* is a narrower test than that of carrying on *regulated activities* 'by way of business' in section 22 of the *Act* as it requires the *regulated activities* to represent the carrying on of a business in their own right. Whether or not the business test is satisfied in any particular case is ultimately a question of judgement that takes account of a number of factors (none of which is likely to be conclusive). The nature of the particular *regulated activity* that is carried on will also be relevant to the factual analysis. The relevant factors include:

- (1) the degree of continuity;
- (2) the existence of a commercial element; and
- (3) the scale of the activity and, for the 'by way of business' test, the proportion which the activity bears to the other activities carried on by the same *person* but which are not regulated.

In the case of the 'carrying on the business' test, these factors will need to be considered having regard to all the activities together.

4.3.7 G The main factor that might cause an activity to satisfy the 'by way of business' test in section 22 but not the narrower 'carrying on the business' test in the *Business Order* is that of frequency or regularity. As a general rule, the activity would need to be undertaken with some degree of frequency or regularity to satisfy the narrower 'carrying on the business' test. Conversely, the 'by way of business' test in section 22 could be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done by 'way of business' in all other respects).

4.3.8 G It follows that whether or not any particular *person* may be carrying on a *regulated mortgage activity* 'by way of business' will depend on his individual circumstances. However, some typical examples where the applicable business test would be likely to be satisfied are where a *person*:

- (1) enters into one or more *regulated mortgage contracts* as lender in the expectation of receiving interest or another form of payment that would enable him to profit from his actions;
- (2) administers a *regulated mortgage contract* in return for a payment of some kind (whether in cash or in kind); and
- (3) arranges or advises on *regulated mortgage contracts*, or does both, on a regular basis and receives payment of some kind (whether in cash or in kind and whether from the borrower or from some other *person*).

4.3.9 G Some typical examples where the business test is unlikely to be satisfied are:

- (1) when an individual enters into or administers a one-off mortgage securing a loan to a friend or member of his family whether at market interest rates or not; or
- (2) when a *person* provides a service without any expectation of reward or payment of any kind, such as advice given or arrangements made by many Citizens Advice Bureaux and other voluntary sector agencies (but see *PERG* 4.3.8G(3) where payment is received for advice).

4.4 What is a regulated mortgage contract?

The definition of "regulated mortgage contract"

4.4.1 G Article 61(3)(a) of the *Regulated Activities Order* defines a *regulated mortgage contract* as a contract which, at the time it is entered into, satisfies the following conditions:

- (1) the contract is one where a lender provides credit to an individual or trustees (the 'borrower');
- (2) the contract provides for the obligation of the borrower to repay to be secured by a first legal mortgage on land (other than timeshare accommodation) in the *United Kingdom*; and
- (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower (or, where trustees are the borrower, by an individual who is a beneficiary of the trust) or by a related *person*.

PERG 4.4.2G to PERG 4.4.9G set out the *FSA*'s understanding of some key concepts contained in article 61(3)(a).

Provision of credit

- 4.4.1A G (1) Article 61(3)(c) of the *Regulated Activities Order* states that credit includes a cash loan and any other form of financial accommodation. Although 'financial accommodation' has a potentially wide meaning, its scope is limited by the terms used in the definition of a *regulated mortgage contract* set out in *PERG 4.4.1G*. Whatever form the financial accommodation may take, article 61(3)(a) envisages that it must involve an obligation to repay on the part of the individual who receives it.
- (2) In the *FSA*'s view, an obligation to repay implies the existence, or the potential for the existence, of a debt owed by the individual to whom the financial accommodation is provided (the 'borrower') to the *person* who provides it (the 'lender'). Consequently, for any facility under which any form of financial accommodation is being provided, the test is whether it allows for the possibility that the *person* providing the financial accommodation may be placed in a position where he becomes a creditor of the individual to whom he is providing it. An example of this would be the issue of a guarantee by a bank to a third party for an individual customer (such as a rent guarantee or a performance bond) where the guarantee is secured on a first legal charge over the customer's residential property. In the *FSA*'s view, this would amount to a *regulated mortgage contract* as the customer would owe a debt to the bank in the event that the bank had to pay the third party under the guarantee.

Which borrowers?

- 4.4.2 G The condition set out in *PERG 4.4.1G(1)* limits the range of borrowers to whom the protections of the mortgage regulation regime apply to individuals and trustees. If a *company* (which is not acting as

a trustee) borrows money for the purpose of funding the *company's* business, and the loan is secured by a mortgage over the company's property, the mortgage contract is not a *regulated mortgage contract*. So a lender will not carry on a *regulated activity* by entering into that contract, nor will the lender carry on a *regulated activity* if it advises on, arranges or administers that contract. However, if the lender makes a loan for business purposes to an individual sole trader, or (in England and Wales) a partnership, and the loan is secured on the borrower's house or houses, the contract will be a *regulated mortgage contract*.

Date the contract is entered into

- 4.4.3 G In order to meet the definition of a *regulated mortgage contract*, a mortgage contract must meet the conditions set out in *PERG* 4.4.1G(1) to (3) at the time it was entered into. The effect is that contracts which meet those conditions at that time remain *regulated mortgage contracts* throughout their remaining term, even if there are periods of time when some or all of the conditions are not satisfied. Conversely, contracts that do not start out as *regulated mortgage contracts* cannot subsequently become so, even if they meet all the conditions set out in *PERG* 4.4.1G(1) to (3). A *person* that only administers mortgage contracts which did not meet those conditions at the time they were entered into will not, therefore, need *permission to administer regulated mortgage contracts*.
- 4.4.4 G There may, however, be instances where an existing contract, which was not a *regulated mortgage contract* at the time it was entered into, is replaced as a result of a variation (whether the variation is initiated by the customer or by the lender), and the new contract qualifies as a *regulated mortgage contract*. A *person* may therefore need to consider this possibility (which could affect contracts initially entered into before 31 October 2004 as well as subsequent loans) when deciding whether he needs *permission* to carry on any of the *regulated mortgage activities*.

Land in the United Kingdom

- 4.4.5 G The condition set out in *PERG* 4.4.1G(2) means that a *regulated mortgage contract* must be secured on land in the *United Kingdom*. Contracts which involve taking security over moveable property therefore cannot be *regulated mortgage contracts*. So a contract secured on a caravan will not be a *regulated mortgage contract*, unless the contract also involves a mortgage over the land on which the caravan stands.

Occupancy requirement

- 4.4.6 G The condition set out in *PERG* 4.4.1G(3) means that loans secured on property which is entirely used for business purposes (such as an

office block) cannot fall within the definition. However, loans secured on 'mixed use' property could be covered, provided that the borrower (or trust beneficiary, where the borrowers are trustees) or a 'related person' uses at least 40% of the total of the land as or in connection with a dwelling. Loans secured on a six-floor property, half of which was occupied by the borrower and half let out for business purposes would therefore satisfy the definition. (Article 61(4)(b) makes it clear that 'land', in the context of a multi-storey building, means the aggregate of the floor area of each of the storeys.)

- 4.4.7 G The expression 'as or in connection with a dwelling' set out in *PERG* 4.4.1G(3) means that loans to buy a small house with a large garden would in general be covered. However, if at the time of entering into the contract the intention was for the garden to be used for some other purpose – for example, if it was intended that a third party were to have use of the garden – the contract would not constitute a *regulated mortgage contract*. Furthermore, the *FSA* would not regard a loan to purchase farmland and a farmhouse as constituting a *regulated mortgage contract* (where the farmhouse and garden amount to less than 40% of the land area), since it does not appear that the land could properly be said to be used 'in connection with' the farmhouse. The presence of the farmhouse is unconnected with the use to which the farmland is put (in contrast to a residential property's garden, which would have no existence independent of the property).
- 4.4.8 G The requirement that at least 40% of the land area be used as or in connection with a dwelling means that 'buy to let' loans secured on the property to be let will usually be excluded. However, such loans will not be excluded if:
- (1) the lessee is a 'related person' to the borrower. This will be the case even if the borrower subsequently takes possession of the property, as the conditions set out in *PERG* 4.4.1G(1) to (3) were not satisfied at the outset of the contract (see *PERG* 4.4.3G); or
 - (2) at the time the contract is entered into, the borrower has a real intention to use the land as, or in connection with, a dwelling (for example a member of the British Forces Posted Overseas who buys a property in the *United Kingdom* intending to live there on his return but which he lets out in the meantime).
- 4.4.9 G 'Related person' is defined in article 61(4)(c) of the *Regulated Activities Order* as meaning the borrower's spouse, parents, grandparents, siblings, children and grandchildren. An unmarried partner of the borrower whose relationship with the borrower has the characteristics of the relationship between a husband and wife is also included; this can include a *person* of the same sex as the borrower.

Stepchildren, however, would seem to be excluded.

Purpose of the loan is irrelevant

- 4.4.10 G The definition of *regulated mortgage contract* contains no reference to the purpose for which the loan is being made. So, in addition to loans made to individuals to purchase residential property, the definition is wide enough to cover other loans secured on land, such as loans to consolidate debts, or to enable the borrower to purchase other goods and services.

Type of lending

- 4.4.11 G The definition of *regulated mortgage contract* also covers a variety of types of product. Apart from the normal mortgage loan for the purchase of property, the definition also includes other types of secured loan, such as secured overdraft facility, a secured bridging loan, a secured credit card facility, and so-called 'equity release loans' (defined as *regulated lifetime mortgage contracts* in this *guidance*) under which the borrower (usually an older person) takes out a loan where repayment of the capital (and in some cases the interest) is not required until the property is sold, usually on the death of the borrower.
- 4.4.12 G A number of products, however, are excluded from the definition, such as:
- (1) loans secured by a second or subsequent charge (as the lender does not have a first charge);
 - (2) loans secured on commercial premises (as the borrower will not be using the land as or in connection with a dwelling); and
 - (3) so-called 'home reversion schemes', under which a property owner (usually an older person) sells some or all of his interest in the property in return for a lump sum (usually a proportion of the value of the property sold) and a right to reside at the property for the rest of his life. (It should be noted, however, that the Government announced in May 2005 that 'home reversion schemes' and 'flexible tenure products' are to be regulated by the *FSA* and that it would be introducing legislation to this effect.)

Regulated mortgage contracts and contract variations

- 4.4.13 G The effect of the *Regulated Activities Order* is that mortgage contracts which are varied can fall into one of the following categories:

- (1) a contract that was entered into before 31 October 2004, and that is subsequently varied on or after that date so that it satisfies the conditions set out in *PERG* 4.4.1G(1) to (3), will not be a *regulated mortgage contract* (because it was not a *regulated mortgage contract* at the time it was entered into);
- (2) a contract that was originally entered into before 31 October 2004, but is subsequently changed on or after that date such that a new contract is entered into, will be a *regulated mortgage contract* (provided, of course, that it meets the definition in the *Regulated Activities Order*); and
- (3) a *regulated mortgage contract* that was originally entered into on or after 31 October 2004, and which is subsequently varied by, for example, making a further advance, will remain a *regulated mortgage contract*.

4.4.14 G It is possible for more than one mortgage contract to be secured by the same (first) charge. The first contract might be entered into before 31 October 2004 (and therefore not be a *regulated mortgage contract*) and a second contract entered into on or after 31 October 2004 (and be a *regulated mortgage contract*).

4.5 Arranging regulated mortgage contracts

Definition of the regulated activities involving arranging

4.5.1 G Article 25A of the *Regulated Activities Order* describes two types of *regulated activities* concerned with *arranging regulated mortgage contracts*. These are:

- (1) making arrangements for another *person* to:
 - (a) enter into a *regulated mortgage contract* as borrower; or
 - (b) vary the terms of a *regulated mortgage contract* entered into by him as borrower on or after 31 October 2004 in such a way as to vary his obligations under the contract; and
- (2) making arrangements with a view to a *person* who participates in the arrangements entering into a *regulated mortgage contract* as borrower.

4.5.2 G The first activity (article 25A(1)) is referred to in this *guidance* as *arranging (bringing about) regulated mortgage contracts*. Various points arise:

- (1) It is not necessary for the potential borrower himself to be

involved in making the arrangements.

- (2) This activity is carried on only if the arrangements bring about, or would bring about a *regulated mortgage contract*. This is because of the exclusion in article 26 (see *PERG* 4.5.4G).
- (3) This activity therefore includes the activities of brokers who make arrangements on behalf of a borrower to enter into or vary a *regulated mortgage contract* where these arrangements go beyond merely introducing (see *PERG* 4.5.10G) or advising (although giving advice may be the *regulated activity of advising on regulated mortgage contracts*). Such arrangements might include, for instance, negotiating the terms of the *regulated mortgage contract* with the eventual lender, on behalf of the borrower. It also includes the activities of certain so-called 'packagers' (see *PERG* 4.15 (Mortgage activities carried on by 'packagers').)
- (4) *PERG* 4.6.2G contains examples of variations that are, in the *FSA's* view, within the definition of *advising on regulated mortgage contracts* and would also be covered by article 25A(1) arrangements.

- 4.5.3 G The second activity (article 25A(2)) is referred to in this *guidance* as making *arrangements with a view to regulated mortgage contracts*. This activity is different from article 25A(1)) because it requires a potential borrower to actively participate by utilising the arrangements to enter into a *regulated mortgage contract*. It does not require that the arrangements would bring about a *regulated mortgage contract*. Nor does it cover arrangements leading to contract variations. It includes the activities of introducers (see *PERG* 4.5.10G below) introducing potential borrowers to brokers and lenders. It may also, in certain circumstances, extend to the activities of a publisher, broadcaster, or website operator, albeit subject to exclusions in the *Regulated Activities Order* (see *PERG* 4.5.5G and *PERG* 4.5.6G).

Exclusion: article 25A(1) arrangements not causing a deal

- 4.5.4 G Article 26 of the *Regulated Activities Order* (Arrangements not causing a deal) excludes from article 25A(1) *arrangements* which do not bring about or would not bring about the *regulated mortgage contract* in question. In the *FSA's* view, a *person* brings about or would bring about a *regulated mortgage contract* 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.

Exclusion: article 25(A)2 arrangements enabling parties to communicate

4.5.5 G Article 27 of the *Regulated Activities Order* (Enabling parties to communicate) contains an exclusion that applies to arrangements which might otherwise fall within article 25A(2) merely because they provide the means by which one party to a *regulated mortgage contract* (or potential *regulated mortgage contract*) is able to communicate with other parties. Simply providing the means by which parties to a *regulated mortgage contract* (or potential *regulated mortgage contract*) are able to communicate with each other is excluded from article 25(A)2 only. This will ensure that *persons* such as Internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to be *arrangements made with a view to regulated mortgage contracts*).

4.5.6 G In the FSA's view, the crucial element of the exclusion in article 27 is the inclusion of the word "merely". When 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 25A(2). Further detailed *guidance* relating to the scope of the exclusion in article 27 is contained in *PERG* 8.32.6G to *PERG* 8.32.11G.

Exclusion: article 25A(1) and (2) arranging of contracts to which the arranger is a party

4.5.7 G Arranging a *regulated mortgage contract* (or contract variation) to which the arranger is to be a party is excluded from both article 25A(1) and (2) by article 28A of the *Regulated Activities Order* (Arranging contracts to which the arranger is a party). As a result, a *person* cannot both be *entering into a regulated mortgage contract* and arranging a *regulated mortgage contract* under article 25A as regards a particular *regulated mortgage contract*. This means that a direct sale by a mortgage lender does not involve the *regulated activity* of arranging but, if the transaction is completed, does involve the *regulated activity* of *entering into a regulated mortgage contract*. The FSA's rules on *arranging regulated mortgage contracts*, however, do apply to direct sales.

Exclusion: article 25A(1) and (2) arrangements with or through authorised persons

4.5.8 G An *unauthorised person* who makes arrangements for or with a view to a *regulated mortgage contract* between a borrower and an *authorised person*, is excluded from article 25A(1) and (2) by article 29 of the *Regulated Activities Order* (Arranging deals with or through authorised persons) if specified conditions as to advice and remuneration are satisfied. For example, the exclusion is dependent on the borrower not receiving any advice on the *regulated mortgage*

contract from the *unauthorised person* making the arrangements. Additionally, payment must not be received unless it is accounted for to the borrower (which, in the *FSA*'s view, means that it must be paid over to, or treated as belonging to and held to the order of, the borrower).

Exclusion: article 25A(1)(b) arrangements made in the course of administration by authorised person

- 4.5.9 G Article 29A of the *Regulated Activities Order* excludes from article 25A(1)(b) (which covers making arrangements for another *person* to vary the terms of a *regulated mortgage contract*) certain activities of an *unauthorised person* who is taking advantage of the exclusion from *administering a regulated mortgage contract* in article 62 (Exclusion: arranging administration by authorised persons) see *PERG* 4.8.4G).

Exclusion: article 25A(2) arrangements and introducing

- 4.5.10 G Article 33A of the *Regulated Activities Order* (Introducing to authorised persons) excludes from article 25A(2) arrangements under which a borrower is introduced to certain *persons*. Introducing is only a *regulated activity* under article 25A(2) as it does not of itself bring about *regulated mortgage contracts* (see *PERG* 4.5.2G).

- 4.5.11 G The exclusion applies for introductions to:
- (1) an *authorised person* who has *permission* to carry on a *regulated activity* specified in article 25A (Arranging regulated mortgage contracts) or article 53A (Advising on regulated mortgage contracts) or article 61(1) (Entering into a regulated mortgage contract as lender); introducers can check the status of an *authorised person* and its *permission* by visiting the *FSA*'s register at <http://www.fsa.gov.uk/register/>;
 - (2) an *appointed representative* who is appointed to carry on a *regulated activity* specified in article 25A or article 53A of the *Regulated Activities Order*; introducers can check the status of an *appointed representative* by visiting the *FSA*'s register at <http://www.fsa.gov.uk/register/>; the *FSA* would normally expect introducers to request and receive confirmation of the *regulated activities* that the *appointed representative* is appointed to carry on, prior to proceeding with an introduction; and
 - (3) an *overseas person* who carries on a *regulated activity* specified in article 25A (Arranging regulated mortgage contracts) or article 53A (Advising on regulated mortgage contracts) or article 61(1) (Entering into a regulated mortgage

contract).

- 4.5.12 G The exclusion in article 33A only applies when the introducer satisfies two conditions:
- (1) he does not receive any money paid by the borrower in connection with any transaction that the borrower enters into with or through the *person* to whom the borrower is introduced as a result of the introduction, other than money payable to him on his own account; and
 - (2) before making the introduction he discloses to the borrower all relevant information described in *PERG* 4.5.14G.
- 4.5.13 G In the *FSA'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 to an introducer (for example, a housebuilder) by a buyer in connection with a transfer of property. For example, article 33A 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 and still take the benefit of the exclusion. This is because the sums that the housebuilder receives in connection with the introduction and with the sale of his property to the borrower are both "payable to him on his own account". The housebuilder may also receive a commission from the *person* introduced to. He may not, however, receive any sums payable by the borrower to the *person* to whom the borrower is introduced, for example valuation fees, as those sums are not payable to the housebuilder on his own account.
- 4.5.14 G The information that the introducer must disclose to the borrower prior to making the introduction is, where relevant:
- (1) that he is a member of the same *group* as the *person* (N) to whom the borrower is introduced;
 - (2) details of any payment which he will receive from N, by way of fee or commission, for introducing the borrower to N; and
 - (3) an indication of any other reward or advantage arising out of his introducing to N.
- 4.5.15 G In the *FSA's* view, details of fees or commission referred to in *PERG* 4.5.14G(2) 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.

- 4.5.16 G In the *FSA's* view, the information condition in *PERG* 4.5.14G(3) 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 and this and other relevant information may be provided on a standard form basis to the borrower, as appropriate.
- 4.5.17 G The *FSA* 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.
- 4.5.18 G In addition to the exclusion in article 33A, introducers may be able to take advantage of the exclusion in article 33 of the *Regulated Activities Order* (Introducing). This excludes arrangements where:
- (1) they are arrangements under which *persons* will be introduced to another *person*;
 - (2) the *person* to whom the introduction is 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* (including mortgages) to which the arrangements relate.

Other exclusions

- 4.5.19 G The *Regulated Activities Order* contains a number of other exclusions which have the effect of preventing certain activities from amounting to *regulated activities* within article 25. These are referred to in *PERG* 4.10 (Exclusions applying to more than one regulated activity). There is also an exclusion where both the arranger and

borrower are overseas, which is referred to in *PERG* 4.11 (Link between activities and the United Kingdom).

4.6 Advising on regulated mortgage contracts

Definition of 'advising on regulated mortgage contracts'

4.6.1 G Article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts) makes *advising on regulated mortgage contracts* a *regulated activity*. This covers advice which is both:

- (1) given to a *person* in his capacity as borrower or potential borrower; and
- (2) advice on the merits of the borrower:
 - (a) *entering into* a particular *regulated mortgage contract* (whether or not the entering into is done by way of business); or
 - (b) varying the terms of a *regulated mortgage contract* entered into by the borrower on or after 31 October 2004 in such a way as to vary the borrower's obligations under the contract.

4.6.2 G In the *FSA*'s view, the circumstances in which a *person* is giving advice on the borrower varying the terms of a *regulated mortgage contract* so as to vary his obligations under the contract include (but are not limited to) where the advice is about:

- (1) the borrower obtaining a further advance secured on the same land as the original loan; or
- (2) a rate switch or a product switch (that is, where the borrower does not change lender but changes the terms for repayment from, say, a variable rate of interest to a fixed rate of interest or from one fixed rate to another); or
- (3) the borrower transferring from a repayment mortgage to an interest-only mortgage or the reverse situation.

Although advice on varying the terms of a *regulated mortgage contract* is not a *regulated activity* if the contract was entered into before 31 October 2004, there may be instances where the variation to the old contract is so fundamental that it amounts to *entering into* a new *regulated mortgage contract* (see *PERG* 4.4.4G and *PERG* 4.4.13G(2)). In that case, giving the advice would be a *regulated activity*.

- 4.6.3 G For advice to fall within article 53A as set out in *PERG* 4.6.1G it must:
- (1) relate to a particular mortgage contract (that is, one that the borrower may enter into or, in the case of advice on a variation, one that he has already entered into);
 - (2) be given to a *person* in his capacity as a borrower or potential borrower;
 - (3) be advice (that is, not just information); and
 - (4) relate to the merits of the borrower entering into, or varying the terms of, the contract.

- 4.6.4 G Each of these aspects is considered in greater detail in *PERG* 4.6.5G (Advice must relate to a particular regulated mortgage contract) to *PERG* 4.6.17G (Advice must relate to the merits (of entering into as borrower or varying)). Additionally, the following should be borne in mind:

- (1) a *person* may be carrying on *regulated activities* involving arranging, whether or not that *person* is *advising on regulated mortgage contracts* (see *PERG* 4.5);
- (2) the provision of advice or information may involve the communication of a *financial promotion* (see *PERG* 8 (Financial promotion and related activities)); and
- (3) *PERG* 8.25 ((Advice must relate to an investment which is a security or contractually based investment) to *PERG* 8.29 (Advice must relate to the merits (of buying or selling a particular investment)) will be relevant to any *person* who may be advising on other forms of investment at the same time as he advises on *regulated mortgage contracts*; this includes, for example, a *person* advising on the merits of using a particular endowment policy or *ISA* as the means for repaying the capital under an *interest-only mortgage*.

Advice must relate to a particular regulated mortgage contract

- 4.6.5 G Advice will come within the *regulated activity* in article 53A of the *Regulated Activities Order* only if it relates to a particular *regulated mortgage contract* (or several different *regulated mortgage contracts*). The question is whether a recommendation is made to a *customer* which either explicitly or implicitly steers the *customer* to a particular *regulated mortgage contract* because of its features.

- 4.6.6 G Advice would not relate to a particular contract if it consisted of a

recommendation that a *person* should take out a mortgage with ABC building society without (expressly or by implication) specifying what kind of mortgage.

4.6.7 G Typical recommendations and whether they will be regulated as advice under article 53A of the *Regulated Activities Order*

This table belongs to *PERG 4.6.5G* and *PERG 4.6.6G*.

| Recommendation | Regulated or not? |
|---|--|
| I recommend you take out the ABC Building Society 2 year fixed rate mortgage at 5%. | Yes. This is advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into. |
| I recommend you do not take out the ABC Building Society 2 year fixed rate mortgage at 5%. | Yes. This is advice which steers the borrower away from a particular mortgage which the borrower could have entered into. |
| I recommend that you take out either the ABC Building Society 2 year fixed rate mortgage at 5% or the XYZ Bank standard variable rate mortgage. | Yes. This is advice which steers the borrower in the direction of more than one particular mortgage which the borrower could enter into. |
| I recommend you take out (or do not take out) an ABC Building Society fixed rate mortgage. | This will depend on the circumstances. If, for example, the society only offers one such mortgage, this would be a recommendation intended implicitly to steer the borrower in the direction of that particular mortgage which the borrower could enter into and therefore would be advice. |
| I suggest you take out (or do not take out) a mortgage with ABC Building Society. | No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into. However, if the society only offers one mortgage, this would be a recommendation intended implicitly to steer the borrower in the direction of that particular |

| | |
|--|--|
| | mortgage which the borrower could enter into and therefore would be advice. |
| I suggest you change (or do not change) your current mortgage from a variable rate to a fixed rate. | No in respect of the advice about rate type, as this does not steer the borrower in the direction of a particular mortgage which the borrower could enter into. Yes in respect of the advice about varying the terms of the particular mortgage that the borrower had already entered into. |
| I suggest you take out (or do not take out) a variable rate mortgage. | No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into. |
| I recommend you take out (or do not take out) a mortgage. | No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into. |
| I would always recommend buying a house and taking out a mortgage as opposed to renting a property. | No. This is an example of generic advice which does not steer the borrower in the direction of a particular mortgage that he could enter into. |
| I recommend you do not borrow more than you can comfortably afford. | No. This is an example of generic advice. |
| If you are looking for flexibility with your mortgage I would recommend you explore the possibilities of either a flexible mortgage or an off-set mortgage. There are a growing number of lenders offering both. | No. This is an example of generic advice. |

4.6.8 G Generic or general advice will not fall under article 53A. Examples of

generic advice are shown in *PERG 4.6.7G*.

- 4.6.9 G In the *FSA's* view, guiding a *person* through scripted questions or a decision tree should not, of itself, involve advice within the meaning of article 53A (it should be generic advice). But the combination of advice, which in isolation may properly be considered generic, with the identification of a particular or several particular *regulated mortgage contracts* may well, in the *FSA's* view, cause the *person* to be *advising on regulated mortgage contracts*; the *FSA* considers that it is necessary to look at the process as a whole; this is considered in more detail, in the context of scripted questioning, in *PERG 4.6.22G* (Scripted questioning (including decision trees)).

Advice given to a person in his capacity as a borrower or potential borrower

- 4.6.10 G For the purposes of article 53A, advice must be given to or directed at someone who is acting as borrower or potential borrower. As indicated in *PERG 4.4.2G* (Which borrowers?), this means the individual or trustee to whom the credit has been provided by the lender or who is looking to obtain the credit on the security of his property. Advice given to a *body corporate* will not generally be caught because the advice will not concern a *regulated mortgage contract*, as defined. But this does not apply where the *body corporate* is acting as trustee.
- 4.6.11 G Article 53A will not, for example, apply where advice is given to *persons* who receive it as:
- (1) a lender under or administrator of a *regulated mortgage contract*; or
 - (2) an adviser who may use it to inform advice given by him to others; or
 - (3) a journalist or broadcaster; or
 - (4) an agent of a borrower unless appointed as the borrower's attorney and therefore entering into the *regulated mortgage contract* as agent (or proxy) for the borrower.
- 4.6.12 G Advice will still be covered by article 53A even though it may not be given to or directed at a particular borrower (for example advice given in a periodical publication or on a website).

Advice or information

- 4.6.13 G In the *FSA's* view, advice requires an element of opinion on the part of the adviser which steers or is intended to steer a borrower or potential borrower in the direction of one or more particular

mortgages. In effect, it is a recommendation as to a course of action. Information on the other hand, involves objective statements of facts and figures.

- 4.6.14 G In general terms, simply giving balanced and neutral information without making any comment or value judgement on its relevance to decisions which a borrower may make is not advice.
- 4.6.15 G Information relating to entering into *regulated mortgage contracts* may often involve one or more of the following:
- (1) an explanation of the terms and conditions of a *regulated mortgage contract*, whether given orally or in writing or by providing leaflets and brochures;
 - (2) a comparison of the features and benefits of one *regulated mortgage contract* with another;
 - (3) the production of scripted questions for the borrower to use in order to exclude options that would fail to meet his requirements; such questions may often go on to identify a range of *regulated mortgage contracts* with characteristics that appear to meet the borrower's requirements and to which he might wish to give detailed consideration (scripted questioning is considered in more detail in *PERG* 4.6.21G to *PERG* 4.6.25G (Scripted questioning (including decision trees)));
 - (4) tables that compare the interest rates and other features of different mortgages;
 - (5) leaflets or illustrations that help borrowers to decide which type of mortgage to take out;
 - (6) the provision, in response to a request from a borrower who has identified the main features of the type of mortgage he seeks, of several leaflets together with an indication that all the *regulated mortgage contracts* described in them have those features.
- 4.6.16 G In the *FSA*'s opinion, however, such information is likely take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation as described in *PERG* 4.6.10G. Examples of situations where information provided by a *person* ('P') are likely to take the form of advice are given below.
- (1) P provides information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of the borrower. This may arise where P offers to provide information about mortgages that contain features specified by the borrower but then exercises discretion as to which mortgages to offer to

the borrower.

- (2) P, as a result of going through the sales process, discusses the merits of one *regulated mortgage contract* over another, resulting in advice to enter into or not enter into a particular one.

Advice must relate to the merits (of entering into as borrower or varying)

- 4.6.17 G Advice under article 53A must relate to the pros or cons of *entering into a regulated mortgage contract* as borrower.
- 4.6.18 G A neutral and balanced explanation of the implications under a *regulated mortgage contract* of, for example, exercising certain rights or failing to make interest payments on time, need not, itself, involve advice on the merits of entering into that contract or varying its terms.
- 4.6.19 G Neither does advice on the merits of using a particular mortgage broker or adviser in his capacity as such amount to advice for the purposes of article 53A. It is not advice on the merits of *entering into* or varying the terms of a *regulated mortgage contract*.
- 4.6.20 G Without explicit or implicit advice on the merits of entering into as borrower or varying the terms of a *regulated mortgage contract*, advice will not fall under article 53A if it is advice on the likely meaning of uncertain provisions in a *regulated mortgage contract* or on how to complete an application form.

Scripted questioning (including decision trees)

- 4.6.21 G Scripted questioning involves using any form of sequenced questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a mortgage or other product that meets his needs. A decision tree is an example of scripted questioning. The process of going through the questions will usually narrow down the range of options that are available. Scripted questions must be prepared in advance of their actual use.
- 4.6.22 G Undertaking the process of scripted questioning gives rise to particular issues concerning advice. These mainly involve two aspects of this *regulated activity*. These are that advice must relate to a particular *regulated mortgage contract* (see *PERG* 4.6.5G) and the distinction between information and advice (see *PERG* 4.6.13G). Whether or not scripted questioning in any particular case is *advising on regulated mortgage contracts* will depend on all the circumstances. If the process involves identifying one or more particular *regulated mortgage contracts* then, in the *FSA's* view, to avoid *advising on regulated mortgage contracts*, the critical factor is likely to be whether the process is limited to, and likely to be

perceived by the borrower as, assisting the borrower to make his own choice of product which has particular features which the borrower regards as important. The questioner will need to avoid making any judgement on the suitability of one or more products for the borrower. See also *PERG* 4.6.4G for other matters that may be relevant.

- 4.6.23 G The potential for variation in the form, content and manner of scripted questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, whether a borrower wishes to pay a fixed or variable rate of interest or the size of deposit available). In the *FSA's* view, this does not of itself amount to *advising on regulated mortgage contracts*, as it involves the provision of information rather than advice. There are various possible scenarios, including the following:
- (1) the questioner may go on to identify several *regulated mortgage contracts* 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 *regulated mortgage contracts*, without making a recommendation as to a particular one) this need not of itself involve *advising on regulated mortgage contracts*;
 - (2) the questioner may go on to advise the borrower on the merits of one particular *regulated mortgage contract* over another; this would be *advising on regulated mortgage contracts*;
 - (3) the questioner may, before or during the course of the scripted questioning, give a recommendation or opinion which influences the choice of mortgage contract and, following the scripted questioning, identify one or more particular *regulated mortgage contracts*; the key issue then is whether the advice can be said to relate to a particular *regulated mortgage contract* (see further *PERG* 4.6.22G)).
- 4.6.24 G The second type of scripted questioning involves providing questions and answers incorporating opinion, judgement or recommendations (for example, whether a repayment mortgage or interest-only mortgage is a better option or whether interest rates are likely to rise). There are various possible scenarios, including the following:
- (1) the scripted questioning may not lead to the identification of any particular *regulated mortgage contract*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on regulated mortgage contracts*;
or

- (2) the scripted questioning may lead to the identification of one or more particular *regulated mortgage contracts*; the key issue then is whether the advice can be said to relate to a particular *regulated mortgage contract* (see further *PERG 4.6.22G*).

4.6.25 G In the scenarios identified in *AUTH 4.6.23G(3)* and *AUTH 4.6.24G(2)*, the *FSA* considers that it is necessary to look at the process and outcome of scripted questioning as a whole. It may be that the element of advice incorporated in the questioning may properly be viewed as generic advice if it were considered in isolation. But, although the actual advice may be generic, the process has ended in identifying one or more particular *regulated mortgage contracts*. The combination of the generic advice and the identification of a particular or several particular *regulated mortgage contracts* to which it leads may well, in the *FSA's* view, cause the questioner to be *advising on regulated mortgage contracts*. Factors that may be relevant in deciding whether the process involves *advising on regulated mortgage contracts* may include:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the stage in the questioning at which the opinion is offered and its significance;
- (4) the role played by any questioner who guides a *person* through the scripted questions;
- (5) the outcome of the questioning (whether particular *regulated mortgage contracts* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (6) whether the scripted questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party (for example, the *FSA*), and all that the questioner has done is help the borrower understand what the questions or options are and how to determine which option applies to his particular circumstances.

Medium used to give advice

4.6.26 G With the exception of periodicals, broadcasts and other news or information services (see *PERG 4.6.30G* (Exclusion: periodical publications, broadcasts and websites)) the medium used to give advice should make no material difference to whether or not the advice is caught by article 53A.

- 4.6.27 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.
- 4.6.28 G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The same principles apply as with a paper version (see *PERG 4.6.21G* to *PERG 4.6.25G* (Scripted questioning (including decision trees))).
- 4.6.29 G Advice in publications, broadcasts and websites is subject to a special regime – see *PERG 4.6.30G* (Exclusion: periodical publications, broadcasts and websites) and *PERG 7* (Periodical publications, news services and broadcasts: applications for certification).

Exclusion: periodical publications, broadcasts and websites

- 4.6.30 G The main exclusion from *advising on regulated mortgage contracts* relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies if the principal purpose of any of these is neither to give advice of the kind to which article 53 (Advising on investments) or article 53A applies nor to lead or enable *persons* to:
- (1) acquire or dispose of *securities* or *contractually based investments*; or
 - (2) enter as borrower into *regulated mortgage contracts* or vary the terms of *regulated mortgage contracts* entered into by such *persons* as the borrower.

This is explained in greater detail, together with the provisions on the granting of certificates, in *PERG 7* (Periodical publications, news services and broadcasts: applications for certification).

Exclusion: advice in the course of administration by authorised person

- 4.6.31 G Article 54A of the *Regulated Activities Order* excludes from *advising on regulated mortgage contracts* certain activities of an *unauthorised*

person which is taking advantage of the exclusion from *administering a regulated mortgage contract* in article 62 (see *PERG* 4.8.4G).

Other exclusions

- 4.6.32 G The *Regulated Activities Order* contains a number of other exclusions which have the effect of preventing certain activities from amounting to *advising on regulated mortgage contracts*. These are referred to in *PERG* 4.10 (Exclusions applying to more than one regulated activity).

4.7 Entering into a regulated mortgage contract

Definition of 'entering into a regulated mortgage contract'

- 4.7.1 G Article 61(1) of the *Regulated Activities Order* makes *entering into a regulated mortgage contract* as lender a *regulated activity*.

Exclusions

- 4.7.2 G The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and personal representatives from amounting to *entering into a regulated mortgage contract*. This is referred to in *PERG* 4.10 (Exclusions applying to more than one regulated activity). There is also an exclusion where both the lender and borrower are overseas, which is referred to in *PERG* 4.11 (Link between activities and the United Kingdom).

Transfer of lending obligations

- 4.7.3 G A *person* who provides credit to a borrower under a *regulated mortgage contract* will enter into a *regulated mortgage contract*, even if the lending obligations under that contract are subsequently transferred to a third party. Consequently, a *person* who acts as a so-called 'correspondent lender' in the mortgage market will need to seek *authorisation*.

4.8 Administering a regulated mortgage contract

Definition of 'administering a regulated mortgage contract'

- 4.8.1 G Article 61(2) of the *Regulated Activities Order* makes *administering a regulated mortgage contract* a *regulated activity* 'where the contract was entered into by way of business' on or after 31 October 2004.
- 4.8.2 G The definition does not include administration of a *regulated mortgage contract* which was not entered into by way of business.

See *PERG 4.3.3G* for a discussion of the 'by way of business' test. The definition also does not include administration of a mortgage which was entered into before 31 October 2004. See, however, *PERG 4.4.4G* and *PERG 4.4.13G* for a discussion of how a variation of a mortgage contract entered into before 31 October 2004 could amount to the entry into a new *regulated mortgage contract* on or after 31 October 2004.

- 4.8.3 G Under article 61(3)(b) of the *Regulated Activities Order*, *administering a regulated mortgage contract* is defined as either or both of:
- (1) notifying the borrower of changes in interest rates or payments due under the contract, or of other matters of which the contract requires him to be notified; and
 - (2) taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower;

but does not include merely having or exercising a right to take action to enforce the *regulated mortgage contract*, or to require that action is or is not taken.

Exclusion: arranging administration by authorised persons

- 4.8.4 G Article 62 of the *Regulated Activities Order* provides that a *person* who is not an *authorised person* does not *administer a regulated mortgage contract* if he:
- (1) arranges for a *firm* with *permission* to administer a *regulated mortgage contract* (a '*mortgage administrator*') to administer the contract; or
 - (2) administers the *regulated mortgage contract* itself, provided that the period of administration is no more than one month after the arrangement in (1) has come to an end.
- 4.8.5 G This exclusion may be of a particular interest to a special purpose vehicle which administers *regulated mortgage contracts* transferred to it as part of a *securitisation* transaction.
- 4.8.6 G If an *unauthorised administrator* makes *arrangements* for a *mortgage administrator* to administer its *regulated mortgage contracts*, the exclusion may cease to be available because the *mortgage administrator* ceases to have the required *permission*, or because the arrangement is terminated. The exclusion gives the *unauthorised administrator* a one-month grace period during which it may administer the contracts itself. If the period of administration exceeds one month, the *unauthorised administrator* will be in breach of the *general prohibition*, and the *FSA* may take proceedings in respect of

the breach. However:

- (1) under section 23(3) of the *Act*, it is a defence in such proceedings for a *person* to show that 'he took all reasonable precautions and exercised all due diligence to avoid committing the offence';
- (2) the *FSA* would consider whether a *person* had taken 'all reasonable precautions and exercised all due diligence' on a case-by-case basis; what is reasonable is a matter for the senior management of the *unauthorised* administrator to decide in each case, taking account of, for example, the financial standing of the *mortgage administrator* and its ability to perform its obligations under the administration contract;
- (3) factors that the *FSA* would take into account in assessing whether an *unauthorised* administrator has taken 'all reasonable precautions and exercised all due diligence' would include:
 - (a) the level of the *person's* preparedness for a *mortgage administrator* to cease providing administration services; and
 - (b) the reasons for, and the circumstances of, the termination of *arrangements* with a *mortgage administrator*;
- (4) whether any agreement made by an unauthorised administrator would be enforceable under section 26 of the *Act* (Agreements made by unauthorised persons) depends on whether the court is satisfied that this would be just and equitable; in this context, the court may have regard to the extent to which the administrator has complied with the *FSA's guidance*.

Exclusion: administration pursuant to agreement with authorised person

- 4.8.7 G Under article 63 of the *Regulated Activities Order*, a *person* who is not an *authorised person* does not *administer a regulated mortgage contract* if he administers the contract under an agreement with a *firm* with *permission to administer a regulated mortgage contract*. A *firm* with *permission to administer a regulated mortgage contract* may thus outsource or delegate the administration function to an *unauthorised* third party. A *firm* that proposes to do this should however note, as set out in SYSC 3.2.4G(1), that the *FSA* will continue to hold it responsible for the way in which the administration is carried on.

Other exclusions

- 4.8.8 G The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and

personal representatives from amounting to *administering regulated mortgage contracts*. This is referred to in *PERG 4.10* (Exclusions applying to more than one regulated activity). There is also an exclusion where both the administrator and borrower are overseas, which is referred to in *PERG 4.11* (Link between activities and the United Kingdom).

4.9 Agreeing to carry on a regulated activity

4.9.1 G Under article 64 of the *Regulated Activities Order* (Agreeing to carry on specific kinds of activity), in addition to the *regulated activities* of *arranging (bringing about)*, *making arrangements with a view to*, *advising on*, *entering into* and *administering regulated mortgage contracts*, agreeing to do any of these things is itself a *regulated activity*. In the FSA's opinion, this activity concerns the entering into of a legally binding agreement to provide the services that it concerns. So a *person* is not carrying on a *regulated activity* involving agreeing merely because he makes an offer to do so.

4.9.2 G To the extent that an exclusion applies in relation to a *regulated activity*, then 'agreeing' to carry on an activity within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order*.

4.10 Exclusions applying to more than one regulated activity

Exclusion: Activities carried on in the course of a profession or non-investment business

4.10.1 G The exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) applies to the *regulated activities* of *arranging (bringing about)*, *making arrangements with a view to* and *advising on regulated mortgage contracts*. *PERG 4.14* contains further guidance on mortgage activities carried on by *professional firms*.)

4.10.2 G *Arranging (bringing about)*, *making arrangements with a view to* and *advising on regulated mortgage contracts* are excluded if they are carried on by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is the case if it may reasonably be regarded as necessary for him to make the arrangements or give the advice in order to provide his professional or other services and he is not separately paid for making the arrangements or giving the advice.

4.10.3 G In the FSA's view, for arranging or advice to be a necessary part of other services it must, as a general rule, be the case that it is not possible for the other services to be provided unless the arranging or advising are also provided.

4.10.4 G Situations where this exclusion might apply, in the *FSA's* view, are set out below:

- (1) Advice by solicitors: the provision of legal services may involve a solicitor advising his client on the legal effects and consequences of entering into a particular *regulated mortgage contract*. To the extent that this may involve advice on the merits of entering into the contract it is likely to be a necessary part of the legal advice. But it would not be necessary for the solicitor to go on to recommend that his client would be better to enter into a different particular *regulated mortgage contract*.
- (2) Advice by licensed conveyancers: as a necessary part of conveyancing work and under their duty of care to the client, a licensed conveyancer may state that the mortgage the client has applied for is right for them or not. If the client has already applied for a mortgage and the conveyancer just says that their choice is right or wrong but does not recommend alternatives, then that advice is likely to be excluded. But if the conveyancer recommends an alternative then that advice is unlikely to be excluded.
- (3) Conveyancing as arranging: the provision of pure conveyancing services (whether performed by a solicitor or a licensed conveyancer) will, themselves, be arrangements within the scope of article 25A. So they will be excluded under article 67. But if the client does not yet have a mortgage, an introduction to or other arrangement involving a lender is unlikely to be a necessary part of conveyancing services.
- (4) Debt counselling services: The provision of debt counselling services may involve the counsellor advising his client on the merits of varying the terms of an existing *regulated mortgage contract* and, in certain cases, assisting a distressed borrower in corresponding with a lender. Such advice and arrangements are likely to be a necessary part of the debt counselling services. But it would not be a necessary part of those services for the counsellor to offer advice on the merits of his client entering into a new particular *regulated mortgage contract*.

Exclusion: Trustees, nominees and personal representatives

4.10.5 G There are exclusions that apply, in certain circumstances, in relation to each of the *regulated mortgage activities* if the *person* carrying on the activity is acting in the capacity of trustee or personal representative. Article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) sets out the circumstances in which the exclusions apply. The terms of these differ slightly depending on the *regulated activity*.

- 4.10.6 G For each of the *regulated activities* of *arranging (bringing about), making arrangements with a view to* and *advising on regulated mortgage contracts*, the exclusions apply if the trustee or personal representative is acting in that capacity and:
- (1) the arrangements he makes concern the entering into or variation of *regulated mortgage contracts* and the contracts are to be entered into or varied either by himself and a fellow trustee or personal representative or by the beneficiary under the trust, will or estate on behalf of which he is acting; or
 - (2) the advice is given to such trustees or personal representatives or beneficiaries.
- 4.10.7 G For each of the *regulated activities* of *entering into a regulated mortgage contract* and *administering a regulated mortgage contract*, the exclusions apply if the trustee or personal representative is acting in that capacity and the borrower is a beneficiary under the trust, will or estate on behalf of which he is acting.
- 4.10.8 G In every case, the trustee or personal representative must not receive any remuneration that is additional to any he receives for acting in his capacity as trustee or personal representative. But a *person* is not to be regarded as receiving additional remuneration merely because his remuneration as trustee or personal representative is calculated by reference to time spent.

4.11 Link between activities and the United Kingdom

Introduction

- 4.11.1 G Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a borrower is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on. This section describes the legislation that is relevant to this question and gives the *FSA*'s views on various scenarios.
- 4.11.2 G Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the *Act* that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the *Act*) (see *PERG* 8 (Financial promotion and related activities)), and on giving the impression that a *person* is authorised (section 24 (False claims to be authorised or

exempt)).

Legislative provisions: definition of "regulated mortgage contract"

- 4.11.3 G A contract is only a *regulated mortgage contract* if the land is in the *United Kingdom* (see *PERG 4.4.5G* (Land in the United Kingdom)).

Legislative provisions: section 418 of the Act

- 4.11.4 G Section 418 of the *Act* deals with the carrying on of *regulated activities* in the *United Kingdom*. It extends the meaning that 'carry on a *regulated activity* in the United Kingdom' would ordinarily have by setting out additional cases. The *Act* states that in these cases a *person* who is carrying on a *regulated activity* but would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.

- 4.11.5 G For the purposes of *regulated mortgage activities*, sections 418(2), (4), (5), (5A) and (6) are relevant, as follows:

- (1) Section 418(2) refers to a case where a *UK-based person* carries on a *regulated activity* in another *EEA State* in the exercise of rights under a *Single Market Directive*. The only *Single Market Directive* which is relevant to mortgages is the *Banking Consolidation Directive*.
- (2) Section 418(4) refers to the case where a *UK-based person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
- (3) Section 418(5) refers to the case where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an *establishment* maintained by him in the *United Kingdom*.
- (4) Section 418(5A) refers to the case where an *electronic commerce activity* is carried on with or for a *person* in an *EEA State* from an establishment in the *United Kingdom*. See further *PERG 4.11.21G* (E-Commerce Directive).
- (5) Section 418(6) makes it clear that for the purposes of sections 418(2) to (5A), it is irrelevant where the *person* with whom the activity is carried on is situated.

Legislative provisions: overseas persons exclusion

- 4.11.6 G The exclusions in article 72(5A) to (5F) of the *Regulated Activities Order* (Overseas persons) provide that an *overseas person* does not

carry on the *regulated activities* of:

- (1) *arranging (bringing about) or making arrangements with view to a regulated mortgage contract;*
- (2) *entering into a regulated mortgage contract; or*
- (3) *administering a regulated mortgage contract;*

if the borrower (and each of them, if more than one) is an individual and is normally resident overseas. In the case of arranging a variation of, or administration of, an existing *regulated mortgage contract*, each borrower must be an individual who was normally resident overseas when he entered into the contract. In the *FSA's* view, normal residence for the purposes of this exclusion envisages physical presence with a degree of continuity, making allowance for occasional temporary absences (e.g. holiday). An *overseas person* under article 3 of the *Regulated Activities Order* (Interpretation) is a *person* who carries on certain *regulated activities* albeit not from a permanent place of business maintained by him in the *United Kingdom*.

- 4.11.7 G An *overseas person* might advise a *person* in the *United Kingdom* on an *endowment assurance* at the same time as advising on a *regulated mortgage contract*. If so, whilst the *overseas person* exclusion in article 72(5) will apply in relation to the advice on the *endowment assurance*, there will be no 'overseas persons exclusion' for the advice on the *regulated mortgage contract*.

Territorial scenarios: general

- 4.11.8 G The *FSA's* view of the effect of the *Act* and *Regulated Activities Order* in various territorial scenarios is set out in the remainder of this section. In those scenarios:
- (1) the term "service provider" is used to describe a *person* carrying on any of the *regulated mortgage activities*;
 - (2) the term "borrower" refers to a borrower who is an individual and not a trustee; the position of a borrower acting as a trustee is not considered; and
 - (3) it is assumed that the activity is not an *electronic commerce activity* (as to which, see *PERG* 4.11.21G (E-Commerce Directive)).

PERG 4.11.9G contains a simplified tabular summary of those views, which should be used only in conjunction with the more detailed analysis.

- 4.11.9 G Simplified summary of the territorial scope of the regulated mortgage activities, to be read in conjunction with the rest of this section.

This table belongs to *PERG* 4.11.8G

| | | Individual borrower resident and located: | |
|--|-----------------------|---|-----------------------|
| | | in the <i>UK</i> | outside the <i>UK</i> |
| Service provider carrying on <i>regulated activity</i> from establishment: | in the <i>UK</i> | Yes | Yes |
| | outside the <i>UK</i> | Yes | No |

Yes = *authorisation* or exemption required

No = *authorisation* or exemption not required

Service provider in the United Kingdom

- 4.11.10 G Where a *person* is carrying on any of the *regulated mortgage activities* from an establishment maintained by him in the *United Kingdom*, that *person* will be 'carrying on a *regulated activity* in the *United Kingdom*'. The location and residence of the borrower is irrelevant. That is the practical effect of sections 418(4), (5) and (6) of the *Act*.
- 4.11.11 G There may also be situations where a lender, who does not maintain an *establishment* in the *United Kingdom*, provides services in the *United Kingdom*. For instance, a lender might attend a property exhibition in the *United Kingdom* at which he sets up a loan with a borrower. A lender might also attend the offices of its *UK*-based lawyers, or appoint them as its agent, to enter into a contract with a borrower. In these cases, the overseas lender would only be carrying on a *regulated activity* in the *United Kingdom* if he subsequently enters into a *regulated mortgage contract* with a *UK* resident. This is because *arrangements* made with borrowers at the exhibition would be subject to the exclusion in article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) (see *AUTH* 4.5.7G). As regards *entering into a regulated mortgage contract* with a borrower resident overseas, this would be subject to the *overseas persons* exclusion.

Service provider overseas: general

4.11.12 G If a service provider is overseas, the question of whether that *person* is carrying on a *regulated activity* in the *United Kingdom* will depend upon:

- (1) the type of *regulated activity* being carried on;
- (2) section 418 of the *Act*;
- (3) the residence and location of the borrower;
- (4) the application of the *overseas persons* exclusion in article 72(5A) to (5F) of the *Regulated Activities Order*; and
- (5) whether the service provider is carrying on an *electronic commerce activity*.

The factors in (1), (3) and (4) are considered in relation to each *regulated activity* in *PERG* 4.11.13G to *PERG* 4.11.20G. The factor in (5) is considered in *PERG* 4.11.21G.

Service provider overseas: arranging regulated mortgage contracts

4.11.13 G When a *person* is *arranging (bringing about) regulated mortgage contracts* or *making arrangements with a view to regulated mortgage contracts* from overseas, the question of whether he will be carrying on *regulated activities* in the *United Kingdom* will depend on the relevant circumstances. In the *FSA*'s view, factors to consider include:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the *United Kingdom*;
- (2) the *overseas persons* exclusion in article 72(5A) to (5C) of the *Regulated Activities Order*; and
- (3) where the arrangements are in fact made.

4.11.14 G In the *FSA*'s view:

- (1) if the borrower is *normally resident* in the *United Kingdom*, the clear territorial limitation in the definition of *regulated mortgage contract* carries most weight in determining where regulation should apply; it is likely that the arranger will be carrying on *regulated activities* in the *United Kingdom*;
- (2) if the borrower is *normally resident* overseas, the arrangements

are excluded by the *overseas persons* exclusion.

In the case of *arranging (bringing about) regulated mortgage contracts*, the normal residence of the borrower at the time the arrangements are made is the determining factor, except in the case of *arranging (bringing about) a variation of a contract*, in which case it is the normal residence of the borrower at the time that the *regulated mortgage contract* was entered into. In the case of *making arrangements with a view to regulated mortgage contracts*, the *normal residence* of the borrower at the time he participates in the arrangements is the determining factor.

Service provider overseas: advising on regulated mortgage contracts

- 4.11.15 G In the *FSA's* view, *advising on regulated mortgage contracts* is carried on where the borrower receives the advice. Accordingly:
- (1) if the borrower is located in the *United Kingdom*, a person advising that borrower on *regulated mortgage contracts* is carrying on a *regulated activity* in the *United Kingdom*; but
 - (2) if the service provider and borrower are both located overseas, the *regulated activity* is not carried on in the *United Kingdom*.

Service provider overseas: entering into a regulated mortgage contract

- 4.11.16 G The effect of article 72(5D) of the *Regulated Activities Order* is that an *overseas person* does not carry on the *regulated activity* of *entering into a regulated mortgage contract* if the borrower is resident overseas at the time the contract is entered into.
- 4.11.17 G In the *FSA's* view, in circumstances other than those excluded by article 72(5D) of the *Regulated Activities Order*, an overseas lender is likely to carry on the *regulated activity* of *entering into regulated mortgage contracts* in the *United Kingdom*. This is because of:
- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation applies only if the land is in the *United Kingdom*;
 - (2) the general principle and practice that contracts relating to land are usually governed by the law of the place where the land is situated;
 - (3) practical issues of conveyancing; a lender is likely to use the services of a solicitor or licensed conveyancer operating from the *United Kingdom*, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom*; and

- (4) the existence of the *overseas persons* exclusion in article 72(5D).

Service provider overseas: administering a regulated mortgage contract

- 4.11.18 G The effect of article 72(5E) and (5F) of the *Regulated Activities Order* is that an *overseas person* who administers a *regulated mortgage contract*, where the borrower was resident overseas at the time that the contract was entered into, does not carry on the *regulated activity of administering a regulated mortgage contract*.
- 4.11.19 G In the *FSA's* view, in circumstances other than those excluded by article 72(5E) of the *Regulated Activities Order*, an overseas administrator is likely to carry on the *regulated activity of administering a regulated mortgage contract* in the *United Kingdom*. This is because:
- (1) the territorial limitation in the definition of *regulated mortgage contract* means that regulation applies only if the land is in the *United Kingdom*;
 - (2) when administrators notify borrowers resident in the *United Kingdom* of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom*;
 - (3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his *UK* address;
 - (4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom*, either to enforce *regulated mortgage contracts* subject to the jurisdiction of these courts or to register and enforce judgements obtained elsewhere, in the case of contracts subject to non-UK jurisdictions; and
 - (5) of the existence of the exclusion in article 72(5E) (*Overseas persons*).

Service provider: agreeing to carry on a regulated activity

- 4.11.20 G In most cases, there will be no preliminary agreement to enter into a *regulated mortgage contract* in advance of entering into the contract itself. Moreover, the exclusions relevant to a *regulated activity* are taken into account to determine whether a *person* is *agreeing to carry on* that *regulated activity*. So, for example, agreeing to arrange *regulated mortgage contracts* in cases where borrower and service provider are overseas, would not be *regulated activities* because the

activities themselves are outside the scope of regulation. Otherwise, in the FSA's view, the issue of where agreeing to carry on a *regulated activity* takes place will depend on such factors as a contractual analysis of where the agreement is entered into, including where appropriate the general position at common law (see, for example, *PERG* 4.11.17G).

E-Commerce Directive

- 4.11.21 G The *E-Commerce Directive* removes restrictions on the cross-border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose their requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* contains only a few exceptions, termed derogations, from this principle. The *E-Commerce Directive* defines an e-commerce service (termed an information society service) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television. Further *guidance* is contained in the FSA's E-Commerce Directive sourcebook (*ECO*).

Distance marketing directive

- 4.11.22 G The FSA will be responsible for implementing the *Distance Marketing Directive* for those firms and activities it regulates. The FSA and the Treasury agree that the *Distance Marketing Directive* is intended to operate on a *country of origin* basis, except where a firm is *marketing* into the UK from an establishment in an *EEA State* which has not implemented the Directive.

4.12 Appointed representatives

What is an appointed representative?

- 4.12.1 G Section 39 of the *Act* makes provision exempting *appointed representatives* from the need to obtain *authorisation*. An *appointed representative* is a *person* who is a party to a contract with an *authorised person* which permits or requires the *appointed representative* to carry on certain regulated activities. *SUP* 12 (Appointed representatives) contains *guidance* relating to *appointed representatives*.
- 4.12.2 G A *person* who is an *authorised person* cannot be an *appointed representative* (see section 39(1) of the *Act* (Exemption of appointed representatives)).

Business for which an appointed representative is exempt

- 4.12.3 G An *appointed representative* can carry on only those *regulated activities* which are specified in the *Appointed Representatives Regulations*. As respects *regulated mortgage contracts*, these are *arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts* (as well as agreeing to do so).

Persons who are not already appointed representatives

- 4.12.4 G A *person* who is not already an *appointed representative* for *designated investment business* activities, and who may wish to become one in relation to the *regulated activities* of *arranging (bringing about), making arrangements with a view to or advising on regulated mortgage contracts*, can do so. He must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities*, and who accepts responsibility for the *appointed representative's* actions when acting for him. SUP 12.4 (What must a firm do when it appoints an appointed representative?) and SUP 12.5 (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made.

Persons who are already appointed representatives

- 4.12.5 G Where a *person* is already an *appointed representative* (in relation to any non-mortgage activities) and he proposes to carry on any *regulated mortgage activities*, he will need to consider the following matters.
- (1) He must become *authorised* if his proposed mortgage activities include either *entering into a regulated mortgage contract* or *administering a regulated mortgage contract*. These activities may not be carried on by *appointed representatives* and the *Act* does not permit any *person* to be exempt for some activities and *authorised* for others. Once *authorised*, the *person* may only carry on the *regulated activities* that are covered by his *permission*. He will therefore need to apply for a *permission* to cover all the *regulated activities* that he proposes to carry on.
 - (2) If he proposes to carry on the *regulated activities* of *arranging (bringing about), making arrangements with a view to or advising on regulated mortgage contracts*, he may be able to do so as an *appointed representative*. But this will depend on a number of issues.
 - (a) He will need to be appointed by an *authorised person* who is prepared to accept responsibility for the *appointed representative's regulated mortgage activities* when acting for him. The *authorised person* must have *permission* to carry on these *regulated mortgage*

activities.

- (b) If these *regulated mortgage activities* are to be carried on for the same *authorised person* who has already appointed him for his *non-mortgage regulated activities*, the contract between them will need to be amended to reflect the additional activities. Other amendments to the contract may be required.
- (c) It may be that these *regulated mortgage activities* are to be carried on for a different *person*.
- (d) If the *regulated mortgage activities* relating to *arranging* are to be limited to making introductions, he may be able to operate within the exclusion for introducers described at *PERG 4.5.10G*. This is different from the exclusions for introductions relating to *securities* and *contractually based investments*, which are described at *PERG 8.33*.

4.13 Other exemptions

4.13.1 G Certain named *persons* are exempted by the *Exemption Order* from the need to obtain *authorisation*. The following bodies are exempt in relation to carrying on by them of any of the *regulated mortgage activities*:

- (1) local authorities (paragraph 47 of the Schedule to the *Exemption Order*) but not their *subsidiaries*;
- (2) registered social landlords in England and Wales within the meaning of Part I of the Housing Act 1996 (paragraph 48(a) of the Schedule to the *Exemption Order*) but not their subsidiaries;
- (3) registered social landlords in Scotland within the meaning of the Housing (Scotland) Act 2001 (paragraph 48(2)(b) of the Schedule to the *Exemption Order*) but not their subsidiaries;
- (4) The Housing Corporation (paragraph 48(c) of the Schedule to the *Exemption Order*);
- (5) Scottish Homes (paragraph 48(d) of the Schedule to the *Exemption Order*); and
- (6) The Northern Ireland Housing Executive (paragraph 48(e) of the Schedule to the *Exemption Order*).

4.14 Mortgage activities carried on by professional firms

Introduction

- 4.14.1 G *Professional firms* (broadly, firms of solicitors, accountants and actuaries) may carry on *regulated mortgage activities* in the course of their usual professional activities. The *regulated activities* of *advising on, arranging (bringing about), making arrangements with a view to and administering regulated mortgage contracts* are those most likely to be relevant.
- 4.14.2 G In the FSA's view, the following exclusions are likely, in many cases, to exclude the normal activities of *professional firms* from amounting to *regulated mortgage activities*:
- (1) article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business), which applies in relation to the advising and arranging activities (see *PERG 4.10.1G*);
 - (2) article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) which applies in relation to each of the *regulated mortgage activities* (see *PERG 4.10.5G*); and
 - (3) article 63 of the *Regulated Activities Order* (Administration pursuant to agreement with authorised person) which applies in relation to *administering a regulated mortgage contract* (see *PERG 4.8.7G*); in the FSA's view, this would exclude steps taken by a solicitor to recover payments due under a *regulated mortgage contract* if his instructions come from an *authorised person* with *permission* to administer a *regulated mortgage contract*.
- 4.14.3 G In addition, a *professional firm* may, in certain circumstances, be able to use the *Part XX exemption* to avoid any need for *authorisation*. *PROF 2* (Status of exempt professional firm) contains general guidance on the *Part XX exemption*. In particular, *PROF 2.1.9G* explains that the Treasury have specified certain *regulated activities* to which the *Part XX exemption* cannot apply in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities Order 2001 ("the Non-Exempt Activities Order")). *PERG 4.14.4G* to *4.14.6G* explain which of the *regulated activities* relating to *regulated mortgage contracts* have been so specified.

Part XX exemption: arranging regulated mortgage contracts

- 4.14.4 G *Arranging (bringing about) a regulated mortgage contract and making arrangements with a view to a regulated mortgage contract* have not been specified in the *Non-Exempt Activities Order*. Accordingly, a *professional firm* may carry on these *regulated activities* without *authorisation*, provided the other conditions of the *Part XX exemption* are complied with.

Part XX exemption: advising on regulated mortgage contracts

- 4.14.5 G *Advising on regulated mortgage contracts* has been specified in the *Non-Exempt Activities Order*. However, a *professional firm* is prevented from using the *Part XX exemption* to advise on *regulated mortgage contracts* only if the advice it gives consists of a recommendation. This will be the case if the recommendation is made to an individual to enter into a *regulated mortgage contract* with a lender who would, in entering into the contract, carry on the *regulated activity of entering into a regulated mortgage contract*, irrespective of whether the lender is an *authorised* or *exempt person* or would carry on the activity by way of business. However, a *professional firm* is allowed to give advice that involves a recommendation of this kind provided the advice endorses a corresponding recommendation given to the borrower by an *authorised person* who has *permission to advise on regulated mortgage contracts* or an *exempt person* whose exemption covers that activity.

Part XX exemption: entering into and administering a regulated mortgage contract

- 4.14.6 G *Entering into a regulated mortgage contract* and *administering a regulated mortgage contract* have both been specified in the *Non-Exempt Activities Order*. As an exception, a *professional firm* is allowed under the *Part XX exemption* to carry on these *regulated activities* if the firm is acting as a trustee or personal representative. But this is provided that the borrower is a beneficiary under the trust, will or intestacy.

4.15 Mortgage activities carried on by 'packagers'

Introduction

- 4.15.1 G The term 'packagers' is used variously to describe a range of intermediaries and their different activities in the mortgage process. Depending on the nature of their activities, these intermediaries may carry on *regulated mortgage activities*. The *regulated activities* likely to be of most relevance are *arranging (bringing about)* or *making arrangements with a view to regulated mortgage contracts* (described in more detail at *PERG 4.5*) and *advising on regulated mortgage contracts* (described in more detail at *PERG 4.6*). It is important to note that it is the nature of the relevant activities and not an entity's own description of itself or its activities that will determine the need for *authorisation*. This section describes the activities of various types of 'packagers'.

Mortgage Clubs (sometimes called mortgage wholesalers)

4.15.2 G So-called 'mortgage clubs' or 'wholesalers' essentially act as a distribution function for lenders, providing information to intermediaries about current deals available from a range of lenders. They provide information (often through an electronic sourcing system) in a way that helps intermediaries search the market effectively and, as such, do not deal directly with individual borrowers. If only engaged in these activities and without direct contact with individual borrowers, in the *FSA's* view these entities are unlikely to carry on a *regulated mortgage activity* because they will not:

- (1) *arrange (bring about) regulated mortgage contracts*; their involvement is too indirect to bring about the contract;
- (2) *make arrangements with a view to regulated mortgage contracts*; borrowers will not be participating in the arrangements which they make; or
- (3) *advise on regulated mortgage contracts*, because they provide information not advice and the information is, in any event, directed to intermediaries rather than borrowers.

Mortgage packaging companies

4.15.3 G So-called 'mortgage packaging companies' may undertake certain parts of the mortgage process for lenders on an outsourced basis, ensuring that a complete set of documentation is collated and sent to the lender. This might include receiving application forms from intermediaries, undertaking credit reference checks and instructing a valuer. Other activities might include a product placement service for other intermediaries who provide product advice or recommendations to their clients. In the *FSA's* view, mortgage packaging companies engaged in these activities are unlikely to be carrying on a *regulated activity* where they have no direct contact or contract with potential borrowers (for the reasons given in *PERG 4.15.2G*).

Broker packagers (sometimes called 'intermediary brokers')

4.15.4 G The term 'broker packagers' is typically used to describe intermediaries who either market their services directly to borrowers or who offer other intermediaries a complete mortgage outsourcing service. They are often involved in the sales and advice process, including helping the borrower complete application forms. In the *FSA's* view, broker packagers carrying on these types of activity in direct contact with the borrower are likely to be carrying on the *regulated activities* of *arranging (bringing about)* and *making arrangements with a view to regulated mortgage contracts*. They may also be *advising on regulated mortgage contracts* depending on the circumstances.

4.16 Mortgage activities

Introduction

- 4.16.1 G It is common practice in the mortgage industry for the original lender which makes the loan to pass on ownership of the loan to a third party through *securitisation*. *Securitisation* transactions take different forms, but the essence is that the original lender sells the beneficial interest (with or without the legal interest) in a mortgage portfolio to a special purpose vehicle ('SPV'), which raises finance to pay for the portfolio by selling its own *securities*. The original lender may (or may not) retain the first legal charge on each mortgage in the portfolio. There may also be other parties to the transaction, for example a security trustee to whom the SPV in turn charges the portfolio. Invariably, the SPV will also appoint either the original lender or a third party to administer the portfolio on its behalf. This section discusses whether, on a typical *securitisation* transaction, a SPV (and similarly a security trustee) carries on a *regulated mortgage activity*.
- 4.16.2 G The government's intention behind the regulatory regime for mortgages was "to ensure that, at any one time, it would be possible for each mortgage to be linked to one and only one FSA authorised firm (with mortgage permission) to have the ongoing regulatory responsibility towards consumers" (HM Treasury, *Regulating Mortgages*, February 2002, paragraph 47). In other words, it should be possible to arrange a *securitisation* transaction so that the SPV and other third parties do not carry on *regulated activities*, so long as an *authorised person* (with appropriate *permission*) is involved.

Entering into a regulated mortgage contract

- 4.16.3 G A SPV does not carry on the *regulated activity* of *entering into a regulated mortgage contract* (or agreeing to do so), merely by acquiring the legal or beneficial interest in the contract from the original lender, or by providing funding to the original lender. If the contract is subsequently varied, a SPV should take care to avoid the original contract being replaced with a new *regulated mortgage contract* (see *PERG* 4.4.4G and *PERG* 4.4.13G). The original lender is, of course, likely to require *authorisation*.

Administering, arranging and advising on a regulated mortgage contract

- 4.16.4 G If an unauthorised SPV arranges for an *authorised person* with *permission* to administer a *regulated mortgage contract* to administer its *regulated mortgage contracts*, it can avoid carrying on the *regulated activities* of:

- (1) *administering a regulated mortgage contract*, because of the

exclusion in article 62 of the *Regulated Activities Order* (described in *PERG 4.8.4G*);

- (2) *arranging (bringing about) or making arrangements with a view to regulated mortgage contracts*, because any arrangements that may be made by the *authorised person* in *administering* the contract are excluded, for the SPV, by article 29A of the *Regulated Activities Order* (referred to at *PERG 4.5.9G*); in addition, making the original *securitisation* arrangements is unlikely to be a *regulated activity*, as it is unlikely to "bring about" the entering into of the contract and the borrower is unlikely to participate in the arrangements;
- (3) *advising on regulated mortgage contracts*, because any advice given by the *authorised person* in administering the contract is excluded, for the SPV, by article 54A of the *Regulated Activities Order* (referred to at *PERG 4.6.28G*); and
- (4) *agreeing to carry on* any of the activities in (1) to (3) because agreeing to carry on an activity is only a *regulated activity* if the activity to be carried on would itself be a *regulated activity*.

4.17 Interaction with the Consumer Credit Act

Entering into and administering a regulated mortgage contract

- 4.17.1 G Article 90 of the *Regulated Activities Order* essentially carves out *regulated mortgage contracts* from regulation under the Consumer Credit Act 1974 (CCA). Many loans that fall within the *regulated mortgage contract* definition are already exempt from much of the detail required under the CCA.
- 4.17.2 G Some loans that will fall within the *regulated mortgage contract* definition are also currently classified as regulated agreements under the CCA. In these cases, the impact of the carve-out in article 90 of the *Regulated Activities Order* is likely to be more significant. In particular, most of the CCA controls in respect of entering into, operation and termination of agreements will not apply. Article 90 also, however, provides that section 126 of the CCA (Enforcement of land mortgages) and other provisions relating to it, apply to agreements which would otherwise be regulated agreements. In the FSA's view, it follows that section 126 of the CCA and related provisions including sections 129, 130, 131, 135 and 136 (dealing amongst other things with extension of time and protection of property pending proceedings) will apply to these *regulated mortgage contracts*.
- 4.17.3 G *Regulated mortgage contracts* that were in place at 31 October 2004 and which are subject to the CCA will remain subject to that regime and will come within the FSA's remit. But there may be instances

where a variation of an existing contract amounts to entering into a new *regulated mortgage contract* (see *PERG 4.4.4G* and *PERG 4.4.13G*).

- 4.17.4 G Unsecured loans, as well as loans secured on second charges on property, are not subject to the article 90 carve-out. Many of these loans are currently covered by the CCA and the position will not change.
- 4.17.5 G In some cases, lenders may provide a flexible mortgage product comprising both a secured first charge loan and unsecured borrowing, for example credit card facilities. In this example, in addition to considering the need for *authorisation*, the lender will also require a CCA licence in respect of the unsecured lending, even where the product is sold under a single agreement.

Advising on and arranging a regulated mortgage contract

- 4.17.6 G The CCA also regulates *persons* who carry on certain types of ancillary credit business including "credit brokerage", "debt-adjusting" and "debt-counselling", as defined by section 145 of the CCA. One aspect of the CCA regime is that a licence is required for these activities. Article 20 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 1) Order 2003 (SI 2003/1475) adds new exceptions to section 145 of the CCA in relation to these activities.
- 4.17.7 G Article 20(2) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 1) Order 2003 amends section 146 of the CCA (Exceptions from section 145) so that it is not "credit brokerage" for a *person* to introduce an individual seeking to obtain credit if the introduction is made (a) to an *authorised person* who has *permission* to enter as lender into "relevant agreements"; or (b) to a "qualifying broker", with a view to that individual obtaining credit under a "relevant agreement".
- 4.17.8 G Amended section 146 of the CCA defines "relevant agreement" as meaning a consumer credit agreement secured by a land mortgage, where entering into that agreement as lender is a *regulated activity*. "Qualifying broker" is defined in the same section as meaning a *person* who may effect introductions of the kind mentioned in *PERG 4.17.7G* without contravening the *general prohibition* under section 19 of the *Act*. "Credit brokerage" itself includes introducing an individual seeking to obtain credit to finance the acquisition of a dwelling to be occupied by himself or his relatives, to any *person* carrying on a business in the course of which he provides credit secured on land (for full definition see section 145(2) of the CCA).
- 4.17.9 G In addition to the provisions of the exception under amended section 146 of the CCA, introducers are referred to the *guidance* in *PERG*

4.5.10G dealing with the provisions relating to introducing in the *Regulated Activities Order*.

- 4.17.10 G Article 20(2) amends section 146 of the CCA by providing that it is not "debt adjusting" to carry on an activity which would otherwise be "debt adjusting" under section 146(5) of the CCA if (a) the debt in question is due under a "relevant agreement"; and (b) that activity constitutes a *regulated activity*. "Debt adjusting" includes in relation to debts due under consumer credit agreements (a) negotiating with the creditor, on behalf of the debtor, terms for discharge of the debt, or (b) taking over, in return for payments by the debtor, his obligation to discharge a debt, or (c) any similar activity concerned with the liquidation of the debt (see full definition in section 145(5) of the CCA).
- 4.17.11 G In addition to the provisions of the exception under amended section 146 of the CCA, debt adjusters and arrangers are referred to the *guidance* in *PERG 4.5* dealing with the provisions relating to *arranging* and, in particular, *PERG 4.5.1G(1)(b)* dealing with varying a *regulated mortgage contract*.
- 4.17.12 G Article 20(2) amends section 146 CCA by providing that it is not "debt-counselling" for a *person* to give advice to debtors if (a) the debt in question is due under a "relevant agreement"; and (b) giving that advice constitutes a *regulated activity*. "Debt-counselling" includes the giving of advice to debtors about the liquidation of debts due under consumer credit agreements (see the full definition in section 145(6) of the CCA).
- 4.17.13 G In addition to the provisions of the exception under amended section 146 of the CCA, debt counsellors and advisers are referred to the *guidance* in *PERG 4.6* dealing with *advising on regulated mortgage contracts* and, in particular, *PERG 4.6* (Definition of 'advising on regulated mortgage contracts') dealing with varying a *regulated mortgage contract*.
- 4.17.14 G The CCA's licensing regime will still apply to credit brokers, debt adjusters and debt counsellors in respect of non-regulated mortgages and other loans, as well as to *authorised persons* or *appointed representatives* who carry on ancillary credit business in addition to *regulated activities*. Accordingly, *mortgage intermediaries* requiring *authorisation* may also need to retain their CCA licences.

Financial Promotion and advertisements

- 4.17.15 G Articles 90 and 91 of the *Regulated Activities Order* include provisions that have the effect of removing from CCA regulation *financial promotions* about *qualifying credit*. Such promotions will not therefore be subject to Part IV of the CCA or regulations made

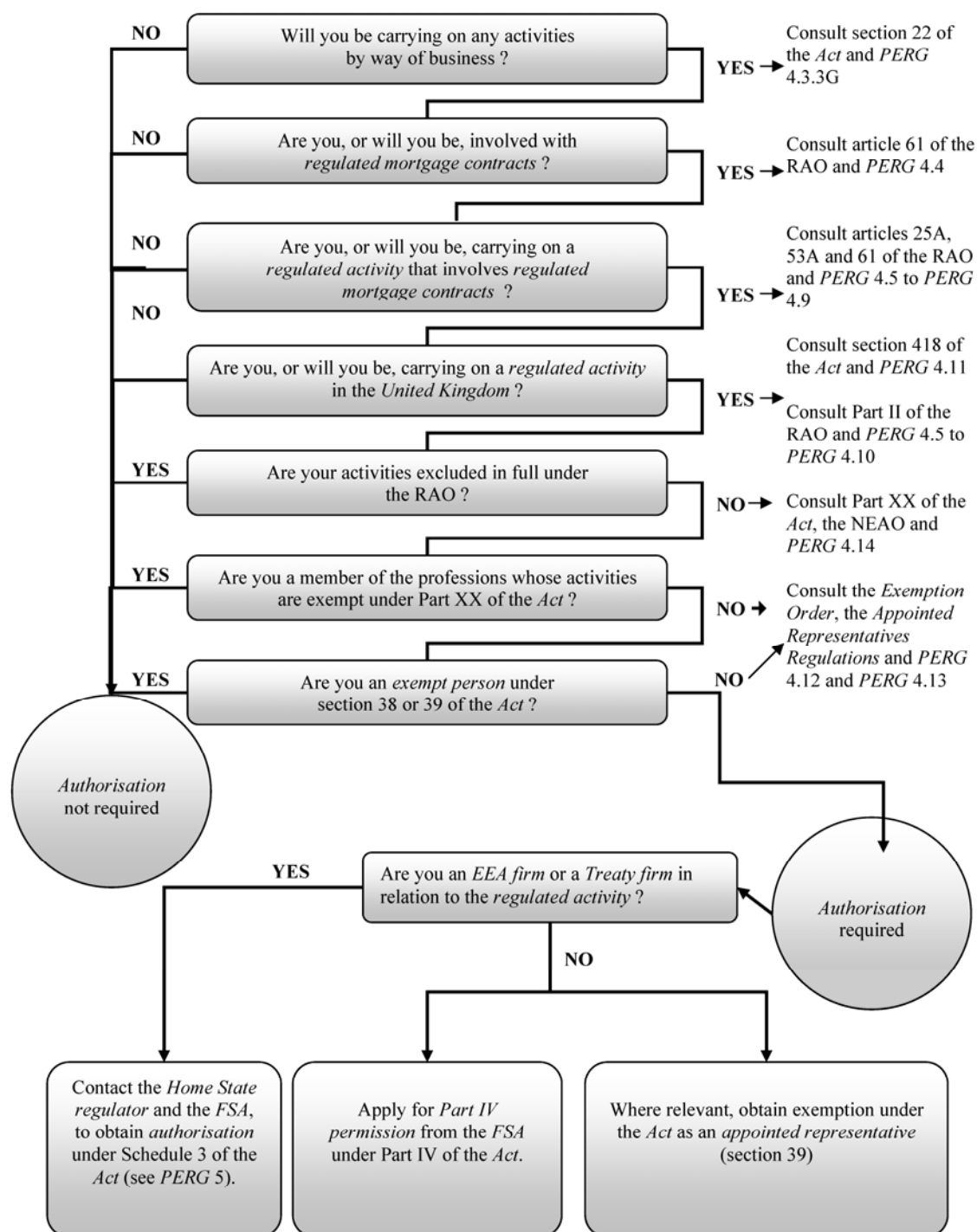
under that Part.

4.17.16 G For more detailed *guidance* concerning the interface between the *financial promotion* regime and the regulation of credit advertisements under the CCA, see *PERG* 8.17.17G.

4.18 Regulated activities related to mortgages: flowchart

4.18 Do you need authorisation?

Do you need authorisation?



Key to Abbreviations:

NEAO = The Financial Services and Markets Act 2001 (Professions) (Non Exempt Activities) Order 2001

RAO = The Financial Services and Markets Act 2001 (Regulated Activities) Order 2001.

GUIDANCE ON INSURANCE MEDIATION ACTIVITIES

5 Guidance on insurance mediation activities

5.1 Application and purpose

Application

5.1.1 G This chapter applies principally to any *person* who needs to know whether he carries on *insurance mediation activities* and is thereby subject to *FSA* regulation. As such it will be of relevance among others to:

- (1) insurance brokers;
- (2) insurance advisers;
- (3) *insurance undertakings*; and
- (4) other *persons* involved in the sale and administration of *contracts of insurance*, even where these activities are secondary to their main business.

Purpose of guidance

5.1.2 to 5.1.5 G [not used]

5.1.6 G The purpose of this *guidance* is to help *persons* consider whether they need *authorisation* or a variation of their *Part IV permission*. Businesses new to regulation who act only as introducers of *insurance business* are directed in particular to *PERG* 5.6.2G (article 25(1): arranging (bringing about) deals in investments) to *PERG* 5.6.9G (Exclusion: Article 72C (Provision of information on an incidental basis)) and *PERG* 5.15.6G (Flow chart: Introducers) to help consider whether they require *authorisation*. This *guidance* also explains the availability to *persons* carrying on *insurance mediation activities* of certain exemptions from *FSA* regulation, including the possibility of becoming an *appointed representative* (see *PERG* 5.13.1G to *PERG* 5.13.6G (Appointed representatives)).

Effect of guidance

5.1.7 G This *guidance* is issued under section 157 of the *Act* (Guidance). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* and the circumstances contemplated by it, then the *FSA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates.

5.1.8 G Rights conferred on third parties cannot be affected by *guidance* given by the *FSA*. This *guidance* represents the *FSA*'s view, and does not bind the courts, for example, in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (Enforceability of Agreements)).

5.1.9 G A *person* reading this *guidance* should refer to the *Act* and the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*. A *person* may need to seek his own legal advice.

5.1.10 G [not used]

Guidance on other activities

5.1.11 G A *person* may wish to carry on activities related to other forms of *investment* in connection with *contracts of insurance*, such as *advising on* and *arranging regulated mortgage contracts*. Such a *person* should also consult the *guidance* in *PERG 2* (Authorisation and Regulated Activities), *PERG 4* (Regulated activities connected with mortgages) and *PERG 8* (Financial Promotion and Related Activities).

5.2 Introduction

5.2.1 G This *guidance* is based on the statutory instruments made as part of implementing the *IMD* in the *United Kingdom*. This legislation includes the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003 (S.I. 2003/1476), which amends among others the *Regulated Activities Order*, the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (S.I. 2003/1217), the Non-Exempt Activities Order and the Business Order. Other legislation that forms the basis of this *guidance* includes the Financial Services and Markets Act 2000 (Exemption) (Amendment) (No.2) Order 2003 (S.I. 2003/1675), the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2003 (S.I. 2003/1676) and the Insurance Mediation Directive (Miscellaneous Amendments) Regulations 2003 (S.I. 2003/1473). For ease of reference, references to the *Regulated Activities Order* below adopt the revised *Regulated Activities Order* numbering indicated in the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003.

Requirement for authorisation or exemption

5.2.2 G Any *person* who carries on a *regulated activity* in the *United Kingdom* by way of business must either be an *authorised person* or exempt from the need for *authorisation*. Otherwise, the *person* commits a criminal offence and certain agreements may be

unenforceable. *PERG 2.2* (Authorisation and regulated activities) has further *guidance* on these consequences. To be *authorised*, a *person* must either:

- (1) hold a *Part IV permission* given by the *FSA* (see *AUTH 1.3* (The Authorisation manual) and *AUTH 3* (Applications for Part IV Permission)); or
- (2) qualify for *authorisation* (see *AUTH 5* (Qualifying for Authorisation under the Act)); for example, if the *person* is an *EEA firm* or a *Treaty firm*.

Questions to be considered to decide if authorisation is required

5.2.3 G A *person* who is concerned to know whether his proposed *insurance mediation activities* may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form, in the flow chart in *PERG 5.15.2G* (Flow chart: regulated activities related to insurance mediation – do you need authorisation?):

- (1) will the activities relate to *contracts of insurance* (see *PERG 5.3* (Contracts of insurance))?
- (2) if so, will I be carrying on any *insurance mediation activities* (see *PERG 5.5* (The regulated activities: dealing in contracts as agent) to *PERG 5.11* (Other aspects of exclusions))?
- (3) if so, will I be carrying on my activities by way of business (see *PERG 5.4* (The business test))?
- (4) if so, is there the necessary link with the *United Kingdom* (see *PERG 5.12* (Link between activities and the United Kingdom))?
- (5) if so, will any or all of my activities be excluded (see *PERG 5.3.7G* (Connected contracts of insurance) to *PERG 5.3.8G* (Large risks); *PERG 5.6.5G* (Exclusion: article 72C provision of information on an incidental basis) to *PERG 5.6.23G* (Other exclusions); *PERG 5.7.7G* (Exclusions); *PERG 5.8.24G* (Exclusion: periodical publications, broadcasts and web-sites) to *PERG 5.8.26G* (Other exclusions); *PERG 5.11* (Other aspects of exclusions) and *PERG 5.12.9G* to *PERG 5.12.10G* (Overseas persons))?
- (6) if it is not the case that all of my activities are excluded, am I a *professional firm* whose activities are exempted under Part XX of the *Act* (see *PERG 5.14.1G* to *PERG 5.14.4G* (Professionals))?
- (7) if not, am I exempt as an *appointed representative* (see *PERG 5.13* (Appointed representatives))?

- (8) if not, am I otherwise an exempt *person* (see *PERG 5.14.5G* (Other exemptions))?

If a *person* gets as far as question (8) and the answer to that question is "no", that *person* requires *authorisation* and should refer to *AUTH 3* (Application for Part IV Permission). The order of these questions considers firstly whether a *person* is carrying on *insurance mediation activities* before dealing separately with the questions "will I be carrying on my activities by way of business?" (3) and "if so, will any or all of my activities be excluded?" (5).

- 5.2.4 G It is recognised pursuant to section 22 of the *Act* that a *person* will not be carrying on *regulated activities* in the first instance, including *insurance mediation activities*, unless he is carrying on these activities by way of business. Similarly, where a *person's* activities are excluded he cannot, by definition, be carrying on *regulated activities*. To this extent, the content of the questions above does not follow the scheme of the *Act*. For ease of navigation, however, the questions are set out in an order and form designed to help *persons* consider more easily, and in turn, issues relating to:
- (1) the new activities;
 - (2) the business test; and
 - (3) the exclusions.

Approach to implementation of the IMD

- 5.2.5 G The *IMD* imposes requirements upon *EEA States* relating to the regulation of *insurance* and *reinsurance mediation*. The *IMD* defines "insurance mediation" and "reinsurance mediation" as including the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance and reinsurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim (the text of article 2.3 *IMD* is reproduced in full in *PERG 5.16.2G* (article 2.3 of the Insurance Mediation Directive)).
- 5.2.6 G The *United Kingdom's* approach to implementing the *IMD* by domestic legislation is, in part, through secondary legislation, which will apply pre-existing *regulated activities* (slightly amended) in the *Regulated Activities Order* to the component elements of the *insurance mediation* definition in the *IMD* (see *PERG 5.2.5G* and the text of article 2.3 *IMD* in *PERG 5.16.2G* (article 2.3 of the Insurance Mediation Directive)).
- 5.2.7 G The effect of the *IMD* and its implementation described in *PERG 5.2.5G* to *PERG 5.2.6G* is to vary the application of the existing *regulated activities* set out in *PERG 5.2.8G* (1) to (3), (5) and (6), principally by applying these *regulated activities* to *general insurance contracts* and *pure protection contracts* and by making

changes to the application of the various exclusions to these *regulated activities*. These *regulated activities* applied prior to 14 January 2005 to qualifying contracts of insurance (as defined by article 3 of the *Regulated Activities Order* and referred to in the *Handbook* as *life policies* (which includes *pension policies*)). The legislation implementing the *IMD* introduced a new *regulated activity* set out in *PERG* 5.2.8G (4), which potentially applies to all *contracts of insurance*.

- 5.2.8 G It follows that each of the *regulated activities* below potentially apply to any *contract of insurance*:
- (1) *dealing in investments as agent* (article 21 (Dealing in investments as agent));
 - (2) *arranging (bringing about) deals in investments* (article 25(1) (Arranging deals in investments));
 - (3) *making arrangements with a view to transactions in investments* (article 25(2) (Arranging deals in investments));
 - (4) *assisting in the administration and performance of a contract of insurance* (article 39A (Assisting in the administration and performance of a contract of insurance));
 - (5) *advising on investments* (article 53 (Advising on investments));
 - (6) *agreeing to carry on any of the above regulated activities* (article 64 (Agreeing to carry on specified types of activity)).

- 5.2.9 G It is the scope of the *Regulated Activities Order* rather than the *IMD* which will determine whether a *person* requires *authorisation* or exemption. However, the scope of the *IMD* is relevant to the application of certain exclusions under the *Regulated Activities Order* (see, for example, the commentary on article 67 in *PERG* 5.11.9G (Activities carried on in the course of a profession or non-investment business)).

Financial promotion

- 5.2.10 G An *unauthorised person* who intends to carry on activities connected with *contracts of insurance* will need to comply with section 21 of the *Act* (Restrictions on financial promotion). This *guidance* does not cover *financial promotions* that relate to *contracts of insurance*. *Persons* should refer to the general *guidance* on *financial promotion* in *PERG* 8 (Financial promotion and related activities). (See in particular *PERG* 8.17A (Financial promotions concerning insurance mediation activities) for information on *financial promotions* that relate to *insurance mediation activities*.)

5.3 Contracts of insurance

- 5.3.1 G A *person* who is concerned to know whether his proposed activities

may require *authorisation* will wish to consider whether those activities relate to *contracts of insurance* or contracts of *reinsurance*, or to *insurance business* or *reinsurance business*, which is the business of *effecting* or *carrying out contracts of insurance* or *reinsurance as principal*.

Definition

- 5.3.2 G The *Regulated Activities Order* does not attempt an exhaustive definition of a 'contract of insurance'. Instead, article 3(1) of the order (Interpretation) makes some specific extensions and limitations to the general common law meaning of the concept. For example, article 3(1) expressly extends the concept to fidelity bonds and similar contracts of guarantee, which are not contracts of insurance at common law, and it excludes certain *funeral plan contracts*, which would generally be contracts of insurance at common law.
- 5.3.3 G One consequence of this is that common law judicial decisions about whether particular contracts amount to 'insurance' or their being effected or carried out amounts to 'insurance business' are relevant in defining the regulatory scope of the *Act*.
- 5.3.4 G As with any other contract, a *contract of insurance* that is not effected by way of a deed will only be legally binding if, amongst other things, it is entered into for valuable consideration. Determining what amounts to sufficient consideration in any given case is a matter for the courts. In practice, however, the legal definition of consideration is very wide. In particular, just because a *contract of insurance* is 'free' in the colloquial sense does not mean that there is no consideration for it. In the vast majority of cases, therefore, 'free' insurance policies (such as policies that act as loss leaders for an *insurance undertaking*) will be binding contracts and will amount to *specified investments* and therefore be subject to *FSA* regulation.
- 5.3.5 G The *Regulated Activities Order* does not define a *reinsurance* contract. The essential elements of the common law description of a *contract of insurance* are also the essential elements of a *reinsurance* contract. Whilst the *IMD* addresses insurance and *reinsurance* separately, throughout this *guidance* the term 'contract of insurance' (italicised or otherwise) also applies to contracts of *reinsurance*.
- 5.3.6 G *Guidance* describing how the *FSA* identifies *contracts of insurance* is in *PERG 6* (Guidance on the Identification of Contracts of Insurance).

Connected contracts of insurance

- 5.3.7 G Article 72B of the *Regulated Activities Order* (Activities carried on by a provider of relevant goods or services) excludes from *FSA* regulation certain *regulated activities* carried on by providers of non-motor goods and services related to travel in relation to *contracts of insurance* that satisfy a number of conditions. Details about the scope

of this exclusion can be found at *PERG 5.11.13G* to *PERG 5.11.15G* (Activities carried on by a provider of relevant goods or services).

Large risks

- 5.3.8 G Large risks situated outside the *EEA* are also excluded (described in more detail at *PERG 5.11.16G* (Large risks)). The location of the risk or commitment may be determined by reference to the *EEA State* in which the risk is situated, defined in article 2(d) of the Second Non-Life Directive (88/357/EEC) or the *EEA State* of the commitment, defined in article 1(1)(g) of the Consolidated Life Directive (2002/83/EC). Broadly put, this is:
- (1) for insurance relating to buildings and/or their contents, the *EEA State* in which the property is situated;
 - (2) for insurance relating to vehicles, the *EEA State* of registration;
 - (3) for policies of four months or less duration covering travel or holiday risks, where the *policy* was taken out;
 - (4) in all other cases (including those determined by reference to the *EEA State* of the commitment), the *EEA State* where the policyholder has his habitual residence, or if the policyholder is a legal person, where his establishment, to which the contract relates, is situated.

Specified investments

- 5.3.9 G For an activity to be a *regulated activity*, it must be carried on in relation to 'specified investments' (see section 22 of the Act Regulated activities) and Part III of the Regulated Activities Order (Specified investments)). For the purposes of *insurance mediation activity*, *specified investments* include the following '*relevant investments*' defined in article 3(1) of the *Regulated Activities Order* (Interpretation):
- (1) rights under any *contract of insurance* (see article 75 (Contracts of insurance)); and
 - (2) rights to or interests in rights under *life policies* (see article 89 (Rights to or interests in investments)).

'*Relevant investments*' is the term used in articles 21 (Dealing in investments as agent), 25 (Arranging deals in investments) and 53 (Advising on investments) of the *Regulated Activities Order* to help define the types of investment to which the activities in each of these articles relate.

- 5.3.10 G A *person* will have rights under a *contract of insurance* when he is a *policyholder*. The question of whether a *person* has rights under a *contract of insurance* may require careful consideration in the case of group policies (with reference to the *Glossary* definition of

policyholder). In the case, in particular, of *general insurance contracts* and *pure protection contracts*, the existence or otherwise of rights under such policies may be relevant to whether a *person* is carrying on *insurance mediation activities*.

- 5.3.11 G A *person* may also have rights to or interests in rights under a *life policy* where he is not a *policyholder*, but this will again depend on the terms of the individual *policy*.
- 5.4 The business test
- 5.4.1 G A *person* will only need *authorisation* or exemption if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated Activities)).
- 5.4.2 G There is power in the *Act* for the Treasury to specify the circumstances in which a *person* is or is not to be regarded as carrying on *regulated activities* by way of business. The *Business Order* has been made using this power (partly reflecting differences in the nature of the different activities). As such, the business test for *insurance mediation activity* is distinguished from the standard test for 'investment business' in article 3 of the *Business Order*. Under article 3(4) of the *Business Order*, a *person* is not to be regarded as carrying on by way of business any *insurance mediation activity* unless he takes up or pursues that activity for remuneration. Accordingly, there are two principal elements to the business test in the case of *insurance mediation activities*:
- (1) does a *person* receive remuneration for these activities?
 - (2) if so, does he take up or pursue these activities by way of business?
- 5.4.3 G As regards *PERG 5.4.2G(1)*, the *Business Order* does not provide a definition of 'remuneration', but, in the *FSA's* view, it has a broad meaning and covers both monetary and non-monetary rewards. This is regardless of who makes them. For example, where a *person* pays discounted premiums for his own insurance needs in return for bringing other business to an *insurance undertaking*, the discount would amount to remuneration for the purposes of the *Business Order*. Remuneration can also take the form of an economic benefit which the *person* expects to receive as a result of carrying on *insurance mediation activities*. In the *FSA's* view, the remuneration does not have to be provided or identified separately from remuneration for other goods or services provided. Nor is there a minimum level of remuneration.
- 5.4.4 G As regards *PERG 5.4.2G(2)*, in the *FSA's* view, for a *person* to take up or pursue *insurance mediation activity* by way of business, 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 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 *FSA's* view:

- (1) it is not necessarily the case that services provided free of charge will not amount to a business; for example, advice (including advice available on a website) may be provided free of charge to potential *policyholders* but in the course of a business funded by commission payments; and
- (2) the 'by way of business' test may very occasionally be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done 'by way of business' in other respects, for example, because of the size of reward received or its relevance to other business activities).

5.4.5 G It follows that whether or not any particular *person* is acting 'by way of business' for these purposes will depend on his individual circumstances. However, a typical example of where the applicable business test would be likely to be satisfied by someone whose main business is not *insurance mediation activities*, is where a *person* recommends or arranges specific insurance *policies* in the course of carrying on that other business and receives a fee or commission for doing so.

5.4.6 G Some typical examples of where the business test is unlikely to be satisfied, assuming that there is no direct financial benefit to the arranger, include:

- (1) arrangements which are carried out by a *person* for himself, or for members of his family;
- (2) where employers provide insurance benefits for staff; and
- (3) where affinity groups or clubs set up insurance benefits for members.

5.4.7 G *PERG 5.4.8G* contains a table that summarises the main issues surrounding the business test as applied to *insurance mediation activities* and that may assist *persons* to determine whether they will need *authorisation* or exemption. The approach taken in the table involves identifying factors that, in the *FSA's* view, are likely to play a part in the analysis. Indicators are then given as to the significance of each factor to the *person's* circumstances. By analysing the indicators as a whole, a picture can be formed of the likely overall position. The table provides separate indicators for the two elements of remuneration and by way of business. As a *person* has to satisfy both elements, a clear overall indication against either element being satisfied should mean that the test is failed. This approach cannot be expected to provide a clear conclusion for everyone. But it should enable *persons* to assess the relevant aspects of their activities and to identify where changes could, if necessary, be made so as to make

their position clearer. The *person* to whom the indicators are applied is referred to in the table as 'P'.

5.4.8 G Table: Carrying on insurance mediation activities 'for remuneration' and 'by way of business'

| | | |
|---|--|--|
| Carrying on insurance mediation activities 'for remuneration' and 'by way of business' | | |
| 'For remuneration' | | |
| Factor | Indicators that P <u>does not</u> carry on activities "for remuneration" | Indicators that P <u>does</u> carry on activities "for remuneration" |
| Direct remuneration, whether received from the customer or the insurer/broker (cash or benefits in kind such as tickets to the opera, a reduction in other insurance premiums, a remission of a debt or any other benefit capable of being measured in money's worth) | P does not receive any direct remuneration specifically identified as a reward for his carrying on <i>insurance mediation activities</i> . | P receives direct remuneration specifically identified as being a reward for his carrying on <i>insurance mediation activities</i> . |

| | | |
|---|--|---|
| <p>Indirect remuneration (such as any form of economic benefit as may be explicitly or implicitly agreed between P and the insurer/broker or P's customer – including, for example, through the acceptance of P's terms and conditions or mutual recognition of the economic benefit that is likely to accrue to P). An indirect economic benefit can include expectation of making a profit of some kind as a result of carrying on <i>insurance mediation activities</i> as part of other services.</p> | <p>P does not obtain any form of indirect remuneration through an economic benefit other than one which is not likely to have a material effect on P's ability to make a profit from his other activities.</p> | <p>P obtains an economic benefit that: (a) is explicitly or implicitly agreed between P and the insurer/broker or P's customer; and (b) has the potential to go beyond mere cost recovery through fees or other benefits received for providing a package of services that includes <i>insurance mediation activities</i> but where no particular part of the fees is attributable to <i>insurance mediation activities</i>. This could include where <i>insurance mediation activities</i> are likely to:</p> <ul style="list-style-type: none"> • play a material part in the success of P's other business activities or in P's ability to make a profit from them; or • provide P with a materially increased opportunity to provide other goods or services; or • be a major selling point for P's other business activities; or • be essential for P to provide other goods or services. <p>P charges his customers a greater amount for other goods or services than would be the case if P were not also carrying on <i>insurance mediation activities</i> for those customers and this:</p> <ul style="list-style-type: none"> • is explicitly or implicitly agreed between P and the insurer/broker or P's customer; and • has the potential to go beyond mere cost recovery. |
|---|--|---|

| | | |
|--------------------------|---|---|
| Recovery of costs | P receives no benefits of any kind (direct or indirect) in respect of his <i>insurance mediation activities</i> beyond the reimbursement of his actual costs incurred in carrying on the activity (including receipt by P of a sum equal to the insurance premium that P is to pass on to the <i>insurer</i> or broker). | P receives benefits of any kind (direct or indirect) in respect of his <i>insurance mediation activities</i> which go beyond the reimbursement of his actual costs incurred in carrying on the activity. |
| 'By way of business' | | |
| Factor | Indicators that P <u>does not</u> carry on activities "by way of business" | Indicators that P <u>does</u> carry on activities "by way of business" |
| Regularity/ frequency | <p>Involvement is one-off or infrequent (for instance, once or twice a year) provided that the transaction(s) is not of such size and importance that it is essential to the success of P's other business activities.</p> <p>Transactions do not result from formal arrangements (for instance, occasional involvement purely as a result of an unsolicited approach).</p> | <p>Involvement is frequent (for instance, once a week).</p> <p>Involvement is infrequent but the transactions are of such size or importance that they are essential to the success of P's other business activities.</p> <p>P has formal arrangements which envisage transactions taking place on a regular basis over time (whether or not such transactions turn out in practice to be regular).</p> |

| | | |
|---|---|--|
| Holding out | P does not hold himself out as providing a professional service that includes <i>insurance mediation activities</i> (by professional is meant not the services of a layman). | P holds himself out as providing a professional service that includes <i>insurance mediation activities</i> . |
| Relevance to other activities/ business | <p><i>Insurance mediation activities:</i></p> <ul style="list-style-type: none"> • have no relevance to P's other activities; or • have some relevance but could easily be ceased without causing P any difficulty in carrying on his main activities; or • would be unlikely to result in a material reduction in income from P's main activities if ceased | <p><i>Insurance mediation activities:</i></p> <ul style="list-style-type: none"> • are essential to P in carrying on his main activities; or • would cause a material disruption to P carrying on his main activities if ceased; or • would be likely to reduce P's income by a material amount. |
| Commercial benefit | <p>P receives no direct or indirect pecuniary or economic benefit.</p> <p>P is a layman and acting in that capacity.</p> <p>P would not obtain materially less income from his main activities if they did not include <i>insurance mediation activities</i>.</p> | <p>P receives a direct or indirect pecuniary or economic benefit from carrying on <i>insurance mediation activities</i> – such as a fee, a benefit in kind or the likelihood of materially enhanced sales of other goods or services that P provides.</p> <p>P would obtain materially less income from his main activities if they did not include <i>insurance mediation activities</i>.</p> |

- 5.5 The regulated activities: dealing in contracts as agent
- 5.5.1 G Article 21 of the *Regulated Activities Order* (Dealing in investments as agent) makes dealing in *contracts of insurance* as agent a *regulated activity*. The activity is defined in terms of *buying, selling, subscribing for or underwriting contracts as agent*, that is, on behalf of another. Examples include:
- (1) where an intermediary, by accepting on the *insurance undertaking's* behalf to provide the insurance, commits an *insurance undertaking* to provide insurance for a prospective policyholder; or
 - (2) where the intermediary agrees, on behalf of a prospective *policyholder*, to *buy an insurance policy*.
- 5.5.2 G Intermediaries with delegated authority to bind *insurance undertakings* are likely to be *dealing in investments as agent*. It should be noted, in particular, that this is a *regulated activity*:
- (1) whether or not any advice is given (see *PERG 5.8* (The regulated activities: advising on contracts of insurance)); and
 - (2) whether or not the intermediary deals through an *authorised person* (for example, where he instructs another agent who is an *authorised person* to enter into a *contract of insurance* on his *client's* behalf).
- 5.5.3 G There are also certain exclusions which are relevant to whether a *person* is carrying on the activity of *dealing in investments as agent* (see *PERG 5.11* (Other aspects of exclusions)).
- 5.6 The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance
- 5.6.1 G Article 25 of the *Regulated Activities Order* (Arranging deals in investments) describes two types of *regulated activities* concerned with arranging deals in respect of *contracts of insurance*. These are:
- (1) *arranging (bringing about) deals in investments* (article 25(1) (Arranging deals in investments)); and
 - (2) *making arrangements with a view to transactions in investments* (article 25(2) (Arranging deals in investments)).
- Article 25(1): arranging (bringing about) deals in investments
- 5.6.2 G The activity in article 25(1) is carried on only if the arrangements bring about, or would bring about, the transaction to which the arrangement relates. This is because of the exclusion in article 26 of the *Regulated Activities Order* (Arrangements not causing a deal). Article 26 excludes from article 25(1) arrangements which do not bring about or would not bring about the transaction to which the

arrangements relate. In the *FSA's* view, a *person* would bring about a *contract of insurance* if his involvement in the chain of events leading to the *contract of insurance* were important enough that, without it, there would be no policy. Examples of this type of activity would include negotiating the terms of the *contract of insurance* on behalf of the customer with the *insurance undertaking* and vice versa, or assisting in the completion of a proposal form and sending it to the *insurance undertaking*. Other examples include where an *insurance undertaking* enters into a *contract of insurance* as *principal* or an intermediary enters into a *contract of insurance* as agent.

Article 25(2): making arrangements with a view to transactions in investments

- 5.6.3 G The activity within article 25(2) contrasts with article 25(1) in that it is not limited by the requirement that the arrangements would bring about the transaction to which they relate.
- 5.6.4 G Article 25(2) may, for instance, include activities of *persons* who help potential *policyholders* fill in or check application forms in the context of ongoing arrangements between these *persons* and *insurance undertakings*. A further example of this activity would be a *person* introducing customers to an intermediary either for *advice* or to help arrange an insurance *policy*. The introduction might be oral or written. By contrast, the *FSA* considers that a mere passive display of literature advertising insurance (for example, leaving leaflets advertising insurance in a dentist's or vet's waiting room and doing no more) would not amount to the article 25(2) activity.

Exclusion: article 72C (Provision of information on an incidental basis)

- 5.6.5 G The *Regulated Activities Order* provides an important potential exclusion, however, for *persons* whose principal business is other than *insurance mediation activities*.
- 5.6.6 G In broad terms, article 72C of the *Regulated Activities Order* excludes from the activities of *arranging* and *assisting in the administration and performance of a contract of insurance* activities that:
- (1) consist of the provision of information to the *policyholder* or potential *policyholder*;
 - (2) are carried on by a *person* carrying on any profession or business which does not otherwise consist of *regulated activities*; and
 - (3) amount to the provision of information that may reasonably be regarded as being incidental to that profession or business.
- 5.6.7 G In the *FSA's* view, 'incidental' in this context means that the activity must arise out of, be complementary to or otherwise be sufficiently closely connected with the profession or business. In other words,

there must be an inherent link between the activity and the firm's main business. For example, introducing dental insurance may be incidental to a dentist's activities; introducing pet insurance would not be incidental to his activities. In addition, to be considered 'incidental', in the FSA's view, the activity must not amount to the carrying on of a business in its own right.

5.6.8 G This exclusion applies to a *person* whose profession or business does not otherwise consist of *regulated activities*. In the FSA's view, the fact that a *person* may carry on *regulated activities* in the course of the carrying on of a profession or business does not, of itself, mean that the profession or business consists of *regulated activities*. This is provided that the main focus of the profession or business does not involve *regulated activities* and that the *regulated activities* that are carried on arise in a way that is incidental and complementary to the carrying on of the profession or business. So, the exclusion may be of relevance to *exempt professional firms*. It might also, for example, be relied on by doctors, vets and dentists as well as many businesses in the non-financial sector, even if they have *permission* to carry on *regulated activities* or are *appointed representatives*. This is assuming that their activities for which they are seeking to use the exclusion in article 72C are limited to providing information in a way which is incidental to their main profession or business. The exclusion only extends to information given to the *policyholder* or potential *policyholder* and not to the *insurance undertaking*. An intermediary who forwards a proposal form to an *insurance undertaking* would not be able to take the benefit of the exclusion. Similarly, where a *person* does more than provide information (for example, by helping a potential *policyholder* fill in an application form), he cannot take the benefit of this exclusion. Nor does it cover the activity of advising a customer under article 53 of the *Regulated Activities Order* (Advising on investments).

5.6.9 G The exclusion will be of assistance to introducers who would otherwise be carrying on the *regulated activity of making arrangements with a view to transactions in investments* (assuming, as mentioned in PERG 5.6.8G, that they provide information only to *policyholders* or potential *policyholders*, and not to the intermediary or *insurance undertaking* to whom they introduce these *policyholders* or potential *policyholders*). In order to assist such *introducers* determine whether or not they are likely to require *authorisation*, a simplified flowchart is included in PERG 5.15.6G (Flow chart: *introducers*). *Introducers* may also find the *guidance* at PERG 5.9.2G (The regulated activities: agreeing to carry on a regulated activity) helpful. PERG 5.6.17G (Exclusion from article 25(2) for introducing) has *guidance* to assist *persons* determine whether their introducing activities amount to *making arrangements with a view to transactions in investments*.

Exclusion from article 25(2): arrangements enabling parties to

communicate

- 5.6.10 G Article 27 of the *Regulated Activities Order* (Enabling parties to communicate) contains an exclusion that applies to arrangements which might otherwise bring within article 25(2) those who merely provide the means by which one party to a transaction (or potential transaction) is able to communicate with other parties. Simply providing the means by which parties to a transaction (or potential transaction) are able to communicate with each other is excluded from article 25(2) only. This will ensure that *persons* such as internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to fall within article 25(2)).
- 5.6.11 G In the *FSA's* view, the crucial element of the exclusion in article 27 is the inclusion of the word 'merely'. When 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). Further detailed *guidance* relating to the scope of the exclusion in article 27 is contained in *PERG 2.8.6G(2)* (Arranging deals in investments) and *PERG 8.32.6G* to *PERG 8.32.11G* (Arranging deals in investments).

Exclusion from article 25(2): transactions to which the arranger is a party

- 5.6.12 G Article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) excludes from the *regulated activities* in article 25(1) and 25(2) arrangements made for or with a view to *contracts of insurance* when:
- (1) the *person* (P) making the arrangements is the only *policyholder*; or
 - (2) P, as a result of the transaction, would become the only *policyholder*.
- 5.6.13 G Market makers in traded endowment policies may be able to rely on this exclusion to avoid the need to be *authorised*. They must ensure, however, that where they are carrying on the *regulated activity of dealing in investments as principal* (article 14) they are also able to rely on the exclusions in articles 15 or 16 (see the *guidance* in *PERG 2.8.4G* (Dealing in investments as principal)).
- 5.6.14 G *Insurance undertakings* do not fall within the terms of this exclusion and so will be *arranging contracts of insurance*, in addition to *effecting* and *carrying out contracts of insurance*.
- 5.6.15 G In some cases, a *person* may make arrangements to enter into a *contract of insurance* as *policyholder* on its own behalf and also arrange that another *person* become a *policyholder* under the same *contract of insurance*. If so, the *person* should be aware that the effect of the narrower exclusion in article 28 as part of

implementation of the *IMD* is that he may be *arranging* on behalf of the other *policyholder*. This may be relevant, for example, to a *company* which arranges insurance for itself (not *arranging*) as well as other *companies* in a *group* or loan syndicate (potentially *arranging*).

- 5.6.16 G The restriction in the scope of article 28 raises an issue where there is a trust with co-trustees, where each trustee will be a *policyholder* with equal rights and obligations. If the activities of one of the trustees include *arranging* in respect of *contracts of insurance*, that trustee could be viewed as *arranging* on behalf of his co-trustees who will also be *policyholders*. Similar issues also arise in respect of trustees *assisting in the administration and performance of a contract of insurance*. The *FSA* is of the view, however, that trustees should not be regarded as carrying on *regulated activities* where they are acting as joint *policyholders* in *arranging* or *assisting in the administration and performance of a contract of insurance*. In this respect, trustees differ from *policyholders* under a group policy, where each *person* covered under the group policy may make claims on the policy in relation to his own risks. In that situation, a *policyholder* who is providing services to other *policyholders* of *arranging* or *assisting in the administration and performance of a contract of insurance* will be carrying on a *regulated activity*.

Exclusion from article 25(2) for introducing

- 5.6.17 G Article 33 of the *Regulated Activities Order* (Introducing) excludes arrangements which would otherwise fall under article 25(2) 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;
 - (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; and
 - (4) the arrangements do not relate to transactions relating to *contracts of insurance*.

- 5.6.18 G The effect of *PERG* 5.6.17G(4) is that some *persons* who, in making

introductions, are *making arrangements with a view to transactions in investments* under article 25(2) of the *Regulated Activities Order*, cannot use the introducing exclusion. This is if, in general terms, the arrangements for making introductions relate to *contracts of insurance* (*PERG 5.6.19G* has further *guidance* on when arrangements for introductions may be regarded as relating to *contracts of insurance*). However, this does not mean that all introducers whose introductions relate directly or indirectly to *contracts of insurance* will necessarily require *authorisation* if they cannot use the exclusion in article 72C of the *Regulated Activities Order* for merely passing information. For this to be the case, a *person* must first be carrying on the business of *making arrangements with a view to transactions in investments*. In the *FSA's* view, the following points will be relevant in determining whether this is the case.

- (1) Article 25(2) applies to ongoing arrangements made with a view to transactions taking place from time to time as a result of *persons* having taken part in the arrangements. So, they will not apply to one-off introductions or introductions that are not part of an ongoing pre-existing arrangement between introducer and introducee. An introducer who merely suggests to a *person* that he seeks advice or assistance from an *authorised person* or an *exempt person* with whom the introducer has no pre-existing agreement that anticipates introductions will be made, will not be making arrangements at all. He will simply be offering general advice or information.
- (2) The purpose of the arrangements must be for the *person* who is introduced to, in general terms, enter into a transaction to *buy or sell securities or relevant investments*. So, arrangements for introducing *persons* for advice only will not be caught (for example, introductions to a financial planner or to the publisher of an investment newsletter). In other cases, it may be likely that transactions will be entered into following the provision of advice. Provided the introducer is completely indifferent as to whether or not a *contract of insurance* may ultimately be bought (or sold) as a result of the advice given to the *person* he has introduced, the introducer will not be *making arrangements with a view to transactions in investments*. This is likely to be the case where the introducer does not receive any pecuniary reward that is linked to the volume of business done as a result of his introductions.

5.6.19 G Where a *person* is *making arrangements with a view to transactions in investments* by way of making introductions, and he is not completely indifferent to whether or not transactions may result, it may still be the case that the exclusion in article 33 will apply. In the *FSA's* view, this is where:

- (1) the introduction is for independent advice on *investments*

generally; and

- (2) the introducer is indifferent as to whether or not a *contract of insurance* may ultimately be bought (or sold) rather than any other type of *investment*.

This is because the arrangements for making introductions do not specifically relate to a *contract of insurance* or to any other type of *investment* but to *investments* generally. Whether or not a *person* is making arrangements for introductions for the purpose of the provision of independent advice on *investments* generally will depend on the facts in any particular case. But, in the *FSA*'s view, it is very unlikely that article 33 could apply where introductions are made to a *person* for the purposes of that *person* giving advice on and then *arranging general insurance*.

- 5.6.20 G The table in *PERG* 5.6.21G has examples of the application of article 33 to arrangements for making introductions.
- 5.6.21 G Application of article 33 to arrangements for making introductions. This table belongs to *PERG* 5.6.20G.

| | Type of introduction | Applicability of exclusion |
|---|---|--|
| 1 | Introductions are purely for the purpose of the provision of independent advice – Introducer is completely indifferent to whether or not transactions take place after advice has been given. | Exclusion not relevant as introducer is not <i>arranging</i> under article 25(2). |
| 2 | Introduction is one-off or otherwise not part of pre-existing ongoing arrangements that envisage such introduction being made. | Exclusion not relevant as introducer is not <i>arranging</i> under article 25(2). |
| 3 | Introducer is not indifferent to whether or not transactions take place after advice has been given, but is indifferent to whether or not the transactions may involve a <i>contract of insurance</i> . | Exclusion will be available provided the introduction was made with a view to the provision of independent advice on <i>investments</i> generally. |
| | Introducer is not indifferent to | |

| | Type of introduction | Applicability of exclusion |
|---|--|---|
| 4 | whether or not transactions take place after advice has been given (for example, because he expects to receive a percentage of the commission), and introductions specifically relate to <i>contracts of insurance</i> . | Exclusion is not available. If introducer is an <i>unauthorised person</i> , he will need <i>authorisation</i> or exemption as an <i>appointed representative</i> . If introducer is an <i>authorised person</i> (such as an IFA introducing to a <i>general insurance broker</i>), he will need to vary his <i>Part IV permission</i> accordingly. If introducer is an <i>appointed representative</i> , he will need to ensure that his agreement covers making such arrangements. |

Exclusion from article 25(2): arrangements for the provision of finance

- 5.6.22 G An *unauthorised person* who makes arrangements with a view to a *person* who participates in the arrangements *buying* or *selling contracts of insurance* may be excluded from article 25(2) by article 32 of the *Regulated Activities Order* (Provision of finance). This is provided the sole purpose of the arrangements is the provision of finance to enable the *person* to *buy the contract of insurance*. Premium finance companies may be able to rely on this exclusion provided the arrangements they put in place, taken as a whole, have as their sole purpose the provision of finance to fund premiums.

Other exclusions

- 5.6.23 G The *Regulated Activities Order* contains some other exclusions which have the effect of narrowing or limiting the application of *regulated activities* within article 25 by preventing certain activities from amounting to *regulated activities*. These are referred to in *PERG* 5.11.8G (Exclusions applying to more than one regulated activity).
- 5.7 The regulated activities: assisting in the administration and performance of a contract of insurance
- 5.7.1 G The *regulated activity of assisting in the administration and performance of a contract of insurance* (article 39A) relates, in broad terms, to activities carried on by intermediaries after the conclusion of a *contract of insurance* and for or on behalf of *policyholders*, in particular in the event of a claim. Loss assessors acting on behalf of *policyholders* in the event of a claim are, therefore, likely in many cases to be carrying on this *regulated activity*. By contrast, claims

management on behalf of certain insurers is not a *regulated activity* (see *PERG 5.7.7G (Exclusions)*).

- 5.7.2 G Neither assisting in the administration nor assisting in the performance of a contract alone will fall within this activity. Generally, an activity will either amount to assisting in the administration or assisting in the performance but not both. Occasionally, however, an activity may amount to both *assisting in the administration and performance of a contract of insurance*. For example, where a *person* assists a claimant in filling in a claims form, in the *FSA's* view this amounts to assisting in the administration of a *contract of insurance*. In some instances, however, this may also amount to assisting in the performance of a *contract of insurance*. In the *FSA's* view, an example of when a *person* may be assisting in the performance of a contract is where a *person* fills in the whole or a significant part of a claims form on behalf of a claimant. This is because, by helping complete a claims form, a *person* may be assisting the *policyholder* to perform his contractual obligation to notify the *insurance undertaking* in the event of a claim and provide details of the claim in the manner and form required by the contract.
- 5.7.3 G Put another way, where an intermediary's assistance in filling in a claims form is material to whether performance takes place of the contractual obligation to notify claims, it is more likely to amount to *assisting in the administration and performance of a contract of insurance*. Conversely, in the *FSA's* view, a *person* who merely gives pointers about how to fill in the claims form or merely supplies information in support of a claim will not be assisting in the performance of a *contract of insurance*. Instead, the *person* will only be facilitating rather than assisting in the performance of a *contract of insurance*.
- 5.7.4 G More generally, an example of an activity that, in the *FSA's* view, is likely to amount to assisting a *policyholder* in both the administration and the performance of a *contract of insurance* is notifying a claim under a *policy* and then providing evidence in support of the claim, or helping negotiate its settlement on the *policyholder's* behalf. Notifying an *insurance undertaking* of a claim assists the *policyholder* in discharging his contractual obligation to do so (assisting in the performance); providing evidence in support of the claim or negotiating its settlement assists management of the claim (assisting in the administration).
- 5.7.5 G On the other hand, where a *person* does no more than advise a *policyholder* generally about making a claim or provide evidence in support of a claim, this is unlikely to amount to both assisting in the administration and performance. Similarly, the mere collection of premiums from *policyholders* is unlikely, without more, to amount to *assisting in the administration and performance of a contract of insurance*. The collection of premiums from customers or clients at the pre-contract stage, however, may amount to *arranging* (see

example in *PERG 5.15.4G* (Types of activity – are they regulated activities and, if so, why?)).

- 5.7.6 G Where a *person* receives funds on behalf of a *policyholder* in settlement of a claim, in the *FSA's* view, the act of receipt is likely to amount to assisting in the performance of a contract. By giving valid receipt, the *person* assists the *insurance undertaking* to discharge its contractual obligation to provide compensation to the *policyholder*. He may also be assisting the *policyholder* to discharge any obligations he may have under the contract to provide valid receipt of funds, upon settlement of a claim. Where a *person* provides valid receipt for funds received on behalf of the *policyholder*, he is also likely to be assisting in the administration of a *contract of insurance* (for example, making prior arrangements relating to transmission and receipt of payment).

Exclusions

- 5.7.7 G By article 39B of the *Regulated Activities Order* (Claims management on behalf of an insurer etc):
- (1) loss adjusting on behalf of a relevant insurer (see *PERG 5.7.8G*);
 - (2) expert appraisal; and
 - (3) managing claims for a relevant insurer;
- are also excluded from the *regulated activity of assisting in the administration and performance of a contract of insurance*. This is where the activity is carried on in the course of carrying on any profession or business (see also *PERG 5.14* (Exemptions)). In determining whether they are carrying on the *regulated activity of assisting in the administration and performance of a contract of insurance*, therefore, *persons* should consider whether they are acting on behalf of the relevant insurer and not the *policyholder*.
- 5.7.8 G A 'relevant insurer' for the purposes of article 39B means:
- (1) an *authorised person* who has *permission* for *effecting and carrying out contracts of insurance*; or
 - (2) a member of the Society of Lloyd's or the members of the Society of Lloyd's taken together; or
 - (3) an *EEA firm* that is an *insurer*; or
 - (4) a reinsurer, being a *person* whose main business consists of accepting risks ceded by a *person* falling under (1), (2) or (3) or a *person* who is established outside the *United Kingdom* and who carries on the activity of *effecting and carrying out contracts of insurance*.

So, a *person* whose activities are excluded under article 12 of the *Regulated Activities Order* (Breakdown insurance) will not be a relevant insurer for these purposes and any *person* who performs loss adjusting or claims management on behalf of such a *person* will not be able to use the exclusion in article 39B.

5.8 The regulated activities: advising on contracts of insurance

5.8.1 G Article 53 of the *Regulated Activities Order* (Advising on Investments) makes advising on *contracts of insurance* a *regulated activity*. This covers advice which is both:

- (1) given to a *person* in his capacity as an insured or potential insured, or as agent for an insured or a potential insured; and
- (2) advice on the merits of the insured or his agent:
 - (a) *buying, selling*, subscribing for or underwriting a particular *contract of insurance*; or
 - (b) exercising any right conferred by a *contract of insurance* to *buy, sell*, subscribe for or underwrite a *contract of insurance*.

5.8.2 G For advice to fall within article 53, it must:

- (1) relate to a particular *contract of insurance* (that is, one that a *person* may enter into);
- (2) be given to a *person* in his capacity as an investor or potential investor;
- (3) be advice (that is, not just information); and
- (4) relate to the merits of a *person buying, selling*, subscribing for or underwriting (or exercising any right to do so) a *contract of insurance* or rights to or interests in *life policies*.

5.8.3 G Each of these aspects is considered in greater detail in the table in *PERG 5.8.5G*. Where an activity is identified as not amounting to *advising on investments* it could still form part of another *regulated activity*. This will depend upon whether a *person's* activities, viewed as a whole, amount to *arranging*. Additionally, it should be borne in mind that the provision of advice or information may involve the communication of a *financial promotion* (see *PERG 8* (Financial promotion and related activities)).

Advice must relate to a particular contract of insurance

5.8.4 G Advice about *contracts of insurance* will come within the *regulated activity* in article 53 of the *Regulated Activities Order* only if it relates to a particular *contract of insurance*. So, generic or general advice will not fall under article 53. In particular:

- (1) advice would come within article 53 if it took the form of a recommendation that a *person* should *buy* the ABC Insurers motor insurance;
- (2) advice would not relate to a particular contract if it consists of a recommendation only that a *person* should take out insurance of a particular class without identifying any particular *insurance undertaking*, or with ABC Insurers provided that the kind of insurance is not specified (either expressly or by implication): a recommendation only that a *person* should *buy* insurance from ABC Insurers could amount to advice if a specific insurance *policy* would be implied from the context;
- (3) the table in *PERG 5.8.5G* identifies several typical recommendations and indicates whether they will be regarded as advice under article 53.

5.8.5 G Typical recommendations and whether they will be regulated as advice on contracts of insurance under article 53 of the *Regulated Activities Order*. This table belongs to *PERG 5.8.4G*

| Recommendation | Regulated under article 53 or not? |
|---|------------------------------------|
| I recommend you take the ABC Insurers motor insurance <i>policy</i> | Yes |
| I recommend that you take out the GHI Insurers life insurance <i>policy</i> | Yes |
| I recommend that you do not take out the ABC Insurers motor insurance <i>policy</i> | Yes |
| I recommend that you do not take out the GHI Insurers life insurance <i>policy</i> | Yes |
| I recommend that you take out either the ABC Insurers motor insurance <i>policy</i> or the DEF Insurers motor insurance <i>policy</i> | Yes |
| I recommend that you take out either the GHI Insurers life insurance <i>policy</i> or the JKL Insurers life insurance <i>policy</i> | Yes |
| I recommend that you take out | Possibly (depending on whether |

| Recommendation | Regulated under article 53 or not? |
|---|---|
| (or do not take out) insurance with ABC Insurers | or not the circumstances relating to the recommendation, including the range of possible products, is such that this amounts to an implied recommendation of a particular <i>policy</i>) |
| I recommend that you take out (or do not take out) contents insurance | No, unless a specific insurance <i>policy</i> is implied by the context |
| I recommend that you take out (or do not take out) life insurance | No, unless a specific insurance <i>policy</i> is implied by the context |

Advice given to a person in his capacity as an investor or potential investor

- 5.8.6 G For the purposes of article 53, advice must be given to a *person* in his capacity as an investor or potential investor (which, in the context of *contracts of insurance*, will mean as *policyholder* or potential *policyholder*). So, article 53 will not apply where advice is given to *persons* who receive it as:
- (1) an adviser who will use it only to inform advice given by him to others; or
 - (2) a journalist or broadcaster who will use it only for journalistic purposes.

- 5.8.7 G Advice will still be covered by article 53 even though it may not be given to any particular *policyholder* (for example, advice given in a periodical publication or on a website).

Advice or information

- 5.8.8 G In the FSA'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 facts or figures.
- 5.8.9 G In general terms, simply giving information, without making any comment or value judgement on its relevance to decisions which a *person* may make, is not advice. In this respect, it is irrelevant that a *person* may be providing information on a single *contract of insurance* or on two or more. This means that a *person* may provide information on a single *contract of insurance* without necessarily being regarded as giving advice on it. *PERG 5.8.11G* has *guidance*

on the circumstances in which information can assume the form of advice.

- 5.8.10 G In the case of article 53, information relating to *buying* or *selling contracts of insurance* may often involve one or more of the following:
- (1) an explanation of the terms and conditions of a *contract of insurance* whether given orally or in writing or by providing leaflets and brochures;
 - (2) a comparison of the features and benefits of one *contract of insurance* compared to another;
 - (3) the production of pre-purchase questions for a *person* to use in order to exclude options that would fail to meet his requirements; such questions may often go on to identify a range of *contracts of insurance* with characteristics that appear to meet the *person's* requirements and to which he might wish to give detailed consideration (pre-purchase questioning is considered in more detail in *PERG 5.8.15G* to *PERG 5.8.19G* (Pre-purchase questioning (including decision trees)));
 - (4) tables that compare the costs and other features of different *contracts of insurance*;
 - (5) leaflets or illustrations that help *persons* to decide which type of *contract of insurance* to take out; and
 - (6) the provision, in response to a request from a *person* who has identified the main features of the type of *contract of insurance* he seeks, of several leaflets together with an indication that all the *contracts of insurance* described in them have those features.
- 5.8.11 G In the *FSA's* opinion, however, such information is likely to take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. Examples of situations where information provided by a *person* (P) might take the form of advice are given below.
- (1) P may provide information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of a *person*. This may arise where P offers to provide information about *contracts of insurance* that contain features specified by the *person*, but then exercises discretion as to which complying *contract of insurance* to offer to that *person*.
 - (2) P may, as a result of going through the sales process, discuss the merits of one *contract of insurance* over another, resulting in advice to enter into a particular one. In contrast, advice on how to complete an application form, without an explicit or implicit recommendation on the merits of *buying* or *selling* the

contract of insurance whilst 'advice' in the general sense of the word, is not, in the view of the FSA, advice within the meaning of article 53. Such advice may, however, amount to *arranging* (for which see *PERG 5.6.1G* to *PERG 5.6.4G* (The regulated activities: arranging deals in, and making arrangements with a view to transactions in, contracts of insurance)).

Advice must relate to the merits (of buying or selling a contract of insurance)

- 5.8.12 G Advice under article 53 relates to the advantages and disadvantages of *buying, selling*, subscribing for or underwriting a particular *contract of insurance*. It is worth noting that, in this context, 'buying' and 'selling' are defined widely under article 3 of the *Regulated Activities Order* (Interpretation). 'Buying' includes acquiring for valuable consideration, and 'selling' includes surrendering, assigning or converting rights under a *contract of insurance*.
- 5.8.13 G The requirements imposed by the *IMD* (see *PERG 5.2.5G* (Approach to implementation of the *IMD*)) and the text of article 2.3 *IMD* in *PERG 5.16.1G* (article 2.3 of the Insurance Mediation Directive) are narrower than the scope of the *Regulated Activities Order* (see *PERG 5.2.7G* (Approach to implementation of the *IMD*)). This is that, unlike the *Regulated Activities Order*, they do not relate to the assignment of *contracts of insurance*. This is of relevance to, amongst others, *persons* involved in the 'second-hand' market for *contracts of insurance* such as traded endowment policies and certain viatical instruments (that is, arrangements by which a terminally ill person can obtain value from his *life policy*) (see also *PERG 5.6.12G* (Exclusion from article 25(2): transactions to which the arranger is a party)). *Persons* advising on or arranging assignments of these *contracts of insurance* are therefore potentially carrying on *regulated activities* although they may be able to take the benefit of article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) in certain circumstances (see *PERG 5.11.9G* to *PERG 5.11.12G* (Activities carried on in the course of a profession or non-investment business)).
- 5.8.14 G Generally speaking, advice on the merits of using a particular *insurance undertaking*, broker or adviser in their capacity as such, does not amount to advice for the purpose of article 53. It is not advice on the merits of *buying* or *selling* a particular *contract of insurance* (unless, in the circumstances, the advice amounts to an implied recommendation of a particular *policy*).

Pre-purchase questioning (including decision trees)

- 5.8.15 G Pre-purchase questioning involves putting a sequence of questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a *contract of insurance* or other product that meets his 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.

5.8.16 G A key issue for those *firms* proposing to use pre-purchase questioning is whether the specific questioning used may amount to advice. There are two main aspects:

- (1) advice must relate to a particular *contract of insurance* (see *PERG 5.8.4G* (Advice must relate to a particular contract of insurance)); and
- (2) the distinction between information and advice (see *PERG 5.8.8G* to *PERG 5.8.11G* (Advice or information)).

Whether or not pre-purchase questioning in any particular case is advising on *contracts of insurance* will depend on all the circumstances. The process may involve identifying one or more particular *contracts of insurance*. If so, to avoid advising on *contracts of insurance*, 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 his own choice of product which has particular features which the *person* regards as important. The questioner will need to avoid providing any judgement on the suitability of one or more products for that *person* and in this respect should have regard to the factors set out in *PERG 5.8.2G* to *PERG 5.8.4G* (Advice must relate to a particular contract of insurance) and the table in *PERG 5.8.5G*. See also *PERG 5.8.12G* to *PERG 5.8.14G* (Advice must relate to the merits (of buying or selling a contract of insurance)) for other matters that may be relevant.

5.8.17 G The potential for variation in the form, content and manner of pre-purchase questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, the amount of the cover). In the *FSA's* view, this does not itself amount to advising on *contracts of insurance*, if it involves the provision of information rather than advice. There are various possible scenarios, including the following:

- (1) the questioner may go on to identify one or more particular *contracts of insurance* which match features identified by the pre-purchase questioning; provided these are selected in a balanced and neutral way (for example, they identify all the matching *contracts of insurance* available without making a recommendation as to a particular one) this need not involve advising on *contracts of insurance*; and
- (2) the questioner may go on to advise a *person* on the merits of one particular *contract of insurance* over another; this would be advising on *contracts of insurance*.

5.8.18 G The second type of pre-purchase questioning involves providing questions and answers incorporating opinion, judgement or recommendation. There are various possible scenarios, including the

following:

- (1) the pre-purchase questioning may not lead to the identification of any particular *contract of insurance*; in this case, the questioner has provided advice, but it is generic advice and does not amount to advising on *contracts of insurance*; and
- (2) the pre-purchase questioning may lead to the identification of one or more particular *contracts of insurance*; the key issue then is whether the advice can be said to relate to a particular *contract of insurance* (see further *PERG 5.8.4G* (Advice must relate to a particular contract of insurance)).

5.8.19 G In the case of *PERG 5.8.18G(2)* and similar scenarios, the *FSA* considers that it is necessary to look at the process and outcome of pre-purchase questioning as a whole. It may be that the element of advice incorporated in the questioning can properly be viewed as generic advice if it were considered in isolation. But although the actual advice may be generic, the process has ended in identifying one or more particular *contracts of insurance*. The combination of the generic advice and the identification of a particular or several particular *contracts of insurance* to which it leads may well, in the *FSA's* view, cause the questioner to be advising on *contracts of insurance*. Factors that may be relevant in deciding whether the process involves advising on *contracts of insurance* may include:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the stage in the questioning at which the opinion is offered and is significant;
- (4) the role played by the questioner who guides a *person* through the pre-purchase questions;
- (5) the outcome of the questioning (whether particular *contracts of insurance* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (6) 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 his particular circumstances.

Medium used to give advice

5.8.20 G With the exception of:

- (1) periodicals, broadcasts and other news or information services

(see *PERG 5.8.24G* to *PERG 5.8.25G* (Exclusion: periodical publications, broadcasts and web-sites)); and

- (2) situations involving an overseas element (see, generally, *PERG 5.12* (Link between activities and the United Kingdom) and, in particular, *PERG 5.12.8G* (Where is insurance mediation carried on?));

the use of the medium itself to give advice should make no material difference to whether or not the advice is caught by article 53.

5.8.21 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 web-site; and
- (6) through the provision of an interactive software system.

5.8.22 G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problem. The same principles apply as with a paper version (see *PERG 5.8.15G* to *PERG 5.8.19G* (Pre-purchase questioning (including decision trees))).

5.8.23 G Advice in publications, broadcasts and web-sites is subject to a special regime (see *PERG 5.8.24G* (Exclusion: periodical publications, broadcasts and web-sites) and *PERG 7* (Periodical publications, news services and broadcasts: applications for certification)).

Exclusion: periodical publications, broadcasts and web-sites

5.8.24 G An important exclusion from advising on *contracts of insurance* relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies if the principal purpose of the publication or service taken as a whole (including any advertising content) is neither to give advice of a kind mentioned in article 53 (Advising on investments) or article 53A (Advising on regulated mortgage activities) nor to lead or enable *persons* to *buy, sell*, subscribe for or underwrite *relevant investments* or, as borrower, to enter into or vary the terms of a *regulated mortgage contract*.

5.8.25 G This is explained in greater detail, together with the provisions on the granting of certificates by the *FSA* on the application of the proprietor of a periodical publication or news or information service or broadcast, in *PERG 7* (Periodical publications, news services and

broadcasts: applications for certification).

Other exclusions

- 5.8.26 G The *Regulated Activities Order* contains other limited exclusions which have the effect of preventing certain activities from amounting to advice on *contracts of insurance*. These are referred to in *PERG* 5.11.8G (Exclusions applying to more than one regulated activity) to *PERG* 5.11.16G (Large risks).
- 5.9 The Regulated Activities: agreeing to carry on a regulated activity
- 5.9.1 G Under article 64 of the *Regulated Activities Order* (Agreeing to carry on specified kinds of activity), in addition to the *regulated activities* of:
- (1) *dealing in investments as agent*;
 - (2) *arranging (bringing about) deals in investments*;
 - (3) *making arrangements with a view to transactions in investments*;
 - (4) *assisting in the administration and performance of a contract of insurance*; and
 - (5) *advising on investments*;
- agreeing to do any of these things is itself a *regulated activity*. In the FSA's opinion, this activity concerns the entering into of a legally binding agreement to provide the services to which the agreement relates. So, a *person* is not carrying on a *regulated activity* under article 64 merely because he makes an offer to do so.
- 5.9.2 G To the extent that an exclusion applies in relation to a *regulated activity*, 'agreeing' to carry on an activity within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order* (Specified activities: general). So, for example, a vet can, without carrying on a *regulated activity*, enter into an agreement with an *insurance undertaking* to distribute marketing literature provided that the vet can rely on the exclusion in article 72C (Provision of information on an incidental basis) in relation to the activity of distributing the literature (see also *PERG* 5.6.6G and *PERG* 5.6.9G (Exclusion: article 72C (Provision of information on an incidental basis))). However, to be able to rely on the exclusion in article 72C, the vet must not be viewed as providing information to the *insurance undertaking*. More specifically, an unauthorised *introducer* can enter into standing arrangements with *insurance undertakings* or brokers to make introductions, provided that these arrangements do not envisage subsequent provision of information to these *insurance undertakings* or brokers with a view to *arranging (bringing about) deals in investments* or *making arrangements with a view to transactions in investments*.

5.10 Renewals

5.10.1 G It must be emphasised that activities which concern invitations to renew *policies* and the subsequent effecting of renewal of *policies* are likely to fall within *insurance mediation activity*. Those considering the need for *authorisation* or variation of their *permissions* will wish to consider whether a process of tacit renewal operates: that is, where a *policyholder* need take no action if he wishes to maintain his insurance cover by having his *policy* 'renewed'. This process will typically result in the issue of a new *contract of insurance*, not an extension of the period of the existing one. It may involve the activities of *advising on investments, arranging and dealing in investments as agent*. More specifically, preparing a 'tacit renewal' letter on behalf of an *insurance undertaking* is likely to amount to *arranging*. Where it contains a recommendation to renew existing cover this is likely to constitute *advising on investments* (under article 53 of the *Regulated Activities Order*). If the contract takes effect on the date stipulated in the renewal letter, a contract is concluded with the effect that the letter writer may be *dealing in investments as agent*. The process may also involve a *regulated activity* under article 64 (Agreeing to carry on a regulated activity).

5.11 Other aspects of exclusions

5.11.1 G This part of the *guidance* deals with:

- (1) exclusions which are disapplied where the *regulated activity* relates to *contracts of insurance*;
- (2) exclusions which are disapplied where a *person* carries on *insurance mediation*; and
- (3) the following exclusions applying to more than one *regulated activity*:
 - (a) activities carried on in the course of a profession or non-investment business (article 67 (Activities carried on in the course of a profession or non-investment business));
 - (b) activities carried on by a provider of relevant goods or services (article 72B (Activities carried on by a provider of relevant goods or services)); and
 - (c) large risks (article 72D (Large risks contracts where risk situated outside the EEA)).

5.11.2 G There are a number of 'pre-*IMD*' exclusions that have the effect of restricting the scope of the *regulated activities* referred to in this *guidance*. Several of these are disapplied or modified as part of implementation of the *IMD*.

Exclusions disapplied where activities relate to contracts of insurance

5.11.3 G The exclusions outlined in (1) to (7) were available to intermediaries (and in some cases *insurance undertakings*) acting in connection with

life policies before 14 January 2005. In essence, however, the following exclusions do not apply if they concern transactions relating to *contracts of insurance*:

- (1) *dealing in investments as agent* with or through *authorised persons* (article 22 of the Regulated Activities Order (Deals with or through authorised persons));
- (2) *arranging* transactions to which the *arranger* is to be a party, where the *arranger* enters into or is to enter into the transaction:
 - (a) as agent for another *person*; or
 - (b) as *principal*, unless the *arranger* is the only *policyholder* or will, as a result of the transaction, become the only *policyholder* (article 28 (Arranging transactions to which the arranger is a party));
- (3) *arranging deals* with or through *authorised persons* (article 29 (Arranging deals with or through authorised persons));
- (4) *introducing* (article 33 (Introducing));
- (5) activities carried on in connection with the sale of goods and supply of services (article 68 (Activities carried on in connection with the sale of goods and supply of services));
- (6) *groups and joint enterprises* (article 69 (Groups and joint enterprises)) (see *PERG 5.11.6G*); and
- (7) activities carried on in connection with the sale of a *body corporate* (article 70 (Activities carried on in connection with the sale of a body corporate)).

5.11.4 G The restrictions placed on the exclusions listed in *PERG 5.11.3G* on 14 January 2005 have the following effects.

- (1) *Unauthorised persons* who:
 - (a) introduce clients or customers to an independent financial adviser with a view to a transaction; or
 - (b) deal as agent on behalf of their clients or customers with or through an *authorised person*; or
 - (c) arrange for their clients or customers to enter into a transaction with or through an *authorised person*;will not be able to rely on articles 29 or 33 to avoid the need for *authorisation* where the transaction relates to a *contract of insurance*.
- (2) *Unauthorised persons* may, however, be able to rely on the exclusion for the provision of information on an incidental basis in article 72C to continue to avoid the need for

authorisation (see *PERG 5.6.5G* to *PERG 5.6.9G* (Exclusion: article 72C (Provision of information on an incidental basis))).

- (3) *Authorised persons* who themselves introduce clients or customers to others for the purposes of *buying* or *selling* any kind of *contract of insurance* are likely to require a variation of their *Part IV permission*, as neither article 33 nor generally, article 72C (see *PERG 5.6.5G* to *PERG 5.6.9G* (Exclusion: article 72C (Provision of information on an incidental basis))) will apply where this activity amounts to *arranging*.

5.11.5 G *Insurance undertakings* are referred to *PRU 9.4* (Insurance undertakings and mortgage lenders using insurance or mortgage mediation services) as regards their obligations relating to the use of intermediaries generally.

- 5.11.6 G (1) The removal of the exclusion for *groups* and *joint enterprises* in article 69 of the *Regulated Activities Order* (Groups and joint enterprises) may have implications for a *company* providing services for:
- (a) other members of its *group*; or
 - (b) other participants in a *joint enterprise* of which it is a participant.
- (2) Such *companies* might typically provide risk or treasury management or administration services which may include *regulated activities* relating to a *contract of insurance*. If so, such companies will need *authorisation* or exemption if they conduct the activities by way of business (see *PERG 5.4* (The business test) generally and (3) and (4)). This is unless another exclusion applies.
- (3) In the *FSA's* view, particular issues arise in applying the by way of business test to group *companies*. Recital 11 of the *Insurance Mediation Directive* states that the Directive should apply to *persons* whose activity consists in providing insurance mediation services to third parties for remuneration. This suggests that the Directive is intended to apply only where the service is provided to a third party. The expression 'third party' is not defined in the Directive. The *FSA* considers that a group *company* that is providing services solely for the benefit of other group *companies* would not normally be regarded as providing services to a third party. The *FSA* also considers that, as a result, a group *company* providing services solely for the benefit of other group *companies* should not normally be regarded as satisfying the requirement that it be remunerated for providing insurance mediation services to third parties. Were a group *company* to be remunerated other than by another group *company*, however, the situation may be different. For example, if the group *company* receives commission from an insurer or broker, the fact would tend to suggest that the

company has been rewarded for providing a service to the insurer or broker. In the *FSA's* view, it is appropriate to apply this principle to a *group* as defined in section 421 (Group) of the *Act*.

- (4) The *FSA* considers that similar principles to those applied to a *group company* in (2) may be applied to the participants in a *joint enterprise*. This would be where one participant in the *joint enterprise* is providing services solely for the benefit of another participant and for the purposes of the *joint enterprise* and who provides insurance mediation services to one or more participants for the purposes of or in connection with the *joint enterprise*.

Exclusions disapplied in connection with insurance mediation

5.11.7 G Article 4(4A) of the *Regulated Activities Order* (Specified activities: general) disapplies certain exclusions where a *person*, for remuneration, takes up or pursues *insurance mediation* (as defined in article 2.3 of the *IMD* (see *PERG 5.2.5G* (Approach to implementation of the *IMD*) and *PERG 5.16.2G* (Text of article 2.3 of the *Insurance Mediation Directive*)) in relation to a risk or commitment located in an *EEA* state. The relevant exclusions which are disapplied are:

- (1) arrangements in connection with lending on the security of insurance policies (article 30 of the *Regulated Activities Order* (Arranging transactions in connection with lending on the security of insurance policies));
- (2) activities carried on by trustees, nominees and personal representatives (article 66 (Trustees, nominees and personal representatives)); and
- (3) activities carried on in the course of a profession or non-investment business (article 67 (Activities carried on in the course of a profession or non-investment business)) (This exclusion is considered in further detail in *PERG 5.11.9G* to *PERG 5.11.12G* (Activities carried on in the course of a profession or non-investment business)).

Exclusions applying to more than one regulated activity

5.11.8 G Chapter XVII of the *Regulated Activities Order* (Exclusions applying to several specified kinds of activity) contains various exclusions applying to several kinds of activity. Three exclusions of relevance in relation to *contracts of insurance* are dealt with in this section and a fourth, *overseas persons*, in *PERG 5.12* (Link between activities and the United Kingdom).

Activities carried on in the course of a profession or non-investment business

5.11.9 G Article 67 excludes from the activities of *dealing as agent, arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments, assisting in the administration and performance of a contract of insurance and advising on investments*, any activity which:

- (1) is carried on in the course of carrying on any profession or business which does not otherwise consist of the carrying on of *regulated activities* in the *United Kingdom*; and
- (2) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business.

In the *FSA's* view, the fact that a *person* may carry on *regulated activities* in the course of the carrying on of a profession or business does not, of itself, mean that the profession or business consists of *regulated activities*. This is provided that the main focus of the profession or business does not involve *regulated activities* and that the *regulated activities* that are carried on arise in a way that is incidental and complementary to the carrying on of the profession or business.

5.11.10 G Although the article 67 exclusion is disapplied (by article 4(4A) of the *Regulated Activities Order* (Specified investments: general)) when a *person* takes up or pursues *insurance mediation or reinsurance mediation* as defined by articles 2.3 and 2.5 of the *IMD*, there may be cases where a *person* is not carrying on activities that amount to *insurance mediation*. For example, where a *person's* activities amount simply to the provision of information on an incidental basis in the context of another professional activity, these may fall outside the scope of article 2.3 of the *IMD* (see *PERG* 5.16.2G (article 2.3 of the Insurance Mediation Directive)) and the exclusion in article 67 may then operate to exclude these activities. Also, it is possible that a professional *person's* activities may not amount to a *regulated activity* at all. For example, a doctor who provides a medical report to an *insurer* may be regarded as making arrangements with a view to providing an expert medical opinion rather than with a view to transactions in *contracts of insurance*. In such cases, article 67 will not be needed.

5.11.11 G Article 67 may also apply to activities relating to assignments of insurance *policies*, as, in the *FSA's* view, article 2.3 of the *IMD* applies essentially to the creation of new *contracts of insurance* and not the assignment of rights under existing *policies*. As such, where a solicitor or licensed conveyancer arranges an assignment of a *contract of insurance*, the exclusion in article 67 remains of potential application. For similar reasons, trustees advising on or arranging assignments of *contracts of insurance* may, in certain circumstances, be able to rely on the exclusions in article 66 of the *Regulated Activities Order*.

- 5.11.12 G For article 67 to apply in these cases, in addition to *PERG* 5.11.9G(1) and (2), the activity in question must not be remunerated separately from other services (article 67(2) of the *Regulated Activities Order*).

Activities carried on by a provider of relevant goods or services

- 5.11.13 G Article 72B (see also *PERG* 5.3.7G (Connected contracts of insurance)) may be of relevance to *persons* who supply non-motor goods or provide services related to travel in the course of carrying on a profession or business which does not otherwise consist of carrying on *regulated activities*. In the *FSA*'s view, the fact that a *person* may carry on *regulated activities* in the course of the carrying on of a profession or business does not, of itself, mean that the profession or business consists of *regulated activities*. This is provided that the main focus of the profession or business does not involve *regulated activities* and that the *regulated activities* that are carried on arise in a way that is incidental and complementary to the carrying on of the profession or business. For example, a travel agent might carry on *insurance mediation activities* in relation to some *contracts of insurance* that satisfy the conditions of the article 72B and some that do not. The former contracts will be excluded from regulation even though the travel agent must seek *authorisation* or become an *appointed representative* to be permitted to sell the latter contracts. The exclusion applies to *insurance mediation activities* when carried on in relation to 'connected contracts of insurance'. In broad terms, a 'connected contract of insurance' is a *contract of insurance* which:

- (1) is not a contract of long-term insurance (as defined by article 3 of the *Regulated Activities Order* (Interpretation));
- (2) has a total duration (including rights to renewal) of five years or less;
- (3) has an annual premium (or the equivalent of annual premium) of €500 or less;
- (4) covers the risk of:
 - (a) breakdown, loss of, or damage to, non-motor goods supplied by the provider; or
 - (b) damage to, or loss of, baggage and other risks linked to travel booked with the provider ('travel risks');
- (5) does not cover any liability risks (except, in the case of a contract which covers travel risks, where the cover is ancillary to the main cover provided by the contract);
- (6) is complementary to the non-motor goods being supplied or service being provided by the provider; and
- (7) is of such a nature that the only information that a *person* requires in order to carry on one of the *insurance mediation*

activities is the cover provided by the contract.

- 5.11.14 G In the *FSA's* view, the liability risks referred to in *PERG* 5.11.13G(5) cover risks in relation to liabilities that the *policyholder* might have to others (that is, third party claims). Many *policies* will provide this sort of cover and so fall outside the scope of the exclusion. For example, a *policy* that covers the cost of unauthorised calls made when a mobile telephone is stolen includes 'liability risks' and would not be a 'connected contract of insurance'. By contrast, travel *policies* which provide cover in respect of the *policyholder's* personal liability while travelling may fall within the exclusion by virtue of *PERG* 5.11.13G(5), where sold as part of a package by travel agents and other providers of services related to travel.
- 5.11.15 G In the *FSA's* view, the condition in *PERG* 5.11.13G(7) is likely to be satisfied where the *insurance mediation activities* relate to a standard form *contract of insurance*, the terms of which (other than the cost of the premium) are not subject to negotiation.

Large risks

- 5.11.16 G Article 72D (Large risks contracts where risk situated outside the EEA) provides an exclusion for large risks situated outside the *EEA*. Broadly speaking, these are risks relating to:
- (1) railway rolling stock, aircraft, ships, goods in transit, aircraft liability and shipping liability;
 - (2) credit and suretyship where relating to the *policyholder's* commercial or professional liability;
 - (3) land vehicles, fire and natural forces, property damage, motor vehicle liability where the *policyholder* is a business of a certain size.

For a fuller definition of *contracts of large risks* see the definition in the *Glossary*.

5.12 Link between activities and the United Kingdom

Introduction

- 5.12.1 G Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But, when there is a cross-border element, for example because a *customer* is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may need careful consideration. *PERG* 5.15.8G (Flow chart: am I carrying on regulated activities in the United Kingdom?) has a flow chart setting out the questions a *person* needs to consider in determining whether or not his *regulated*

activities are carried on 'in the *United Kingdom*'.

- 5.12.2 G Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the *Act* that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the *Act*) (see *PERG* 8 (Financial promotion and related activities)), and on giving the impression that a *person* is *authorised* (section 24 (False claims to be authorised or exempt)).
- 5.12.3 G The table in *PERG* 5.12.4G is a very simplified summary of territorial issues relating to overseas insurance intermediaries carrying on the business of *insurance mediation activities* in or into the *United Kingdom* for remuneration.
- 5.12.4 G Table Territorial issues relating to overseas insurance intermediaries carrying on *insurance mediation activities* in or into the *United Kingdom*

| | Needs Part IV permission | Schedule 3 EEA passport rights available | Overseas persons exclusion available |
|--|--|--|--------------------------------------|
| Registered <i>EEA</i> -based intermediary with <i>UK</i> branch (registered office or head office in another <i>EEA State</i>) | No | Yes | No |
| Registered <i>EEA</i> -based intermediary with no <i>UK</i> branch providing <i>cross-border</i> services | No | Yes | Potentially available [see Note] |
| Third country intermediary operating from branch in the <i>UK</i> | Yes | No | No |
| Third country intermediary providing services in (or into) the <i>UK</i> | Yes unless <i>overseas persons</i> exclusion applies | No | Potentially available |
| This does not, however, affect the <i>firm's</i> authorisation under Schedule 3 to the <i>Act</i> (see <i>PERG</i> 5.12.9G to <i>PERG</i> 5.12.10G (Passporting)). | | | |

Where are insurance mediation activities carried on?

- 5.12.5 G *Persons* carrying on *insurance mediation activities* from a registered office or head office in the *United Kingdom* will clearly be carrying on *regulated activities* in the *United Kingdom*. However, a *person* may be considered to be carrying on *regulated activities* in the *United Kingdom* even where not carrying on the activity from a registered office or head office in the *United Kingdom*. This is explained further in *PERG 5.12.6G* to *PERG 5.12.8G*.
- 5.12.6 G In determining the location of an activity, and hence whether it is carried on in the *United Kingdom*, various factors need to be taken into account in turn, notably:
- (1) section 418 of the *Act* (Carrying on regulated activities in the *United Kingdom*);
 - (2) the nature of the activity; and
 - (3) the *overseas persons* exclusion (see *PERG 5.12.9G* to *PERG 5.12.10G* (*Overseas persons*)).
- 5.12.7 G Section 418 of the *Act* extends the meaning that 'carry on regulated activity in the *United Kingdom*' would normally have by setting out additional cases in which a *person* who would not otherwise be regarded as carrying on the activity in the *United Kingdom* is to be regarded as doing so. Each of the following cases thus amounts to carrying on a *regulated activity* in the *United Kingdom*:
- (1) where a *UK-based person* carries on a *regulated activity* in another *EEA State* in the exercise of rights under a *Single Market Directive*;
 - (2) where a *UK-based person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*;
 - (3) where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment maintained by him in the *United Kingdom*; and
 - (4) where an *electronic commerce activity* is carried on with or for a *person* in an *EEA State* from an establishment in the *United Kingdom*.

In each of these cases it is irrelevant where the *person* with whom the activity is carried on is situated.

- 5.12.8 G Otherwise, where the cases in *PERG 5.12.7G* (1) to (4) do not apply, it is necessary to consider further the nature of the activity in order to determine where *insurance mediation* is carried on. *Persons* that arrange *contracts of insurance* will usually be considered as carrying on the activity of *arranging* in the location where these activities take

place. As for dealing activities, the location of the activities will depend on factors such as where the acceptance takes place, which in turn will depend on the method of communication used. In the case of advising, this is generally considered to take place where the advice is received.

Overseas persons

5.12.9 G Article 72 of the *Regulated Activities Order* (Overseas persons) provides a potential exclusion for *persons* with no permanent place of business in the *United Kingdom* from which *regulated activities* are conducted or offers to conduct *regulated activities* are made. Where these *persons* carry on *insurance mediation activities* in the *United Kingdom*, they may be able to take advantage of the exclusions in article 72 of the *Regulated Activities Order*. In general terms, these apply where the *overseas person* either:

- (1) deals or arranges deals with or through *authorised* or *exempt persons* only; or
- (2) enters into deals with (or on behalf of) a *person* in the *United Kingdom* or gives advice on investments in the *United Kingdom*, in each case as a result of a 'legitimate approach'.

A 'legitimate approach', for the purposes of (2), is one that results from an unsolicited approach by a *person* (for example, a *customer*) or otherwise is a result of an approach by, or on behalf of, an *overseas person* which complies with the restriction on *financial promotion* under section 21 of the *Act* (see *PERG* 8.3.1G (Financial promotion)).

5.12.10 G The *overseas person* exclusion is available to *persons* who do not have a permanent place of business in the *United Kingdom* and so is of relevance to third country intermediaries (that is, non *EEA*-based intermediaries) who carry on *insurance mediation activities* in, or into, the *United Kingdom* (for example with or through *authorised* insurance brokers and insurance *undertakings* operating in the Lloyd's market).

How should persons be authorised?

5.12.11 G *UK*-based *persons* must obtain *Part IV permission* in relation to their *insurance mediation activities* in the *United Kingdom* as one of the following:

- (1) a *body corporate* whose registered office is situated in the *United Kingdom*; or
- (2) a *partnership* or unincorporated association whose head office is situated in the *United Kingdom*; or
- (3) an individual (that is, a sole trader) whose residence is situated in the *United Kingdom*.

The *United Kingdom* will, in each case, be the *Home State* for the purposes of the *IMD* for insurance or reinsurance intermediaries (see further in connection with the *E-Commerce Directive* in *PERG* 5.12.15G to *PERG* 5.12.17G (E-Commerce Directive)).

- 5.12.12 G Non-UK-based *persons* wishing to carry on *insurance mediation activities* in the *United Kingdom* must:
- (1) qualify for *authorisation* by exercising passport rights (see section 31 (Authorised persons) and schedule 3 (EEA passport rights) to the Act and *PERG* 5.12.13G to *PERG* 5.12.14G (Passporting)); or
 - (2) make use of the *overseas persons* exclusion (which then has the effect that activities are deemed not to be *regulated activities* carried on in the *United Kingdom*); or
 - (3) seek *Part IV permission*.

Passporting

- 5.12.13 G The effect of the *IMD* is that any *EEA*-based insurance intermediaries must first be registered in their home *EEA State* before carrying on *insurance mediation* in that *EEA State* or other *EEA States*. For these purposes, an *EEA*-based insurance intermediary is either:
- (1) a legal *person* with its registered office or head office in an *EEA State* other than the *United Kingdom*; or
 - (2) a natural *person* resident in an *EEA State* other than the *United Kingdom*.

Registered *EEA*-based insurance intermediaries wishing to establish branches in the *United Kingdom* or provide services on a cross-border basis into the *United Kingdom* can do so by notifying their *Home State regulator* which in turn notifies the *FSA*. This enables the intermediary to acquire passporting rights under Schedule 3 to the Act (EEA passporting rights) (see Schedule 3(13) and (14) of the Act as amended by the Insurance Mediation Directive (Miscellaneous Amendments) Regulations 2003). *AUTH* 5 (Qualifying for authorisation under the Act) has general *guidance* on the exercise of passporting rights by *EEA firms*.

- 5.12.14 G On the other hand, non-*EEA*-based insurance intermediaries wishing to establish a branch in the *UK* for the purpose of carrying on *insurance mediation activities* may only do so with *Part IV permission*.

E-Commerce Directive

- 5.12.15 G The *E-Commerce Directive* removes restrictions on the cross-border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose

certain requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* defines an e-commerce service (termed an *information society service*) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television. Further *guidance* is contained in *ECO*.

5.12.16 G The *E-Commerce Directive* does not remove the *IMD* requirement for *persons* taking up or pursuing *insurance mediation* for remuneration to be registered in their *Home State*. Nor does it remove the requirement for *EEA*-based intermediaries to acquire passporting rights in order to establish branches in the *United Kingdom* (see *PERG* 5.12.7G (Where is insurance mediation carried on?) in relation to *electronic commerce activity* carried on from an establishment in the *United Kingdom*) or provide services on a cross-border basis into the *United Kingdom* where the relevant activity is carried on in the *United Kingdom*. An example of *electronic commerce activity* provided on a cross-border basis into the *United Kingdom* could be a recommendation in a (solicited) e-mail from an *EEA*-based intermediary to a *UK*-based customer to *buy* a particular *contract of insurance*.

5.12.17 G Put shortly, the *E-Commerce Directive* relates to services provided into the *United Kingdom* from other *EEA States* and from the *United Kingdom* into other Member States. In broad terms, such cross-border insurance mediation services provided by an *EEA firm* into the *United Kingdom* (via *electronic commerce activity* or distance means) will generally be subject to *IMD* registration in, and conduct of business regulation of, the intermediary's *EEA State* of origin. By contrast, insurance mediation services provided in the *United Kingdom* will be subject to *UK* conduct of business regulation, although the requirement for registration will again depend upon the intermediary's *EEA State* of origin.

5.13 Appointed representatives

What is an appointed representative?

5.13.1 G Section 39 of the *Act* (Exemption of appointed representatives) exempts *appointed representatives* from the need to obtain *authorisation*. An *appointed representative* is a *person* who is party to a contract with an *authorised person* which permits or requires him to carry on certain *regulated activities* (see *Glossary* for full definition). *SUP* 12 (Appointed representatives) contains *rules* and *guidance* relating to *appointed representatives*.

5.13.2 G A *person* who is an *authorised person* cannot be an *appointed representative* (see section 39(1) of the *Act* (Exemption of appointed representatives)).

Business for which an appointed representative is exempt

- 5.13.3 G An *appointed representative* can carry on only those *regulated activities* which are specified in the *Appointed Representatives Regulations*. The *regulated activities* set out in the table in PERG 5.13.4G are included in those regulations. As set out in the table, the *insurance mediation activities* that can be carried on by an *appointed representative* differ depending on the type of *contracts of insurance* in relation to which the activities are carried on.
- 5.13.4 G Insurance mediation activities able to be carried on by an appointed representative. This table belongs to PERG 5.13.3G.

| Type of contract of insurance | Regulated activities an appointed representative can carry on |
|-----------------------------------|---|
| <i>General insurance contract</i> | <ul style="list-style-type: none"> • <i>dealing in investments as agent;</i> • <i>arranging;</i> • <i>assisting in the administration and performance of a contract of insurance;</i> • <i>advising on investments;</i> and • <i>agreeing to carry on these regulated activities.</i> |
| <i>Pure protection contract</i> | <ul style="list-style-type: none"> • <i>dealing in investments as agent (but only where the contract is not a long-term care insurance contract);</i> • <i>arranging;</i> • <i>assisting in the administration and performance of a contract of insurance;</i> • <i>advising on investments;</i> and • <i>agreeing to carry on these regulated activities.</i> |
| <i>Life policy</i> | <ul style="list-style-type: none"> • <i>arranging;</i> • <i>assisting in the administration and performance of a contract of insurance;</i> • <i>advising on investments;</i> and • <i>agreeing to carry on these regulated activities</i> |

Persons who are not already appointed representatives

- 5.13.5 G A *person* who is not already an *appointed representative* may wish to

become one in relation to the *regulated activities* specified in the *Appointed Representatives Regulations* (see table in *PERG 5.13.4G*). If so, he must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities* and who accepts responsibility for the *appointed representative's* actions when acting for him. *SUP 12.4* (What must a firm do when it appoints an appointed representative?) and *SUP 12.5* (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made. In particular, an *appointed representative* will not be able to commence an *insurance mediation activity* until he is included on the *FSA Register* for such activities.

Persons who are already appointed representatives

- 5.13.6 G Where a *person* is already an *appointed representative* and he proposes to carry on any *insurance mediation activities*, he will need to consider the following matters.
- (1) He must become *authorised* if his proposed *insurance mediation activities* include activities that do not fall within the table in *PERG 5.13.4G* (for example, *dealing as agent in pure protection contracts*) and he wishes to carry on these activities. The *Act* does not permit any *person* to be exempt for some activities and *authorised* for others. He will, therefore, need to apply for *permission* to cover all the *regulated activities* that he proposes to carry on.
 - (2) If he proposes to carry on other *regulated activities* specified in the *Appointed Representatives Regulations* in relation to *contracts of insurance* (see the table in *PERG 5.13.4G*), he may be able to do so as an *appointed representative* bearing in mind the following.
 - (a) He will need to be appointed by an *authorised person* prepared to accept responsibility for his *insurance mediation activities* when acting for him. The *authorised person* must have *permission* to carry on these *regulated activities*.
 - (b) If these *insurance mediation activities* are to be carried on for the same *authorised person* who has already appointed him for his other *regulated activities*, the contract between them will need to be amended to reflect the additional activities. Other amendments to the contract will be required (see *SUP 12.5.6AR*).
 - (c) The effect of amendments to the *Appointed Representatives Regulations* is that an *appointed representative* cannot commence an *insurance mediation activity* until he is included on the *FSA Register* as carrying on such activities.

- (d) An *appointed representative* would be entitled to have more than one *principal* subject to certain restrictions. In relation to *non-investment insurance contracts (general insurance contracts and pure protection contracts)*, an *appointed representative* may have an unlimited number of *principals*. In relation to *regulated mortgage contracts and designated investment business*, an *appointed representative* is limited in the number of *principals* he may have. In any case where an *appointed representative* has multiple *principals*, those *principals* are required to enter into a multiple-*principal* agreement (see SUP 12.4.5DR to SUP 12.4.5GG (Appointment of an appointed representative (other than an introducer appointed representative))).
- (e) If the activities of the *appointed representative* are limited to introducing, he should consider the specific *Handbook* provisions relating to *introducer appointed representatives* (see SUP 12 (What must a firm do when it appoints an appointed representative?)).

5.14 Exemptions

Professionals

- 5.14.1 G *Professional firms* (broadly firms of solicitors, accountants and actuaries) may carry on *insurance mediation activities* in the course of their professional activities. *Exempt professional firms* carrying on *insurance mediation activities* may continue to be able to use the *Part XX exemption* to avoid any need for *authorisation*. *PROF 2* (Status of exempt professional firm) contains *guidance* on the *Part XX exemption*. They will, however, need to be shown on the *FSA Register* as carrying on *insurance mediation activities*, in order to benefit from this exemption. The task of registration is the responsibility of the *designated professional bodies* who will need to inform the *FSA* both of member firms carrying on *insurance mediation activities* and individuals within firms' management responsible for these activities.
- 5.14.2 G *Professional firms* with practices that involve acting for claimants in litigation against *insurance undertakings* are likely to be carrying on the *regulated activity of assisting in the administration and performance of a contract of insurance*. *Exempt professional firms* whose practices contain a material element of such activity should consider whether they can continue to take advantage of the *Part XX exemption* to avoid any need for *authorisation*, having regard to the relevant provisions of the *Act*, in particular section 327 (Exemption from the general prohibition) and the *guidance* in *PROF 2.1.14G* (Exempt regulated activities).
- 5.14.3 G *Professional firms* should be aware of the disapplication of the exclusions for trustees (article 66) and activities carried on in the

course of a profession or non-investment business (article 67) outlined in *PERG 5.11.7G* (Exclusions disapplied in connection with insurance mediation) where their activities would amount to *insurance mediation*. Where they do not, they will still be able to rely upon article 67. Otherwise, the *Nonexempt Activities Order* imposes limitations on the extent to which *professional firms* can give advice to individuals. In particular, a *professional firm* cannot recommend to a *private client* that he *buy a life policy*, unless he is endorsing a corresponding recommendation given to the *client*. The recommendation he endorses must be one given by an *authorised person* permitted to advise on *life policies*, or an *exempt person* for these purposes. No such restrictions apply, however, in relation to *contracts of insurance* other than *life policies*.

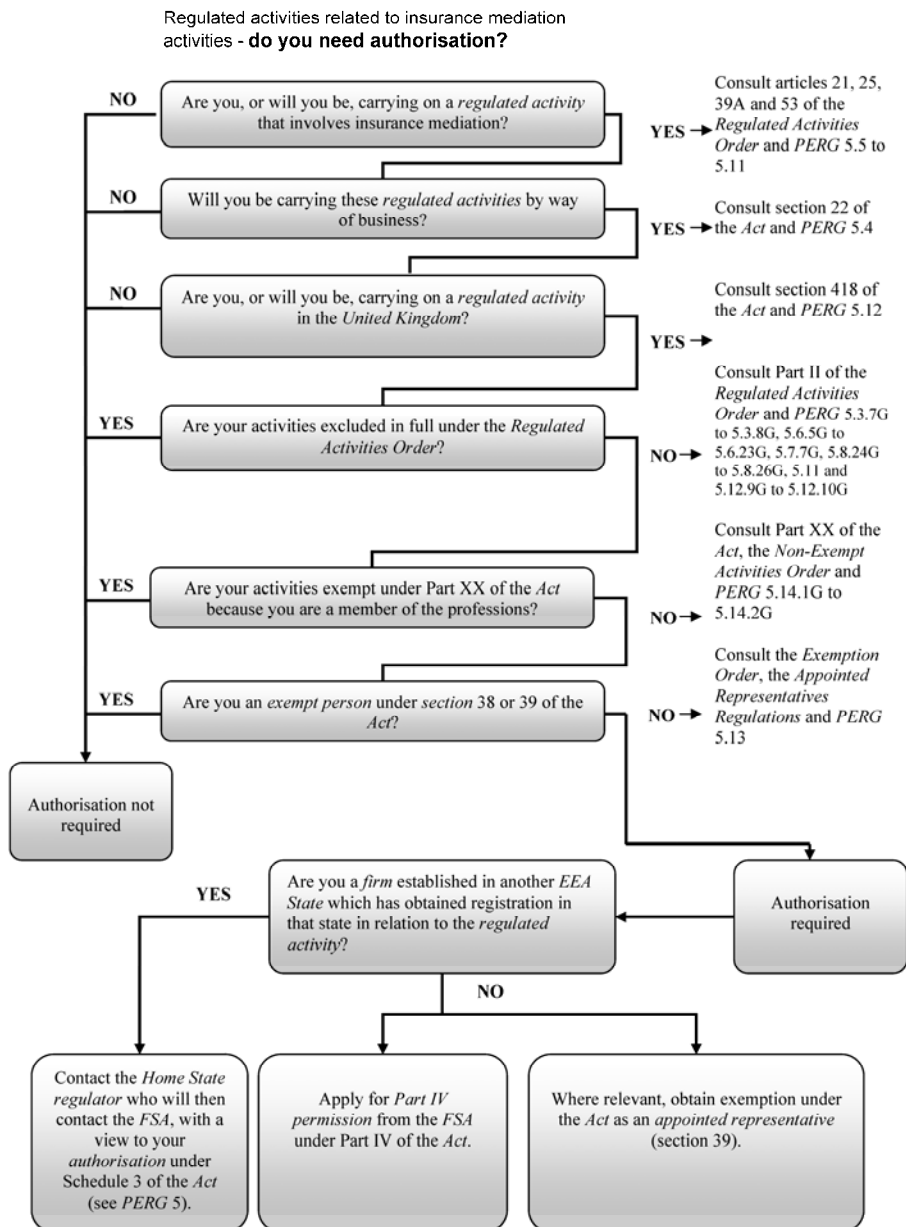
- 5.14.4 G As indicated in *PERG 5.6.8G*, the article 72C exclusion (Provision of information on an incidental basis) is potentially available to *unauthorised professional firms* including *exempt professional firms*. This may be relevant to *professional firms* arranging *contracts of insurance* for *clients* on an individual basis.

Other exemptions

- 5.14.5 G In addition to certain named *persons* exempted by the *Exemption Order* from the need to obtain *authorisation*, the following bodies are exempt in relation to *insurance mediation activities* that do not relate to *life policies*:
- (1) local authorities but not their subsidiaries;
 - (2) registered social landlords in England and Wales within the meaning of Part I of the Housing Act 1996 but not their subsidiaries;
 - (3) registered social landlords in Scotland within the meaning of the Housing (Scotland) Act 2001 but not their subsidiaries;
 - (4) the Housing Corporation;
 - (5) Scottish Homes; and
 - (6) The Northern Ireland Housing Executive.

5.15 Illustrative tables

- 5.15.1 G This flow chart sets out the matters a *person* will need to consider to see if he will need *authorisation* for carrying on *insurance mediation activities*. It is referred to in *PERG 5.2.3G* (Questions to be considered to decide if authorisation is required).
- 5.15.2 G Flow chart: regulated activities related to insurance mediation activities – do you need authorisation?



5.15.3 G The table in PERG 5.15.4G is designed as a short, user-friendly guide but should be read in conjunction with the relevant sections of the text of this guidance. It is not a substitute for consulting the text of this guidance or seeking professional advice as appropriate (see PERG 5.1.4G to PERG 5.1.6G on the effect of this guidance). References in this table to articles are to articles of the Regulated Activities Order. In this table, it is assumed that each of the activities described is carried on by way of business (see PERG 5.4). Save where otherwise indicated, it is assumed that the intermediary is carrying on activities in respect of policies where he is not the policyholder. Also, that this table does not provide an exhaustive list

of all of the exclusions or exemptions that are of relevance to each type of activity. For a full explanation of the exclusions and exemptions under the *Regulated Activities Order* and their applicability see generally *PERG 5.3.7G to PERG 5.3.8G*, *PERG 5.6.5G to PERG 5.6.23G*, *PERG 5.7.7G*, *PERG 5.8.24G to PERG 5.8.26G*, *PERG 5.11*, *PERG 5.12.9G to PERG 5.12.10G*, *PERG 5.13* and *PERG 5.14*. This Table is referred to in *PERG 5.7.5G* (The regulated activities: assisting in the administration and performance of a contract of insurance).

5.15.4 G Types of activity – are they regulated activities and, if so, why?

| Type of activity | Is it a regulated activity? | Rationale |
|---|--|---|
| MARKETING AND EFFECTING INTRODUCTIONS | | |
| Passive display of information -for example, medical insurance brochures in doctor’s surgery (whether or not remuneration is received for this activity) | No. | Merely displaying information does not constitute making arrangements under article 25(2) (see <i>PERG 5.6.4G</i>). |
| Recommending a broker/ <i>insurance undertaking</i> and providing customer with contact details (whether by phone, fax, e-mail, face-to-face or any other means of communication) | Yes, but article 72C may be available. | This will constitute making arrangements under article 25(2). But, the exclusion in article 72C will apply if all the intermediary does is supply information to the customer and the conditions of article 72C are otherwise met (see <i>PERG 5.6.5G to PERG 5.6.9G</i>). Generally, this will not amount to advice under article 53 unless there is an implied recommendation of a particular <i>policy</i> (see <i>PERG 5.8.4G</i>), in which case article 72C |

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| | | would not be available. |
| Providing an <i>insurance undertaking</i> /broker with contact details of customer | Yes. | This will constitute making arrangements under article 25(2) when undertaken in the context of regular or ongoing arrangements for introducing customers. Article 72C will not apply because the information is supplied to someone other than the <i>policyholder</i> or potential <i>policyholder</i> . |
| Marketing on behalf of <i>insurance undertaking</i> to intermediaries only (for example, broker consultants) | Yes. | This amounts to work preparatory to the conclusion of <i>contracts of insurance</i> and so constitutes making arrangements under article 25(2). Article 72C is not available because this activity does not involve provision of information to the <i>policyholder</i> or potential <i>policyholder</i> only. |
| Telemarketing services (that is, companies specialising in marketing an <i>insurance undertaking's</i> products/services to prospective customers) | Yes. | This amounts to introducing and/or other work preparatory to the conclusion of <i>contracts of insurance</i> and so constitutes making arrangements under article 25(2). This could also involve article 25(1) <i>arranging</i> where the telemarketing company actually <i>sells</i> a particular <i>policy</i> and could involve <i>advising on investments</i> . Article 72C will not be |

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| | | available where the provision of information is more than incidental to the telemarketing company's main business or where the telemarketing company is <i>advising on investments</i> . |
| PRE-PURCHASE DISCUSSIONS WITH CUSTOMERS AND ADVICE | | |
| Discussion with client about need for insurance generally/need to take out a particular type of insurance | Generally, no. Article 72C available if needed. | Not enough, of itself, to constitute making arrangements under article 25(2), but you should consider whether, viewed as a whole, your activities might amount to <i>arranging</i> . If so, article 72C might be of application (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G). |
| Advising on the level of cover needed | Generally, no. Article 72C available if needed. | Not enough, of itself, to constitute making arrangements under article 25(2), but you should consider whether, viewed as a whole, your activities might amount to making arrangements under article 25(2) (see <i>PERG</i> 5.8.3G). If so, article 72C might be of application (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G). |
| Pre-purchase questioning in the context of filtered sales (intermediary asks a series of questions and then suggests several | Yes. Subject to article 72 C exclusion where available. | This will constitute <i>arranging</i> although article 72C may be of application (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G). If there is no express or implied |

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| <i>policies</i> which suit the answers given) | | recommendation of a particular <i>policy</i> , this activity will not amount to advice under article 53 (see <i>PERG</i> 5.8.15G to <i>PERG</i> 5.8.19G). |
| Explanation of the terms of a particular <i>policy</i> or comparison of the terms of different policies | Possibly. Article 72C available. | This is likely to amount to making arrangements under article 25(2). In certain circumstances, it could involve <i>advising on investments</i> (see <i>PERG</i> 5.8.8G (Advice or information)). Where the explanation is provided to the potential <i>policyholder</i> , and does not involve <i>advising on investments</i> , article 72C may be of application (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G), and where information is provided by a professional in the course of a profession, article 67 may apply (see <i>PERG</i> 5.11.9G to <i>PERG</i> 5.11.12G). |
| Advising that a customer take out a particular <i>policy</i> | Yes. | This amounts to advice on the merits of a particular <i>policy</i> under article 53 (see <i>PERG</i> 5.8.4G to <i>PERG</i> 5.8.5G). |
| Advising that a customer does not take out a particular <i>policy</i> | Yes. | This amounts to advice on the merits of a particular <i>policy</i> under article 53 (see <i>PERG</i> 5.8.4G to <i>PERG</i> 5.8.5G). |
| Advice by journalists in newspapers, | Generally, no because of the article 54 exclusion. | Article 54 provides an exclusion for advice given in newspapers etc (see <i>PERG</i> 5.8.24G to |

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| broadcasts etc. | | <i>PERG 5.8.25G</i>). |
| Giving advice to a customer in relation to his <i>buying</i> a consumer product, where insurance is a compulsory secondary purchase and/or a benefit that comes with <i>buying</i> the product | Not necessarily but depends on the circumstances. | Where the advice relates specifically to the merits of the consumer product, it is possible that references to the accompanying insurance may be seen to be information and not advice. If, however, the advice relates, in part, to the merits of the insurance element, then it will be <i>regulated activity</i> . |
| ASSISTING CUSTOMERS WITH COMPLETING/SENDING APPLICATION FORMS | | |
| Providing information to customer who fills in application form | Possibly. Subject to article 67 or 72C exclusions where available. | This activity may amount to <i>arranging</i> although the exclusions in article 67 (see <i>PERG 5.11.9G</i> to <i>PERG 5.11.12G</i>) and article 72C (see <i>PERG 5.6.5G</i> to <i>PERG 5.6.9G</i>) may be of application. |
| Helping a potential <i>policyholder</i> fill in an application form | Yes. | This activity amounts to <i>arranging</i> . Article 72C will not apply because this activity goes beyond the mere provision of information to a <i>policyholder</i> or potential <i>policyholder</i> (see <i>PERG 5.6.5G</i> to <i>PERG 5.6.9G</i>). |
| Receiving completed proposal forms for checking and forwarding to an <i>insurance undertaking</i> (for example, an administration outsourcing service | Yes. | This amounts to <i>arranging</i> . Article 72C does not apply because this activity goes beyond the mere provision of information to a <i>policyholder</i> or potential <i>policyholder</i> |

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| provider that receives and processes proposal forms) | | (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G). |
| Assisting in completion of proposal form and sending to <i>insurance undertaking</i> | Yes. | This activity amounts to <i>arranging</i> . Article 72C does not apply because this activity goes beyond the mere provision of information (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G). |
| NEGOTIATING AND CONCLUDING CONTRACTS OF INSURANCE | | |
| Negotiating terms of <i>policy</i> on behalf of a customer with the <i>insurance undertaking</i> | Yes. | This activity amounts to <i>arranging</i> (see <i>PERG</i> 5.6.2G). |
| Negotiating terms of <i>policy</i> on behalf of <i>insurance undertaking</i> with the customer and signing proposal form on his behalf | Yes. | These activities amount to both <i>arranging</i> and <i>dealing in investments as agent</i> . |
| Concluding a <i>contract of insurance</i> on insurance company's behalf, for example, motor dealer who has authority to conclude insurance contract on behalf of <i>insurance undertaking</i> when <i>selling</i> a car | Yes. | A <i>person</i> carrying on this activity will be <i>dealing in investments as agent</i> . He will also be <i>arranging</i> (as the article 28 exclusion only applies in the limited circumstances envisaged under article 28(3)) (see <i>PERG</i> 5.6.12G). |
| Agreeing, on behalf of a prospective <i>policyholder</i> , to <i>buy</i> a <i>policy</i> . | Yes. | A <i>person</i> who, with authority, enters into a <i>contract of insurance</i> on behalf of another is <i>dealing in investments</i> |

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| | | <i>as agent</i> under article 21, and will also be <i>arranging</i> . |
| Providing compulsory insurance as a secondary purchase | Yes. It will amount to <i>dealing in investments as agent</i> or <i>arranging</i> . | The fact that the insurance is secondary to the primary product does not alter the fact that arranging the package involves <i>arranging</i> the insurance. |
| COLLECTION OF PREMIUMS | | |
| Collection of cheque for premium from the customer at the pre-contract stage. | Yes (as part of <i>arranging</i>). | This activity is likely to form part of <i>arranging</i> . But the mere collection/receipt of premiums from the customer is unlikely, without more, to amount to <i>arranging</i> . |
| Collection of premiums at post-contract stage | No. | The mere collection of premiums from <i>policyholders</i> is unlikely, without more, to amount to <i>assisting in the administration and performance of a contract of insurance</i> . |
| MID-TERM ADJUSTMENTS AND ASSIGNMENTS | | |
| Solicitors or licensed conveyancers discharging client instructions to assign <i>contracts of insurance</i> . | Not where article 67 applies. | As the assignment of rights under a <i>contract of insurance</i> (as opposed to the creation of new <i>contracts of insurance</i>) does not fall within the <i>IMD</i> , article 67 is of potential application (see <i>PERG</i> 5.11.9G to <i>PERG</i> 5.11.12G). |
| Making mid-term adjustments to a <i>policy</i> , for example, property manager | Yes. | Assuming the freeholder (as <i>policyholder</i>) is obliged under the terms of the |

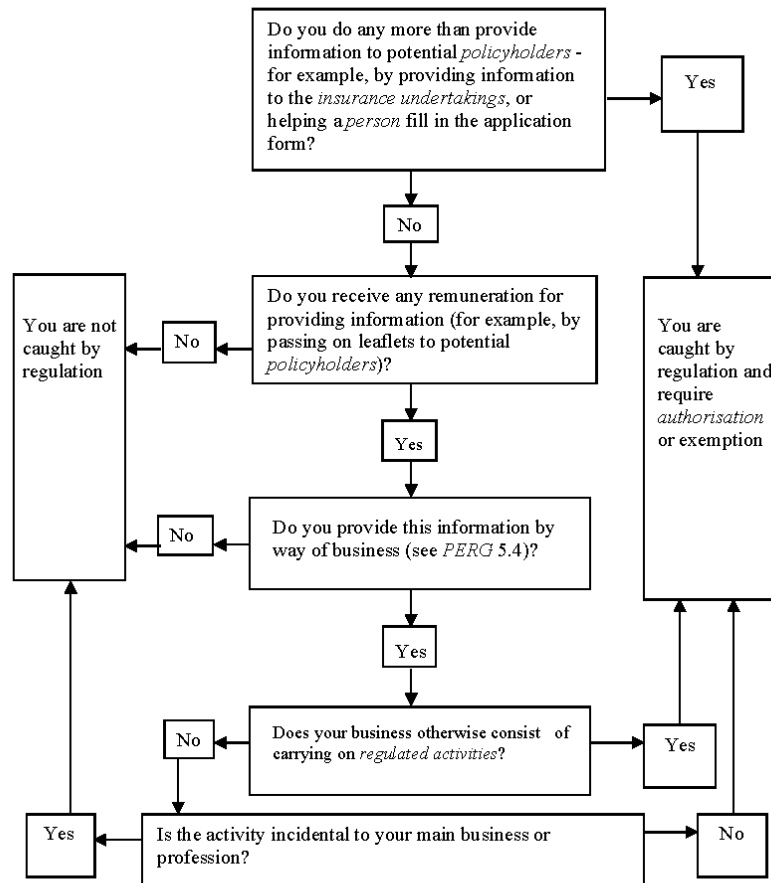
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| notifies changes to the names of the leaseholders registered as “interested parties” in the <i>policy</i> in respect of the property. | | <i>policy</i> to notify the <i>insurance undertaking</i> of changes to the identity of the leaseholders, the property manager is likely to be <i>assisting in the administration and the performance of the contract of insurance</i> . |
| TRADED ENDOWMENT POLICIES (“TEPs”) | | |
| Making introductions for the purposes of <i>selling</i> TEPs | Yes, unless article 72C applies. | Making introductions for these purposes is <i>arranging</i> unless article 72C applies (see <i>PERG</i> 5.6.5G to <i>PERG</i> 5.6.9G). The exclusions in article 29 (Arranging deals with or through authorised persons) and 33 (Introducing) no longer apply to <i>arranging contracts of insurance</i> . |
| Market makers in TEPs | Yes, although the exclusion in article 28 may apply. | Unauthorised market makers can continue to make use of the exclusions in articles 15 (Absence of holding out etc.) and 16 (Dealing in contractually based investments), where appropriate. In order to avoid the need for <i>authorisation</i> in respect of <i>arranging</i> they may be able to rely upon article 28 (see <i>PERG</i> 5.6.12G). |
| ASSISTING POLICYHOLDER WITH MAKING A CLAIM | | |
| Merely providing information to the insured to help him complete a claim | No. | Of itself, this is likely to amount to assisting in the administration but not the performance |

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| form | | of a <i>contract of insurance</i> . In the FSA's view, the provision of information in these circumstances is more akin to facilitating performance of a <i>contract of insurance</i> rather than assisting in the performance (see PERG 5.7.3G to PERG 5.7.5G) |
| Completion of claim form on behalf of insured | Potentially. | This activity amounts to assisting in the administration of a <i>contract of insurance</i> . Whether this activity amounts to <i>assisting in the administration and performance of a contract of insurance</i> will depend upon whether a <i>person's</i> assistance in filling in a claims form is material to whether performance of the contractual obligation to notify a claim takes place (see PERG 5.7.2G to PERG 5.7.3G). |
| Notification of claim to <i>insurance undertaking</i> and helping negotiate its settlement on the <i>policyholder's</i> behalf | Yes. | This activity amounts to <i>assisting in the administration and performance of a contract of insurance</i> (see PERG 5.7.4G). |
| ASSISTING INSURANCE UNDERTAKING WITH CLAIMS BY POLICYHOLDERS | | |
| Negotiation of settlement of claims on behalf of an <i>insurance undertaking</i> | No. | Claims management on behalf of an <i>insurance undertaking</i> does not amount to <i>assisting in the administration and performance of a contract of insurance</i> |

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| | | by virtue of the exclusion in article 39B (see <i>PERG 5.7.7G</i>). |
| Providing information to <i>an insurance undertaking</i> in connection with its investigation or assessment of a claim | No. | This activity does not amount to <i>assisting in the administration and performance of a contract of insurance</i> . |
| Loss adjusters and claims management services (for example, by administration outsourcing providers) | Potentially. | These activities may amount to <i>assisting in the administration and performance of a contract of insurance</i> . Article 39B excludes these activities, however, when undertaken on behalf of an <i>insurance undertaking</i> only (see <i>PERG 5.7.7G</i>). |
| Providing an expert appraisal of a claim | No. | This activity does not amount to <i>assisting in the administration and performance of a contract of insurance</i> whether carried out on behalf of an <i>insurance undertaking</i> or otherwise. |
| Jeweller repairs customer's jewellery pursuant to a <i>policy</i> which permits the jeweller to carry out repairs | No. | This activity does not amount to <i>assisting in the administration and performance of a contract of insurance</i> . It amounts to managing claims on behalf of an <i>insurance undertaking</i> and so falls within the exclusion in article 39B (see <i>PERG 5.7.7G</i>). |

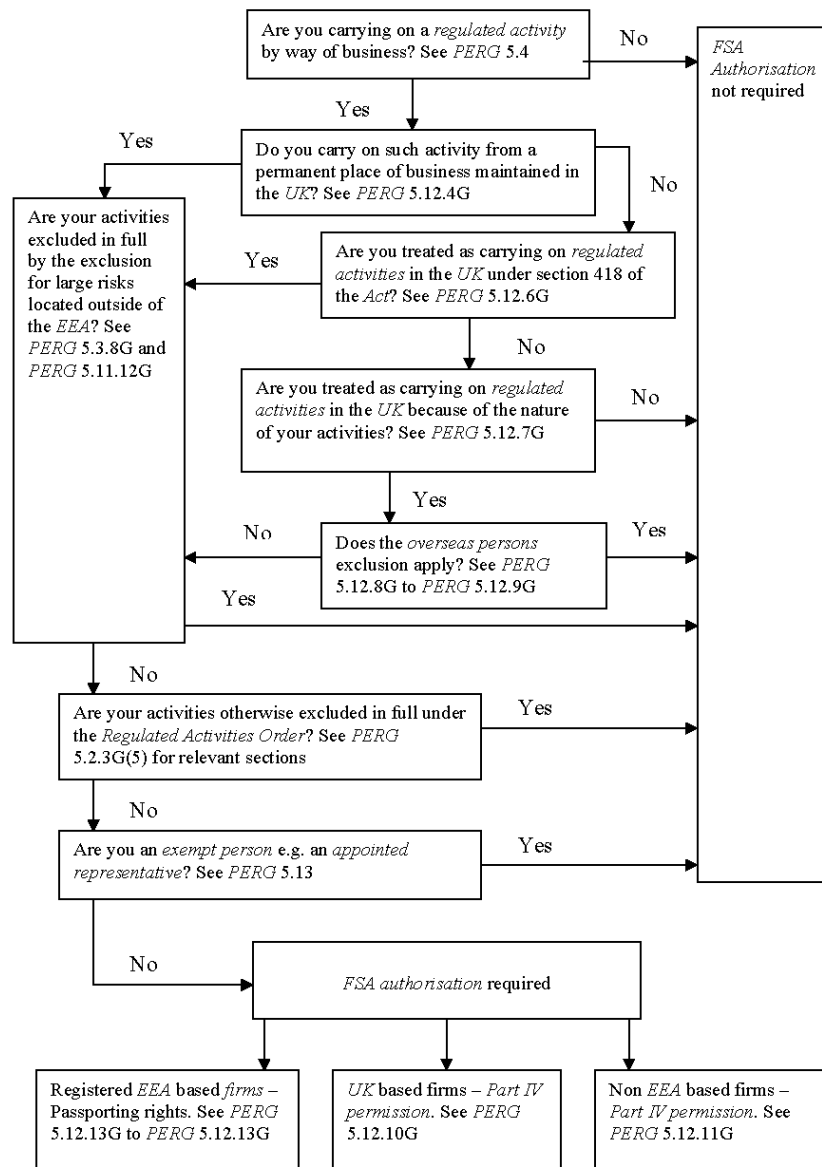
5.15.5 G The flow chart in *PERG 5.15.6G* sets out the matters a *person* whose introducing activities potentially amount to *making arrangements with a view to transactions in investments* will need to consider if he can use the exclusion in article 72C (Provision of information on an incidental basis). It is referred to in *PERG 5.1.6G* (Purpose of guidance) and *PERG 5.6.9G* (Exclusion: article 72C (Provision of information on an incidental basis)).

5.15.6 G Flow Chart: Introdurers.



5.15.7 G The flow chart in *PERG 5.15.8G* sets out the questions a *person* needs to consider in determining whether or not his *regulated activities* are carried on 'in the *United Kingdom*'.

5.15.8 G Flow chart: am I carrying on regulated activities in the United Kingdom?



5.16 Meaning of 'insurance mediation'

5.16.1 G *PERG 5.16.2G* sets out the text of article 2.3 of the *Insurance Mediation Directive*. It is referred to in *PERG 5.2.5G* and *PERG 5.2.5G* (Approach to implementation of the IMD), *PERG 5.11.7G* (Exclusions disapplied in connection with insurance mediation) and *PERG 5.11.10G* (Activities carried on in the course of a profession or non-investment business).

5.16.2 G Text of article 2.3 of the Insurance Mediation Directive

"'Insurance mediation' means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the

event of a claim.

These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.

The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation."

GUIDANCE ON THE IDENTIFICATION OF CONTRACTS OF INSURANCE

- 6 Guidance on the Identification of Contracts of Insurance
 - 6.1 Application
 - 6.1.1 G This chapter is relevant to any *person* who needs to know what activities fall within the scope of the *Act*.
 - 6.2 Purpose of guidance
 - 6.2.1 G The purpose of this *guidance* is to set out:
 - (1) at *PERG* 6.5G the general principles; and
 - (2) at *PERG* 6.6G the range of specific factors;that the *FSA* regards as relevant in deciding whether any arrangement is a *contract of insurance*.
 - 6.2.2 G This *guidance* includes (at *PERG* 6.7) a number of examples, showing how the factors have been applied to reach conclusions with respect to specific categories of business. Further examples may be published from time-to-time.
 - 6.3 Background
 - 6.3.1 G The business of *effecting or carrying out contracts of insurance* is subject to prior *authorisation* and regulation by the *FSA*. (There are some limited exceptions to this requirement, for example, for breakdown insurance.)
 - 6.3.2 G The *Regulated Activities Order*, which sets out the activities for which *authorisation* is required, does not attempt an exhaustive definition of a '*contract of insurance*'. Instead, it makes some specific extensions and limitations to the general common law meaning of the concept. For example, it expressly extends the concept to fidelity bonds and similar contracts of guarantee, which are not *contracts of insurance* at common law, and it excludes certain *funeral plan contracts*, which would generally be *contracts of insurance* at common law. Similarly, the *Exemption Order* excludes certain trade union provident business, which would also be insurance at common law. One consequence of this is that common law judicial decisions about whether particular contracts amount to 'insurance' or 'insurance business' are relevant in defining the scope of the *FSA's authorisation* and regulatory activities, as they were under predecessor legislation.
 - 6.3.3 G The courts have not fully defined the common law meaning of 'insurance' and 'insurance business', since they have, on the whole, confined their decisions to the facts before them. They have,

however, given useful guidance in the form of descriptions of *contracts of insurance*.

- 6.3.4 G The best established of these descriptions appears in the case of *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658. This case, read with a number of later cases, treats as insurance any enforceable contract under which a 'provider' undertakes:
- (1) in consideration of one or more payments;
 - (2) to pay money or provide a corresponding benefit (including in some cases services to be paid for by the provider) to a 'recipient';
 - (3) in response to a defined event the occurrence of which is uncertain (either as to when it will occur or as to whether it will occur at all) and adverse to the interests of the recipient.

6.4 Limitations of this guidance

- 6.4.1 G Although what appears below is the *FSA*'s approach, it cannot state what the law is, as that is a matter for the courts. Accordingly, this *guidance* is not a substitute for adequate legal advice on any transaction.
- 6.4.2 G The list of principles and factors is not closed and this *guidance* by no means covers all types of insurance-like business.
- 6.4.3 G The *FSA* will consider each case on its facts and on its merits.
- 6.4.4 G In some cases transactions with the same commercial purpose or economic effect may be classified differently, ie some as insurance and some as non-insurance.

6.5 General principles

- 6.5.1 G The starting point for the identification of a *contract of insurance* is the case of *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658, from which the description set out in *PERG* 6.3.4G is drawn. Any contracts that fall outside that description are unlikely to be *contracts of insurance*.
- 6.5.2 G The *FSA* will interpret and apply the description in *PERG* 6.3.4G in the light of applicable legislation and common law, including case law.
- 6.5.3 G In particular, if the common law is unclear as to whether or not a particular contract is a *contract of insurance*, the *FSA* will interpret and apply the common law in the context of and in a way that is consistent with the purpose of the *Act* as expressed in the *FSA*'s statutory objectives.

- 6.5.4 G The *FSA* will apply the following principles of construction to determine whether a contract is a *contract of insurance*.
- (1) In applying the description in *PERG* 6.3.4G, more weight attaches to the substance of the contract, than to the form of the contract. The form of the contract is relevant (see *PERG* 6.6.8G(3) and (4)) but not decisive of whether a contract is a *contract of insurance*: *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1997] Ch. 173 (C.A.).
 - (2) In particular, the substance of the provider's obligation determines the substance of the contract: *In re Sentinel Securities* [1996] 1 WLR 316. Accordingly, the *FSA* is unlikely to treat the provider's or the customer's intention or purpose in entering into a contract as relevant to its classification.
 - (3) The contract must be characterised as a whole and not according to its 'dominant purpose' or the relative weight of its 'insurance content': *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1997] Ch. 173 (C.A.).
 - (4) Since only contracts of marine insurance and certain *contracts of insurance* effected without consideration are required to be in writing, a *contract of insurance* may be oral or may be expressed in a number of documents.

6.6 The factors

- 6.6.1 G Contracts under which the provider has an absolute discretion as to whether any benefit is provided on the occurrence of the uncertain event, are not *contracts of insurance*. This may be the case even if, in practice, the provider has never exercised its discretion so as to deny a benefit: *Medical Defence Union v. Department of Trade and Industry* [1979] 2 W.L.R. 686. The degree of discretion required and the matters to which it must relate are illustrated in *PERG* 6.7.1G (Example 1: discretionary medical schemes).
- 6.6.2 G The 'assumption of risk' by the provider is an important descriptive feature of all *contracts of insurance*. The 'assumption of risk' has the meaning in (1) and (3), derived from the case law in (2) and (4) below. The application of the 'assumption of risk' concept is illustrated in *PERG* 6.7.2G (Example 2: disaster recovery business).
- (1) Case law establishes that the provider's obligation under a *contract of insurance* is an enforceable obligation to respond (usually, by providing some benefit in the form of money or services) to the occurrence of the uncertain event. This *guidance* describes the assumption of that obligation as the 'assumption' by the provider of (all or part of) the insured risk. 'Transfer of risk' has the same meaning in this *guidance*.

- (2) The case law referred to in (1) is *Prudential v. Commissioners of Inland Revenue* [1904] 2 KB 658, read with *Hampton v. Toxteth Co-operative Provident Society Ltd* [1915] 1 Ch. 721 (C.A.), *Department of Trade and Industry v. St Christopher Motorists Assoc. Ltd* [1974] 1 All E.R. 395, *Medical Defence Union v. Department of Trade and Industry* [1979] 2 W.L.R. 686 and *Wooding v. Monmouthshire and South Wales Mutual Indemnity Soc. Ltd* [1939] 4 All E.R. 570 (H.L.).
- (3) The *FSA* recognises that there is a line of case law in relation to *long-term insurance business* that establishes that a contract may be a *contract of insurance* even if, having effected that contract, the provider 'trades without any risk'. The *FSA* accepts that the insurer's risk of profit or loss from insurance business is not a relevant descriptive feature of a *contract of insurance*. But in the *FSA*'s view that is distinct from and does not undermine the different proposition in (1).
- (4) The case law referred to in (3) is *Flood v. Irish Provident Assurance Co. Ltd* [1912] 2 Ch. 597 (C.A.), *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1995] Ch. 122, *Re Barrett; Ex parte Young v. NM Superannuation Pty Ltd*, (1992) 106 A.L.R. 549, *Fuji Finance Inc. v. Aetna Life Insurance Co. Ltd* [1997] Ch. 173 (C.A.).
- 6.6.3 G Contracts, under which the amount and timing of the payments made by the recipient make it reasonable to conclude that there is a genuine pre-payment for services to be rendered in response to a future contingency, are unlikely to be regarded as insurance. In general, the *FSA* expects that this requirement will be satisfied where there is a commercially reasonable and objectively justifiable relationship between the amount of the payment and the cost of providing the contract benefit.
- 6.6.4 G Contracts under which the provider undertakes to provide periodic maintenance of goods or facilities, whether or not any uncertain or adverse event (in the form of, for example, a breakdown or failure) has occurred, are unlikely to be *contracts of insurance*.
- 6.6.5 G Contracts under which, in consideration for an initial payment, the provider stands ready to provide services on the occurrence of a future contingency, on condition that the services actually provided are paid for by the recipient at a commercial rate, are unlikely to be regarded as insurance. Contrast *PERG* 6.7.21G (Example 7: solicitors' retainers) with *PERG* 6.7.22G (Example 8: time and distance cover).
- 6.6.6 G The recipient's payment for a *contract of insurance* need not take the form of a discrete or distinct premium. Consideration may be part of some other payment, for example the purchase price of goods (*Nelson v. Board of Trade* (1901) 17 T.L.R. 456). Consideration may

also be provided in a non-monetary form, for example as part of the service that an employee is contractually required to provide under a contract of employment (*Australian Health Insurance Assoc. Ltd v. Esso Australia Pty Ltd* (1993) 116 A.L.R. 253).

6.6.7 G Under most commercial contracts with a *customer*, a provider will assume more than one obligation. Some of these may be insurance obligations, others may not. The *FSA* will apply the principles in *PERG* 6.5.4G, in the way described in (1) to (3) to determine whether the contract is a *contract of insurance*.

(1) If a provider undertakes an identifiable and distinct obligation that is, in substance an insurance obligation as described in *PERG* 6.5.4G, then, other things being equal, the *FSA* is likely to find that by undertaking that obligation the provider has effected a *contract of insurance*.

(2) The presence of an insurance obligation will mean that the contract is a *contract of insurance*, whether or not that obligation is 'substantial' in comparison with the other obligations in the contract.

(3) The presence of an insurance obligation will mean that the contract is a *contract of insurance*, whether or not entering into that obligation forms a significant part of the provider's business. The *FSA* generally regards a provider as undertaking an obligation 'by way of business' if he takes on an obligation in connection with or for the purposes of his core business, to realise a commercial advantage or benefit.

6.6.8 G The following factors are also relevant.

(1) A contract is more likely to be regarded as a *contract of insurance* if the amount payable by the recipient under the contract is calculated by reference to either or both of the probability of occurrence or likely severity of the uncertain event.

(2) A contract is less likely to be regarded as a *contract of insurance* if it requires the provider to assume a speculative risk (ie a risk carrying the possibility of either profit or loss) rather than a pure risk (ie a risk of loss only).

(3) A contract is more likely to be regarded as a *contract of insurance* if the contract is described as insurance and contains terms that are consistent with its classification as a *contract of insurance*, for example, obligations of the utmost good faith.

(4) A contract that contains terms that are inconsistent with obligations of good faith may, therefore, be less likely to be classified as a *contract of insurance*; however, since it is the

substance of the provider's rights and obligations under the contract that is more significant, a contract does not cease to be a *contract of insurance* simply because the terms included are not usual insurance terms.

6.7 Examples

Example 1: discretionary medical schemes

- 6.7.1 G Medical schemes under which an employer operates or contributes to a fund, from which the employee has a right to a benefit (for example, a payment) on the occurrence of a specified illness or injury, are likely to be insurance schemes. This will be the case whether the employee makes any contribution to the fund, or the scheme is funded by the employer as an emolument. The scheme would not be insurance, however, if the employer has an absolute discretion whether or not to provide any benefit to the employee. Absolute discretion requires, for example, that the employer has an unfettered discretion both as to whether the employee will receive a benefit and as to the amount of that benefit. The absolutely discretionary nature of the benefits should also be clear from the terms of the scheme and any literature published about or in relation to it. If these requirements are met, it may not be relevant that, in practice, the employer has never refused to meet a valid claim under the scheme.

Example 2: disaster recovery business

- 6.7.2 G The disaster recovery provider sets up and maintains a range of IT and related facilities (PABX etc). The disaster recovery contracts so far considered by the *FSA* give the recipient, subject to certain conditions including an up front payment, priority access to all or a specified part of these facilities if a 'disaster' causes the failure of a similar business system on which the recipient relies. The provider sells access to the same facilities to a number of different recipients, both for use in response to 'disasters' and, more usually, for use in testing and refining the recipient's ability to switch to alternative systems in the event of a disaster.
- 6.7.3 G In principle, a significant part of disaster recovery business could potentially fall within the description of a *contract of insurance* set out in *PERG* 6.3.4G. The provider undertakes, in consideration of a payment, to provide the recipient with services (alternative facilities) in response to a defined event (a disaster), which is adverse to the interests of the recipient and the occurrence of which is uncertain. The risk dealt with under the disaster recovery contract is a pure risk (see *PERG* 6.6.8G(2)) and, at least at the commencement of the contract, the provider assumes that risk, within the terms of *PERG* 6.6.2G.
- 6.7.4 G However, the disaster recovery contracts considered by the *FSA* had

two key features.

- (1) Priority access to facilities in the event of a disaster was expressed to be on a 'first come, first served' basis. The contracts provided expressly that if the facilities needed by recipient A were already in use, following an earlier invocation by recipient B, the provider's obligation to recipient A was reduced to no more than an obligation of 'best endeavours' to meet A's requirements. The entry into additional contracts of this kind did not increase the probability that the provider's existing resources would be inadequate to meet all possible claims. The terms of the contract were such that there was no pattern of claims that would cause the provider to have to pay claims from its own resources.
- (2) In general, the contracts were priced so that the total consideration collected from the recipient over the life of the contract bore a reasonable and justifiable relationship to the commercial cost of the services actually provided to the recipient (see *PERG* 6.6.5G). This was achieved, for example, by post-invocation charges levied according to the actual usage of services.

6.7.5 G Based on these features, the *FSA* reached the conclusion, with which the other terms of the contracts were consistent (*PERG* 6.6.8G(3)), that these disaster recovery contracts were not *contracts of insurance*.

6.7.6 G An important part of the conclusion in *PERG* 6.7.5G was that, although the provider assumed a risk at the outset of the contract, looking at the contract as a whole and interpreting the common law in the context of the *FSA*'s objectives (see *PERG* 6.5.2G and *PERG* 6.5.3G) there was no relevant assumption of risk.

- (1) The presence or absence of an assumption of risk is an important part of the statutory rationale for the prudential regulation of insurance.
- (2) In *Medical Defence Union v. Department of Trade and Industry* [1979] 2 W.L.R. 686, the court accepted that since there was no common law definition of a *contract of insurance*, the meaning of the term 'fell to be construed in its context according to the general law'. The court recognised that in deciding whether a contract was a *contract of insurance* for the purposes of the Insurance Companies Act 1974, the 'context' included the purpose of the regulatory statute.
- (3) Accordingly, when the common law is unclear, the *FSA* will assess the desirability of regulating a particular contract as insurance in the light of the statutory objectives in the *Act*. The *FSA* will use that assessment as an indicator of whether or not a sufficient assumption of risk is present for the contract to be

classified as a *contract of insurance* at common law.

- (4) In the case of disaster recovery contracts, the fact that there was no pattern of claims that would cause the provider to have to pay claims from its own resources led the *FSA* to conclude that there was no relevant assumption of risk by the disaster recovery provider.

Example 3: manufacturers' and retailers' warranties

- 6.7.7 G Under a simple manufacturer's or retailer's warranty the purchase price of the goods includes an amount, in consideration of which the manufacturer undertakes an obligation (the warranty) to respond (without further expense to the purchaser) to specified defects in the product that emerge within a defined time after purchase. When the warranty operates, the manufacturer or retailer provides repairs or replacement products in response to a defined event (the emergence of a latent defect in the product), which is adverse to the interests of the purchaser and the occurrence of which is uncertain. In summary, therefore, a simple manufacturer's or retailer's warranty is an identifiable and distinct obligation that is similar to and capable of being described as an insurance obligation in substance under *PERG* 6.3.4G.
- 6.7.8 G Notwithstanding *PERG* 6.7.7G, the *FSA*'s view is that an obligation that is of the same nature as a seller's or supplier's usual obligations as regards the quality of the goods or services is unlikely to be an insurance obligation in substance.
- 6.7.9 G The *FSA* is unlikely to classify a contract containing a simple manufacturer's or retailer's warranty as a *contract of insurance*, if the *FSA* is satisfied that the warranty does no more than crystallise or recognise obligations that are of the same nature as a seller's or supplier's usual obligations as regards the quality of the goods or services.
- 6.7.10 G For the purpose of *PERG* 6.7.9G, an obligation is likely to be of the same nature as the seller's or supplier's usual obligations as regards the quality of goods or services if it is an obligation of the seller to the buyer, assumed by the seller in consideration of the purchase price, which:
- (1) implements, or bears a reasonable relationship to, the seller's statutory or common law obligations as regards the quality of goods or services of that kind; or
 - (2) is a usual obligation relevant to quality or fitness in commercial contracts for the sale of goods or supply of services of that kind.

Example 4: separate warranty transactions and extended warranties

- 6.7.11 G It follows from *PERG* 6.7.10G that the *FSA* is unlikely to be satisfied that an obligation in a contract of sale or supply is of the same nature as the seller's or supplier's usual obligations as regards the quality of goods or services, if that obligation has one or more of the following features:
- (1) it is assumed by a person other than the seller or supplier (a 'third party'); or
 - (2) it is significantly more extensive in content, scope or duration than a seller's usual obligations as to the quality of goods or services of that kind.
- 6.7.12 G Other things being equal, the *FSA* is likely to classify a contract of sale containing a warranty that has one or more of the features in *PERG* 6.7.11G as a *contract of insurance*. The features in *PERG* 6.7.11G(1) and (2) typically distinguish a 'third party' warranty and an 'extended warranty' from a 'simple' manufacturer's or retailer's warranty.
- 6.7.13 G If a warranty is provided by a third party, the *FSA* will usually treat this as conclusive of the fact that there are different transactions and an assumption or transfer of risk. This conclusion would not usually depend on whether the provider is (or is not) a part of the same group of companies as the manufacturer or retailer. But it will be the third party (who assumes the risk) that is potentially effecting a *contract of insurance*.
- 6.7.14 G A manufacturer or retailer may undertake a warranty obligation to his customer in a separate contract with the customer, distinct from the contract of sale or supply of goods or services. The *FSA* will examine the separate contract to see if it is a *contract of insurance*. But the mere existence of a separate warranty contract is unlikely to be conclusive by itself.
- 6.7.15 G A manufacturer or retailer may undertake an obligation to ensure that the customer becomes a party to a separate *contract of insurance* in respect of the goods sold. This would include, for example, a contract for the sale of a freezer, with a simple warranty in relation to the quality of the freezer, but also providing insurance (underwritten by an *insurer* and in respect of which the customer is the *policyholder*) covering loss of frozen food if the freezer fails. The *FSA* is unlikely to treat a contract containing an obligation of this kind as a *contract of insurance*. However, the manufacturer or retailer may be in the position of an intermediary and may be liable to regulation in that capacity.
- 6.7.16 G The *FSA* distinguishes the contract in *PERG* 6.7.15G from a contract under which the manufacturer or retailer assumes the obligation to provide the customer with an indemnity against loss or damage if the freezer fails, but takes out insurance to cover the cost of having to

provide the indemnity to the customer. The obligation to indemnify is of a different nature from the seller's or supplier's usual obligations as regards the quality of goods or services and is an insurance obligation. By assuming it, other things being equal, the manufacturer or retailer effects a *contract of insurance*. The fact that the manufacturer or retailer may take out insurance to cover the cost of having to provide the indemnity is irrelevant.

Example 5: typical warranty schemes administered by motor dealers

- 6.7.17 G The following are examples of typical warranty schemes operated by motor dealers. Provided that, in each case, the *FSA* is satisfied that the obligations assumed by the dealer are not significantly more extensive in content, scope or duration than a dealer's usual obligations as to the quality of motor vehicles of that kind, the *FSA* would not usually classify the contracts embodying these transactions as *contracts of insurance*.
- (1) The dealer gives a verbal undertaking to the purchaser that during a specified period (usually 3 months) he will rectify any fault occurring with the vehicle. No money changes hands, and the dealer is responsible for meeting the warranty obligation.
 - (2) The dealer undertakes warranty obligations to his customer. The warranty obligations are either included in the contract for the sale of the vehicle or are set out in a separate contract between dealer and customer at the time of sale. The dealer administers his own warranty scheme and does not employ a separate company (for example a subsidiary) to run the scheme. In the event of a fault, the purchaser must contact the dealer, who is responsible for meeting the warranty obligation. The dealer decides whether or not to put money aside to meet potential claims.
 - (3) The dealer purchases proprietary warranty booklets issued by an administration company. These booklets contain 'terms and conditions' under which the dealer undertakes warranty obligations to the customer. The dealer sells these 'products' to his customer under a separate contract or inflates the price of the vehicle to include them as part of the sale of the vehicle. The administration company administers any claims that arise. The financial arrangements are that the dealer charges his customer for the warranty, passing a fee to the administration company for the purchase of the booklet and any administration relating to the processing of claims. The dealer retains all monies (less administration fee) received from the sale of the warranties and keeps any surplus after claims have been paid. The dealer is responsible for meeting the warranty obligation.
 - (4) The dealer undertakes warranty obligations to his customer. The warranty obligations are either included in the contract for

the sale of the vehicle or are set out in a separate contract between dealer and customer at the time of sale. The dealer employs an administration company to handle all the claims and associated administrative work. The administration company usually has access to a bank account, funded by the dealer and specifically set aside to meet warranty claims. The administration company authorises and pays warranty claims from the bank account in accordance with the dealer's instructions. The dealer ultimately decides on the amount of claims payable from this account and retains all surplus monies. The dealer is responsible for meeting the warranty obligation.

Example 6: tax investigation schemes

- 6.7.18 G When self-assessment for income tax was first introduced, a number of providers set up schemes connected with their tax accounting and tax advisory services. In consideration of an annual fee, the provider undertakes to deal with any enquiries or investigations that HM Revenue and Customs might launch into the self-assessment that the provider completes for the recipient. The event covered by these schemes (an investigation) is both uncertain and adverse to the interests of the recipient, who would, if the scheme were not in place, have to devote resources to dealing with the investigation. Accordingly, these schemes fall within the description of a *contract of insurance* (see *PERG 6.3.4G*).
- 6.7.19 G Some providers argued that these schemes amount to nothing more than a 'manufacturer's warranty' of their own work, within the scope of *PERG 6.7.7G* (Example 3: manufacturers' and retailers' warranties). However, HM Revenue and Customs is expected to make a significant number of random checks of self-assessment forms, irrespective of the quality of the work done by the provider. These random checks are also covered by the schemes. The *FSA* concluded, therefore, that these schemes were not analogous to manufacturers' warranties and that the better view was that they were *contracts of insurance*.

Example 7: solicitors' retainers

- 6.7.20 G A contract under which a provider undertakes, in consideration of an initial payment, to stand ready to provide, or to procure the provision of, legal services on the occurrence of an uncertain event (for example, if the recipient is sued), is capable of being construed as a *contract of insurance* (see *PERG 6.3.4G*). Indeed, *legal expenses insurance* is commonplace.
- 6.7.21 G If, however, a contract of this kind were structured so that the recipient was charged at a commercial rate for any legal services in fact provided, the *FSA*'s approach will be to treat the arrangement as non-insurance. This is principally because, by taking on obligations

of this kind, the provider does not assume a relevant risk (see *PERG* 6.7.6G). The position might be different if the solicitor carries the additional obligation to pay for alternative legal services to be provided if the solicitor is unable to act. In that case, the *FSA*'s approach will be to examine all the elements of the contract to determine whether the substance of the solicitor's obligation (see *PERG* 6.5.4G(2)) is to insure, or to give legal advice for a fee.

Example 8: contracts providing for ultimate repayment of any indemnity ('time and distance cover')

- 6.7.22 G A contract under which a provider agrees to meet a specified obligation on behalf of the recipient (for example an obligation to pay for the re-purchase of shares or to meet a debt) immediately that obligation falls due, subject to later reimbursement by the recipient, would be a *contract of insurance* if in all other respects it fell within the description of such contract (see *PERG* 6.3.4G). This is principally because the provider assumes the risk that an immediate payment will be required and, depending on the terms of the contract, may also assume the risk that the recipient will be unable to make future repayments (see *PERG* 6.6.2G).

PERIODICAL PUBLICATIONS, NEWS SERVICES AND BROADCASTS:
APPLICATIONS FOR CERTIFICATION

7 Periodical publications, news services and broadcasts: applications for certification

7.1 Application and purpose

Application

7.1.1 G This chapter applies to anyone involved in publishing periodicals, or in providing news services or broadcasts, who gives (or proposes to give) advice about *securities*, *relevant investments* or *regulated mortgage contracts* and who wishes to determine whether he will be carrying on the *regulated activities* of *advising on investments* or *advising on regulated mortgage contracts*.

Purpose

7.1.2 G The purpose of this chapter is to provide *guidance* as to:

- (1) when a *person* involved in publishing periodicals, or in providing news services or broadcasts, requires *authorisation* to carry on the *regulated activities* of *advising on investments* or *advising on regulated mortgage contracts* (see *PERG 7.3* (Does the activity require authorisation));
- (2) if he does, whether he qualifies for the exclusion from those activities that applies to a periodical publication, a regularly updated news or information service or a television or radio service (see *PERG 7.4* (Does the article 54 exclusion apply));
- (3) if he does, whether his circumstances are an appropriate case for a certificate given by the *FSA* as conclusive evidence that he does qualify (see *PERG 7.5* (When is it appropriate to apply for a certificate));
- (4) how to apply for a certificate (see *PERG 7.6.1G* to *PERG 7.6.5G*); and
- (5) how the *FSA* will use its power to give certificates (see *PERG 7.6.6G* to *PERG 7.6.10G*).

7.1.3 G This *guidance* is issued under section 157 of the *Act*. The *guidance* represents the *FSA's* views and does not bind the courts, for example in relation to an action for damages brought by a *private person* for breach of a *rule* (see section 150 of the *Act* (Actions for damages)), or in relation to the enforceability of a contract where there has been a

breach of section 19 (The general prohibition) of the *Act* (see section 26 of the *Act* (Enforceability of agreements)). Although the *guidance* does not bind the courts, it may be of persuasive effect for a court considering whether it would be just and equitable to allow a contract to be enforced (see section 28(3) of the *Act*). Anyone reading this *guidance* should refer to the *Act* and to the Financial Services and Markets Act 2000 (Regulated activities) Order 2001 (SI 2001/544) (the Regulated activities *Order*) to find out the precise scope and effect of any particular provision referred to in the *guidance* and should consider seeking legal advice if doubt remains. If a *person* acts in accordance with the *guidance* in the circumstances contemplated by it, then the *FSA* will proceed on the footing that the *person* has complied with the aspects of the requirement to which the *guidance* relates.

7.2 Introduction

Exclusion for advice given in certain publications and services

7.2.1 G Advice is excluded by article 54 of the *Regulated Activities Order* from the *regulated activities* of *advising on investments* and *advising on regulated mortgage contracts* if:

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

Certificate that the exclusion applies

7.2.2 G If a *person* would, but for the exclusion, be carrying on the *regulated activities* of *advising on investments* or *advising on regulated mortgage contracts*, or both, and will be doing so as a business in the *United Kingdom* (see *PERG 7.3*), he may wish to apply to the *FSA* for a certificate that the exclusion applies (see *PERG 7.6*). However, a *person* does not need a certificate to get the benefit of the exclusion. In many cases it will be clear that the exclusion in article 54 applies and a certificate is not called for. A certificate may be appropriate, however, where the exclusion appears to apply but there may be an element of doubt. The granting of a certificate would remove any such doubt.

Certificates under the Financial Services Act 1986

7.2.3 G Certificates given under paragraph 25 of Schedule 1 to the Financial Services Act 1986 (Exclusion for periodical publications giving investment advice) ceased to have effect on 1 December 2001. Holders of such certificates must consider their position under the

terms of the new exclusion. If a *person* considers that a certificate might be appropriate, a new application must be made.

7.3 Does the activity require authorisation?

Advising on investments and advising on regulated mortgage contracts

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

- (1) the advice is given to the *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
- (2) it is advice on the merits of his doing any of the following (whether as *principal* or agent):
 - (a) *buying, selling*, subscribing for or underwriting a particular *investment* which is a *security* or a *relevant investment*; or
 - (b) exercising any right conferred by such an *investment* to *buy, sell*, subscribe for or underwrite such an *investment*.

7.3.1A G Under article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts), advising a *person* is a specified kind of activity if:

- (1) the advice is given to the *person* in his capacity as a borrower or potential borrower; and
- (2) it is advice on the merits of his doing any of the following:
 - (a) entering into a particular *regulated mortgage contract*; or
 - (b) varying the terms of a *regulated mortgage contract* entered into by him after *mortgage day* in such a way as to vary his obligations under that contract.

7.3.2 G Articles 53 and 53A of the *Regulated Activities Order* contain a number of elements, all of which must be present before a *person* will require *authorisation*. For *guidance* on whether a *person* is carrying on these *regulated activities*, see *PERG 8* (Financial promotion and related activities) and *PERG 4* (Guidance on regulated activities connected with mortgages).

Carrying on the regulated activity by way of business

7.3.3 G Under section 22 of the *Act* (Regulated activities), for an activity to be a *regulated activity* it must be carried on 'by way of business'.

There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. It has exercised this power (through the Financial Services and Markets Act 2000 (Carrying on Regulated activities by Way of Business) Order 2001 (SI 2001/1177) (the Business Order). This has been amended by article 18 of the Financial Services and Markets Act 2000 (Regulated activities) (Amendment) (No 2) Order 2003 (SI 2003/1476) as explained in *PERG 7.3.3AG*.

- 7.3.3A G The result of the amendments made to the meaning of the business test in section 22 of the *Act* is that the test differs depending on the activity in question. Where the *regulated activities* of *advising on investments* and *advising on regulated mortgage contracts* are concerned, the business test is not to be regarded as satisfied unless a *person* carries on the business of engaging in those activities. This is a narrower test than that of carrying on *regulated activities* by way of business (as required by section 22 of the *Act*), as it requires the *regulated activities* to represent the carrying on of a business in their own right. Where the advice relates to a *contract of insurance*, the business test is not to be regarded as satisfied unless the *person* carrying on the activity of giving the advice is taking up or pursuing the activity for remuneration. *PERG 2.3* (The Business element) and *PERG 2.4* (Link between activities and the United Kingdom) together with *PERG 5.4* (The business test) provide further detail on this.
- 7.3.4 G In the *FSA's* view, for a *person* to be carrying on the business of *advising on investments* or *advising on regulated mortgage contracts* he will usually need to be doing so with a degree of regularity and for commercial purposes – that is to say, he will normally be expecting to gain some kind of a direct or indirect financial benefit. But, in the *FSA's* view it is not necessarily the case that advice provided free of charge will not amount to a business. Advice is often given 'free' by a journalist or presenter, or in a publication or website, in the sense that no charge is made or commission received. For example, a newspaper may reply to readers' letters to generate goodwill or to generate a supply of further material that it can publish or a website that is 'free' to the user will be sponsored or paid for by advertising. In such cases, if advice on *securities*, *relevant investments* or *regulated mortgage contracts* is given, then in the *FSA's* view the business of *advising on investments* or *advising on regulated mortgage contracts* is being carried on. In addition, non-commercial motives may be relevant in determining whether a *person* can be said to be carrying on the business of giving advice. For example, an investigative journal or journalist may occasionally feel that it is necessary to warn investors against the purchase of a particular *investment* because there are suspicions of fraud in connection with that *investment*. The *FSA* takes the view that, in such circumstances, the journal or journalist would not be regarded as carrying on the business of *advising on investments* or *advising on regulated mortgage contracts* as he would be acting to prevent crime rather

than in the carrying on of a business.

Carrying on the regulated activity in the United Kingdom

- 7.3.5 G Advice given in periodicals published from an establishment in the *United Kingdom* is regarded by the *FSA* as given in the *United Kingdom*. A similar approach is taken to advice given in, or by way of, a service provided from such an establishment.
- 7.3.6 G In other circumstances, advice issued remotely may still be given in the *United Kingdom*. For example, the *FSA* considers that advice is given in the *United Kingdom* if:
- (1) it is contained in a non-UK periodical that is posted in hard copy to *persons* in the *United Kingdom*;
 - (2) it is contained in a non-UK periodical (or given in or by way of a service) which is made available electronically to such *persons*.
- 7.3.7 G But even if advice is given in the *United Kingdom*, the *general prohibition* will not be contravened if the giving of advice does not amount to the carrying on, in the *United Kingdom*, of the business of *advising on investments* or *advising on regulated mortgage contracts*. Also, the *general prohibition* will not be contravened if the exclusion for *overseas persons* in article 72 of the *Regulated Activities Order* (*Overseas persons*) applies. That exclusion applies in relation to the giving of advice on *securities* or *relevant investments* by an *overseas person* as a result of a 'legitimate approach' (defined in article 72(7)). In many cases where publications or services are provided from outside the *United Kingdom* it is likely that they will fall within the terms of this exclusion. For example, this will exclude any advice in a publication or service from being a *regulated activity* if it is given in response to an approach that has not been solicited in any way. It should be noted, however, that the exclusions in article 72 only apply to the *regulated activity* of *advising on regulated mortgage contracts* where both the lender and the borrower are outside the *United Kingdom*. The effect of this is that, where the *principal* purpose of an overseas periodical publication is to offer advice on *securities* or *relevant investments* and *regulated mortgage contracts*, the exclusion for an *overseas person* who provides advice to *persons* in the *United Kingdom* as a result of a legitimate approach will not apply to the advice concerning *regulated mortgage contracts*.

Exclusions and exempt persons

- 7.3.8 G If a *person* is carrying on the business of *advising on investments* in the *United Kingdom*, he will not require *authorisation* if:

- (1) he is able to rely on an exclusion; in addition to the exclusions already mentioned (in articles 54 and 72 of the *Regulated Activities Order*), other exclusions that may be relevant are in Chapter XVII of Part II of the *Regulated Activities Order*; or
- (2) he is an *exempt person* (see *PERG 2.11 (What to do Now?)*); since *persons* are exempt only in relation to specified *regulated activities*, his exemption must apply to the *regulated activity* of *advising on investments*.

Which person is required to be authorised?

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

7.3.10 G Similar principles apply to news services and broadcasts.

7.4 Does the article 54 exclusion apply?

The formats

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

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

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

- (1) to advise on *securities* or *relevant investments* or *regulated mortgage contracts*: or

- (2) to lead or enable *persons*:
 - (a) to *buy, sell*, subscribe for or underwrite *securities* or *relevant investments*; or (as the case may be);
 - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by the *persons* to whom the advice is given as borrower.

Formats in writing or other legible form

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

Television and Radio

- 7.4.4 G The third specified format is for advice in any service consisting of the broadcast or transmission of television or radio programmes. This will encompass the transmission through cable of interactive television programmes. In the *FSA's* view, 'service' in this context goes beyond any particular series of programmes broadcast or transmitted through a given medium. It refers instead to the

administrative system (usually aimed at a particular audience) through which a range of different programmes is provided, for example any particular TV or radio channel. In the *FSA's* view, it is unlikely that a TV or radio service will have one of the *principal* purposes that would prevent its being able to rely on the exclusion unless the complete service is designed to focus on financial or *investment* matters.

The principal purpose test

- 7.4.5 G The exclusion applies only if the principal purpose of the publication or service is not:
- (1) to give advice on *securities, relevant investments* or *regulated mortgage contracts* (see *PERG 7.3.1G*); or
 - (2) to lead or enable *persons* to:
 - (a) *buy, sell*, subscribe for or underwrite *securities* or *relevant investments*; or
 - (b) to enter as borrower into *regulated mortgage contracts*, or vary the terms of *regulated mortgage contracts* entered into by *persons* to whom the advice is given as borrower.

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

- 7.4.6 G Any assessment of the principal purpose of a periodical publication, news service or broadcast needs to be carried out against the background that:
- (1) they all share the characteristic of being available over a sustained period and, within that period, appearing from time to time with a different content;
 - (2) the same periodical publication will have many different editions;
 - (3) the regular updating of the news or information service will produce differences in the material provided, comparing the content of the service as it appears at any one time with its content as it appears at any other; and
 - (4) the programmes in a TV or radio service are bound to have a different content from each other.
- 7.4.7 G To address this feature of variation in content, article 54 requires that the principal purpose of a publication or service is to be assessed by

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

- 7.4.8 G Looking at the first disqualifying purpose set out in the exclusion, all the matters relevant to whether the *regulated activities* of *advising on investments* or *advising on regulated mortgage contracts* are being carried on must be taken into account (see *PERG* 8.24 (Advising on investments)). If the principal purpose of a publication or service is to give to *persons*, in their capacity as investors (or potential investors) or as borrowers (as the case may be), advice as referred to in *PERG* 7.4.5G(1), then the publication or service will not be able to benefit from this exclusion.
- 7.4.9 G For the second disqualifying purpose, the focus switches to assessing whether the principal purpose of a publication or service is to lead a *person* to engage in a relevant transaction or enable him to do so. This disqualifying purpose is an alternative to the first. So it extends to material not covered by the first. In this respect:
- (1) material in a publication or service that invites or seeks to procure *persons* to engage in a relevant transaction can be said to "lead" to those transactions even if it would not constitute the *regulated activities* of *advising on investments* or *advising on regulated mortgage contracts*; this includes, for example, material that consists of generic *buy* or *sell* recommendations, corporate brochures or invitations to invest in particular products or with a particular broker or fund manager; and
 - (2) material enables *persons* to engage in a relevant transaction if it facilitates the transactions, for example by giving a user the forms that enable him to carry out relevant transactions; so this limb of the second disqualifying purpose would apply to the material providing an online dealing facility on an interactive website or to facilities for on-screen dealing through digital television.

In the *FSA's* view, material will not lead or enable a *person* to engage in a relevant transaction where the material is intended merely to raise people's awareness of matters relating to *securities*, *relevant investments* or *regulated mortgage contracts*.

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

Who can benefit from the exclusion?

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

7.5 When is it appropriate to apply for a certificate?

- 7.5.1 G To decide whether the exclusion in article 54 applies, three assessments need to be made:
- (1) first, an assessment whether the vehicle for giving the advice is a newspaper, journal, magazine or other periodical publication, a service comprising regularly updated news or information or a service consisting of the broadcast or transmission of television or radio programmes;

- (2) second, an assessment of the purpose or purposes of any particular publication or service; and
 - (3) third, an assessment of the relative significance of each purpose compared with any others.
- 7.5.2 G Because opinions may differ in circumstances close to the borderline, giving rise to doubt as to whether or not the exclusion applies, the *Regulated Activities Order* makes provision for a certification process. The purpose of this process is not to provide certification for every publication or service to which the exclusion in article 54 applies.
- 7.5.3 G In many cases it will be clear whether or not a publication or service benefits from the exclusion. A publication or service may provide reports on such a wide range of matters that it is not possible to say that it has any purpose other than to provide coverage of a wide range of matters. Alternatively, it may be clear that the principal purpose of a publication or service is something other than those specified in the article 54 exclusion. Examples of cases where, in the *FSA's* view, the exclusion is capable of applying include:
- (1) national or local newspapers providing the normal range of non-financial news and coverage of other matters (such as sports, arts and leisure) and which simply contain financial journalism (such as reports on particular *investments* or markets) as one element of their all-round coverage;
 - (2) weekly or monthly journals aimed at a particular subject (such as computing or sport) but which have some coverage of, or promotional material relating to, *investments* and financial matters;
 - (3) websites which provide financial news or information;
 - (4) closed user group communication systems specialising in financial or *investment* matters; and
 - (5) television or radio channels dedicated to consumer affairs which devote a small number of programmes to financial planning.
- 7.5.4 G It is only where there are grounds to think that there is a significant doubt as to the principal purpose of a publication or service that the question of whether or not to apply to the *FSA* for a certificate under article 54 of the *Regulated Activities Order* is expected to arise. For example, this may happen where a publication or service has several significant purposes and one of them is a disqualifying purpose referred to in the exclusion in article 54. It may on occasion be

difficult to assess the relative importance of the purposes compared with each other, particularly given that over time there will be a variation in the content of the publication or service. In such cases, an application for a certificate would be appropriate.

7.6 Applications for a certificate

Pre-application contact

- 7.6.1 G A *person* considering applying for a certificate should, before sending in any application, contact the Firm Contact Centre of the *FSA* (email: fcc@fsa.gov.uk) to discuss whether a certificate may be appropriate.

Form of application

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

- (6) The application must be accompanied by the application fee (see *PERG 7.6.5G*).

Requests for further information

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

Time for processing applications

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

Application Fee

- 7.6.5 G The fee for an application for a certificate under article 54 of the *Regulated Activities Order* is £2,000 (see *AUTH 4 Annex 1R*).

The *FSA*'s approach to considering applications

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

- 7.6.9 G In reaching a view, the *FSA* will take into account both editorial and promotional material in the publication or service. It will also have regard to the stated purpose of the publication or service and to any other material relevant to its purpose.
- 7.6.10 G Other factors relevant to an assessment of purpose or content of the publication or service may vary depending on the nature of the publication or service. For example, if a service is provided by a website, consideration of the content of the publication or service will take account of hypertext links and other features such as e-mail addresses, bulletin boards and chat rooms.

Grant of application

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

Refusal of application

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

7.7 Post-certification issues

Ongoing monitoring

- 7.7.1 G If a certificate is granted then, until it is revoked, it is conclusive evidence that the exclusion under article 54 of the *Regulated Activities Order* applies. A *person* to whom a certificate is given

should notify the *FSA* of any significant changes to the purpose or nature of the content of the relevant publication or service. The *FSA* will need to keep the content of the publication or service in question under review.

- 7.7.2 G An annual fee of £1,000 will be charged to meet the costs of ongoing monitoring (see *SUP 20 Annex 3R*).

Revocation of certificate

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

Publication of details of certificate holders

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

Further information

- 7.7.5 G For further information contact the Firm Contact Centre of the *FSA* (email: fcc@fsa.gov.uk).

FINANCIAL PROMOTION AND RELATED ACTIVITIES

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*.

Purpose of guidance

- 8.1.2 G The purpose of this *guidance* is two 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*.

- 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* 8.10.2G); and
 - (b) meaning of '*unsolicited real time financial promotion*' (see *PERG* 8.10.8G);
- (8) types of exemption under the *Financial Promotion Order*, including:
- (a) exemption for certain one-off promotions (see *PERG* 8.14.3G);
 - (b) exemption for *financial promotions* not directed at the *United Kingdom* (see *PERG* 8.12.2G);
 - (c) exemptions for *financial promotions* by journalists and in broadcasts (see *PERG* 8.12.23G);
- (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); and

(17) the business test for *regulated activities* (see *PERG* 8.34).

8.1.4 G This *guidance* is issued under section 157 of the *Act*. It represents the *FSA'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 150 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 2001 (SI 2001/1335) (as amended) (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 *FSA* 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 *COB 3*, *ICOB 3*, or *MCOB 3* (Financial promotion) applies to a particular communication. For example, to find out if the communication would be subject to an exemption if it were made by an *unauthorised person* (for example, see *COB 3.2.4R* and *COB 3.2.5R(2)*).

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 *COB 3*, *ICOB 3*, or *MCOB 3* 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 *COB 3*, *ICOB 3*, or *MCOB 3* will apply (subject to additional exemptions in, for example, *COB 3.2.5R*). 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 *COB 3.12.2R*). *PERG 8.36.1G* contains a flowchart explaining these steps.

8.2.6 G One of the main effects of the *Act* is to bring together in one statute the regulation of *persons* who provide financial services. These would previously have been regulated under the Financial Services Act 1986, the Banking Act 1987, the Insurance Companies Act 1982 or under laws relating to *building societies*, *friendly societies* and *credit unions*. The *Act* also consolidates the provisions of those statutes which governed advertising and making unsolicited personal

communications.

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 *FSA'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 *FSA'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 *FSA* recognises that the matter cannot be without doubt. However, it is the *FSA's* 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 *FSA* supports the views expressed by Ministers as referred to in *PERG* 8.4.2G. 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 *FSA* 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 G The *FSA* considers that it is appropriate to apply an objective test to decide whether a communication is an invitation or an inducement. In the *FSA*’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 G 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 G Merely asking a *person* if they wish to enter into an agreement with no element of persuasion or incitement will not, in the *FSA*'s view, be an invitation under section 21. For example, the *FSA* 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

- 8.4.7 G 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 *FSA* 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 G *PERG* 8.4.9G to *PERG* 8.4.34G apply the principles in *PERG* 8.4.4G to *PERG* 8.4.7G 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 FSA'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 G 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 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 G 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* 8.12.21G). 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 G 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* 8.12.14G).

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* 8.4.11G 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* 8.12.23G and *PERG* 8.12.14G). 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 *FSA'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* 8.21.10G.

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* 8.4.16G 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* 8.12.23G). 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 G 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* 8.12.23G).

Investment agreements, share purchase agreements and customer agreements

- 8.4.19 G 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 G 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

- 8.4.21 G 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 8.4.7G* 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 73 (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 73 but which is not the prospectus itself is likely to require *approval* by an *authorised person* unless another exemption applies. *AUTH 1.9.1G* explains about *approval*.

Introductions

- 8.4.22 G (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* 8.12.14G). 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 8.12.23G*).
- (7) Article 15 (Introductions) may apply where the introduction is a *real time financial promotion* (see *PERG 8.12.11G*). In addition, article 28B (Real time communications: introductions in connection with qualifying credit) may apply where an introduction is a *real time qualifying credit promotion* (see *PERG 8.17.12G*).

Distributors

- 8.4.23 G 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 8.12.18G*). 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 8.12.14G*).

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 8.4.7G* 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* 8.14.3G).

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 8.4.29G* to *PERG 8.4.30G*.
- 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 8.4.29G* 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* 8.12.12G).

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* 8.14.3G). *Authorised persons* should note that, where personal quotations or illustrations do amount to a *financial promotion COB 3, ICOB 3* or *MCOB 3* will not usually apply to them (see, for example, *COB* 3.2.5R (6)).

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 to their employees

- 8.4.34 G Employers may *communicate* with their employees on matters which involve *controlled investments*. For example, *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*). 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, include making additional contributions or exercising options.

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, COB 3.12.2R). 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. 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 *FSA* 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 *FSA'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* 8.14.3G).

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 8.4.34G* 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 *FSA* that a *person* is *communicating* where he gives material to the recipient or where, in certain circumstances (see *PERG 8.6.5G*), 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 *FSA*’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 *FSA* 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 G In the *FSA'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 *FSA* 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* 8.12.18G).

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 43 of the *Financial Promotion Order* (Members and creditors of certain bodies corporate) applies only to a communication by a *body corporate* to its own shareholders or creditors about its own *securities*. This exemption may apply where a *company* ('P') wishes to acquire another *company* ('C') for cash and arranges for C to *communicate* its offer to C's shareholders. In this case, where P causes C to *communicate*, it is the *FSA*'s view that the exemption that applies to C 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 C.

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 *FSA*'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 G In the *FSA's* opinion, the matters in *PERG* 8.6.9G 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* 8.10.2G 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 FSA'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* 8.36.3G and *PERG* 8.36.4G. 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 mediation 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 *e-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 *e-money*. This is unless the communication is a *financial promotion* for some other reason.

- 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 8.7.3G*; 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 *FSA'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 8.6.10G* 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* 8.12.2G) 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 changes made in the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157). This is explained more fully in *PERG* 8.12.38G. 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 *FSA* 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 *COB* 3, *ICOB* 3 or *MCOB* 3 purely so that he can *communicate* it himself. In the *FSA'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, *COB 3*, *ICOB 3* or *MCOB 3* 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 *COB 3.12.1G(3)*).
- 8.9.4 G 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 8.4.28G* offers *guidance* about when accompanying material may be part of a *financial promotion*.
- 8.9.5 G The restriction in section 21 is also disapplied under section 21(5) where provided for by the Treasury by order. The Treasury made such an order on 2 April 2001 (the *Financial Promotion Order*). This contains a number of specific exemptions which are referred to in *PERG 8.12* to *PERG 8.15* and *PERG 8.21*. *The Financial Promotion Order* has been amended by:

- (1) the Financial Services and Markets Act 2000 (Financial

- Promotion) (Amendment) Order 2001 (SI 2001/2633));
- (2) the Financial Services and Markets Act 2000 (Miscellaneous Provisions) Order 2001 (SI 2001/3650);
 - (3) the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No2) Order 2001 (SI 2001/3800);
 - (4) the Financial Services and Markets Act 2000 (Financial Promotion and Miscellaneous Amendments) Order 2002 (SI 2002/1310);
 - (5) the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (SI 2002/2157);
 - (6) the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2003 (SI 2003/1676);
 - (7) the Financial Services and Markets Act 2000 (Financial Promotion and Promotion of Collective Investment Schemes) (Miscellaneous Amendments) Order 2005 (SI 2005/270).

A consolidated version of the *Financial Promotion Order* is available on the Treasury website www.hm-treasury.gov.uk under Documents/Financial Services/Regulating Financial Services/FSMA/Secondary legislation ordered by date of laying.

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

8.10.3 G In the *FSA's* view, the matters identified in *PERG* 8.10.2G 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 G The words 'personal visit, telephone conversation or other interactive dialogue' clearly imply that the first two are types of the third. In the *FSA'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 *FSA's* view, no more an interactive dialogue than a questionnaire or an electronic decision tree. The *FSA* 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 G In the *FSA'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* 8.12.37G). 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* 8.10.2G 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 *FSA*'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 G 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 *FSA'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 8.10.2G* 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 8.12.23G*). 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 8.12.32G*).

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 G *PERG* 8.6.9G 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 *FSA* 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 G In the *FSA*’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 G 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 8.6.10G*, 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 *FSA'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 8.36.6G* 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 combinations allowed are:

- (1) exemptions in Part IV of the *Financial Promotion Order* (all *controlled activities*) may be combined with each other or any of the exemptions in:
 - (a) Part V (*deposits and contracts of insurance other than life policies*); or
 - (b) Part VI (other *controlled activities*);
- (2) exemptions in Part V may be combined with each other; and
- (3) exemptions in Part VI may be combined with each other.

However, there is no power to combine exemptions in Part V with exemptions in Part VI.

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 *FSA'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 *FSA'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 *FSA* 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 *FSA*'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 *FSA* 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 sophisticated investor, asking to see a copy of the current certificate or the signed statement or both.

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* 8.12.2G to *PERG* 8.12.38G.

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* 8.12.8G).

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* 8.12.8G) 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 or on behalf of the same *overseas person*; 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 G 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 *FSA*’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 G 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* 8.12.8G) 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 G 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 *FSA*'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 both.

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* 8.11.4G

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 8.14.21G* and *PERG 8.14.27G*), 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 G This exemption applies only to a *real time 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 FSA'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 FSA'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.

Exempt persons (article 16)

- 8.12.12 G This exemption covers two 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, recognised investment exchanges, recognised clearing houses* 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.

8.12.13 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 *COB 3, ICOB 3* or *MCOB 3*. 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* 8.12.23G).

Mere conduits (article 18 and 18A)

- 8.12.18 G The purpose of this exemption 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* 8.6.5G 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 where the *financial promotion* is an *outgoing electronic commerce communication*. 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* 8.12.19G and *PERG* 8.12.20G). 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 *FSA'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 a business carried on by him the principal purpose of which is transmitting or receiving material provided to him by others. In the *FSA's* view, what matters is that the *person* is carrying on a business which has the required principal purpose. Such a business might represent but a part of a *person's* activities (however small), so long as it represents a discrete business. A discrete business is an activity whose principal purpose is to receive and transmit other *persons'* communications and which is not simply a service provided incidentally or as an adjunct to another service. 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 G 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 8.12.6G* 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 whom 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 *FSA*'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 G 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 G 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 (as amended by article 2 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No 2) Order 2001) 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 *FSA*'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 8.12.25G* 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 8.12.27G*). 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 *FSA*'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 Programme Code of the Radio Authority; or
 - (c) the Producers' Guidelines issued by the British Broadcasting Corporation; or
 - (d) the Programme Code of the Independent Television Commission.

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* 8.12.6G), 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 *FSA'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 *FSA'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* 8.12.29G may not be practical. It is the *FSA'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 *FSA*, 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 *FSA'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 (which was added by article 3 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment No 2) Order 2001) 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* 8.12.25G 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* 8.12.25G). 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 *FSA'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 *FSA* 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 *FSA* 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 *FSA* would not expect to take further action. In the *FSA*'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* 8.12.25G). 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 *incoming electronic commerce communications*. 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 in line with article 6 of the *First Life Directive* or the *First Non-life Directive*; and
 - (b) the insurance falls within the scope of any of the *Insurance Directives*; 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* other than *life policies*. The exemptions may be combined with exemptions in Part IV but not with those in Part VI.
- 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* 8.12.14G – and follow up communications – see *PERG* 8.12.10G) 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 mediation activities* is in *PERG* 8.17A (Financial promotions concerning insurance mediation 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* 8.36.6G contains a table showing which types of *financial promotion* are covered by each individual exemption.
- 8.14.2 G *PERG* 8.14.3G to *PERG* 8.14.42G 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 *FSA* 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* 8.14.6G).
- (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 *FSA*'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 *FSA*'s opinion, the indicators referred to in *PERG* 8.14.4G 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 *FSA* 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 *FSA* 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 *FSA*'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* 8.14.4G because it is addressed to more than one recipient and they are not *persons* who will *engage in investment activity* jointly. In the *FSA*'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 *FSA'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 *FSA'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 was added by article 2 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 (SI 2001/2633). It 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 *FSA'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 *FSA'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 *FSA'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 *FSA'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 *FSA'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 *FSA'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.

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 *COB 3* or *MCOB 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 *FSA* recommends that anyone seeking to rely on this exemption either seeks professional advice or contacts the *FSA* 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 *FSA’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 disappplies 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* 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) *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 G 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 G 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 *FSA'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* 8.14.21G may then be sent to him under article 48. *PERG* 8.4.27G 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 (e) which, for the most part, involve the amount of assets held.
- 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 *FSA'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* 8.14.27G to *PERG* 8.14.28DG 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 *FSA* 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 *FSA*'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 *FSA* 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 *FSA* 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 *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 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 54)).
- 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 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 certified high net worth individuals, high net worth companies or unincorporated associations or trusts, or 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 high net worth individuals, high net worth companies or unincorporated associations or trusts, or 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. In the *FSA's* view, the exemption allows for *financial promotions* to be made to the members of the association. It is not restricted to *financial promotions* made to the operator or secretariat of the association.

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* 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.

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 *FSA'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 *FSA*'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. The Treasury, in its consultative document "Financial Services and Markets Act two year review: Changes to secondary legislation Proposals for change, February 2004" proposed changes to article 62 aimed primarily at limiting its scope in relation to the objective test referred to in *PERG* 8.14.35G. In its response to the comments received during the consultation, the Treasury announced, in its document "Financial Services and Markets Act two year review: Changes to secondary legislation Government response, November 2004" that it intends to make certain changes to article 62 in due course.

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* in the *body corporate* or a member of its group, or *warrants* or *certificates representing certain securities* relating to such *shares* or *debentures*. In the *FSA*'s view, an exchangeable *debt security* which is partly a *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 *FSA* 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 *FSA* 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 *FSA* 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 *FSA's* 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* 8.15.2G 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* was added by article 2(b) of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2001 (SI 2001/2633). It 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* 8.15.6G and *PERG* 8.15.7G as 'Part XX activities'); and
 - (2) contains a specified statement and is limited in its content to the matters referred to in *PERG* 8.15.6G.
- 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 services to clients because we are members of [relevant designated professional body]. We can provide these investment 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. In the *FSA's* view, the requirement that a *financial promotion* must contain a statement in the specified terms does not prevent minor changes to the text. This is provided they do not alter or otherwise change the meaning of the statement. For example, replacing "we" with the name of the firm or "because" with "as" or (where relevant) "members of" with "licensed by the" would be acceptable.

- 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 *FSA* 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 FSA'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 8.14.3G*)) 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 2.8.14G*). 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 [not used]

Introduction

- 8.17.1A G Section 21 applies to *financial promotions* concerning agreements for *qualifying credit* (*qualifying credit promotions*). In this respect, it not only covers *financial promotions* about *regulated mortgage contracts* but also *financial promotions* about certain other types of credit agreement. This is explained in more detail in *PERG 8.17.2G* to *PERG 8.17.3G*.

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) loans secured by a second or subsequent charge;
- (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 FSA'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 to vary the terms of that contract in such a way as to vary his 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* will be 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 his 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 him on or after 31 October 2004 in such a way as to vary his 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* will also be 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* (*qualifying credit promotions*). 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* 8.7.10G to *PERG* 8.17.12G.

8.17.10 G Article 46 (Qualifying credit to bodies corporate) exempts any *financial promotion* about providing *qualifying credit* 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 Article 28(4) (One off non-real time communications and solicited real time communications) sets aside the general rule that exemptions

in Parts V and VI of the *Financial Promotion Order* cannot be combined by permitting the combination of article 28 and article 23 (Deposits: real time communications) where the *financial promotion*:

- (1) is a one-off *solicited real time financial promotion*; and
- (2) is about *providing qualifying credit*.

8.17.12 G Article 28B (Real time communications: introductions in connection with qualifying credit) exempts a *real time financial promotion* that relates to one or more of the *controlled activities* about *regulated mortgage contracts*. 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
 - (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 *qualifying credit* 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 *FSA's* register at <http://www.fsa.gov.uk/register/>. If an *authorised person* has *permission* to carry on a *regulated activity* (which can be checked on the *FSA's* register) it is reasonable, in the *FSA's* view, to conclude that the *authorised person* carries on that activity (but not a *controlled activity* which is not a *regulated activity*). The *FSA* 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 *FSA'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 *FSA'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 *FSA'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 *FSA* 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.

Interaction with the Consumer Credit Act

8.17.17 G Most credit advertisements are, with various exceptions, regulated under the Consumer Credit Act 1974. However, article 90(3) (Consequential amendments of the Consumer Credit Act 1974) and Article 91(1) (Consequential amendments to subordinate legislation under the Consumer Credit Act 1974) of the *Regulated Activities Order* disapply the provisions of the Consumer Credit Act 1974 to any *financial promotion* other than an exempt generic communication. An exempt generic communication is a *financial promotion* that is exempt under article 17 of the *Financial Promotion Order* (Generic promotions) (see *PERG* 8.12.14G (Generic promotions (article 17))). Hence, an advertisement about credit of any kind will either be regulated under Section 21 of the *Act* or under the Consumer Credit Act 1974. Such an advertisement will only be subject to regulation under both statutes if it is about secured and unsecured lending. Typical examples showing which statute regulates particular types of credit advertisements are given in the table in *PERG* 8.17.18G (Table – Guide to the application of the Act and the Consumer Credit Act 1974 to credit advertisements).

8.17.18 G Guide to application of the Act and the Consumer Credit Act 1974 to credit advertisements. This table belongs to *PERG* 8.17.17G

| | Subject of advertising or promotion | FSMA regulated | CCA regulated |
|-----|--|----------------|---------------|
| (1) | <i>regulated mortgage contracts</i> | Yes | No |
| (2) | other loans secured on land where the lender also enters into <i>regulated mortgage contracts</i> as lender | Yes | No |
| (3) | loans not secured on land whether or not the lender also enters into <i>regulated mortgage contracts</i> as lender | No | Yes |
| (4) | loans not secured on land but which form part of a loan product that is otherwise secured on land and where the lender enters into <i>regulated mortgage contracts</i> as lender | Yes | No |
| (5) | loans as in (1), (2) or (4) | Yes | No |

| | | | |
|-----|---|-----|-----|
| | but where the advertisement is subject to exemptions under the <i>Financial Promotion Order</i> other than article 17 (Generic promotions) | | |
| (6) | loans as in (1), (2) or (4) but where the advertisement is exempt under article 17 of the <i>Financial Promotion Order</i> (Generic Promotions) | No | Yes |
| (7) | loans with features as in (1), (2), (4) or (5) promoted in combination with other loans | Yes | Yes |

8.17A Financial promotions concerning insurance mediation 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 mediation activities* will vary depending on the type of activity. The implementation of the *Insurance Mediation Directive* 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 are likely to be *authorised persons*. As such they will be subject to COB 3 or ICOB 3. Any *persons* who are making *financial promotions* as referred to in PERG 8.18.1G 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.

COB 3.13.1R 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 8.20.2G*. A *regulated collective investment scheme* is:

- (1) an *authorised unit trust 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) a *scheme* recognised under section 270 of the *Act* (Schemes authorised in designated countries or territories); or
- (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 *FSA* 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 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) and by articles 7 to 10 of the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002, SI 2002/2157) ('the CIS Financial Promotion Order'). 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 8.14.3G(2)* and *PERG 8.14.4G(2)*).
- 8.20.4 G The *FSA* 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 *COB 3 Ann 5R* and referred to in *COB 3.11*. To date, the Treasury has not made an order exempting single property schemes under section 239.
- 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 8.4.14G* 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 *FSA'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* 8.21.4G to *PERG* 8.21.21G set out the *FSA'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 *FSA'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 *FSA* considers that article 69 (see *PERG* 8.21.17G) 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* 8.21.6G), 59 (see *PERG* 8.21.11G), and 69 (see *PERG* 8.21.17G).

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* 8.12.14G). 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* 8.12.21G). 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 8.6.9G). 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 8.12.32G 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 8.14.3G 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 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*; 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. It does not, however, exempt *persons* who may make *financial promotions* on behalf of a *company*.

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 section 234 and 234A of the Companies Act 1985 or corresponding legislation in Northern Ireland or in another *EEA State*.

In this respect, the *FSA* 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* of the *company* making the *financial promotion* (or a member of its *group*) or *warrants* relating to or certificates representing such *shares* or *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, 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 Parts II or III of, schedule 3 to the *Financial Promotion Order*. This includes *recognised investment exchanges* and *EEA regulated markets* that are *exempt persons* under article 36 of the *Exemption Order*, together with various other overseas markets (including OFEX (UK)). 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 FSA'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 *FSA'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 *FSA'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* 8.21.16G.

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, or is specified in or established under the rules of an exchange specified in Part II 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 Part II of the Public Offers of Securities Regulations 1995 (or, where it is an *outgoing electronic commerce communication*, provisions corresponding to that Part under the law of another *EEA State*), would be required to be *communicated* by those Regulations (or other provisions); 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 similar to article 59 in the conditions it imposes (see *PERG* 8.21.12G). These 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* of the *company* or its parent undertaking (or *warrants* relating to or certificates representing such *investments*) are permitted to be traded or dealt in on a relevant market (relevant market having the same meaning as in article 67 - see *PERG* 8.21.13G).

8.21.18 G Article 69 exempts *financial promotions* about 'investments issued by' a *company* or a member of its *group*. An issue arises about whether the term 'investments issued by' a *company* includes investments which are 'to be issued by' a *company*. In the *FSA*'s view, there is a case for arguing that this is the effect although the matter is not beyond doubt. Article 69 replaces an earlier exemption made under section 58(3) of the Financial Services Act 1986 and which applied to investments which were to be issued. The *FSA* understands that article 69 was not intended to be narrower in scope than its predecessor. The *FSA* considers that the better view is that article 69 applies where investments are 'to be issued'.

8.21.19 G In the *FSA*'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) to (6). 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 an inducement about certain *investments* issued by the *company* or a *group* member and which does not amount to advice to any *person* to acquire or dispose of such *investments*; 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 71: Promotions included in listing particulars, etc

8.21.20 G Article 71 applies to a *non-real time financial promotion* included in:

- (1) listing particulars;
- (2) supplementary listing particulars;
- (3) a prospectus approved under *listing rules* under section 84 or 87 of the *Act*;

- (4) a supplementary prospectus approved under *listing rules* made under section 81 of the *Act* (as applied by section 86 or 87); and
- (5) any other document required or permitted to be published by *listing rules* under part VI of the *Act*.

The comments in *PERG* 8.21.14G about when something is required or permitted to be published apply also to (5).

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 by the *company* or a member of its *group*. The *FSA* 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 *FSA's* general views on when a communication is an inducement. It appears to the *FSA* 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 *FSA* 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* 8.12.18G).

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 *FSA*'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 8.23.2G* are:

(1) giving advice on certain investments (articles 53 (Advising on investments), 53A (Advising on regulated mortgage contracts) 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(1) of the *Regulated Activities Order* (Arranging deals in investments)) or *making arrangements with a view to regulated mortgage contracts* (article 25A(2) of the *Regulated Activities Order* (Arranging regulated mortgage contracts) - for example, where the *person* concerned makes arrangements that are intended to lead to a transaction by a third party; 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 and advising on investments. Guidance on the regulated activities of making arrangements with a view to and advising on regulated mortgage contracts* is in *PERG 4* (Guidance on regulated activities connected with mortgages).

8.24 Advising on investments

8.24.1 G Under article 53 of the *Regulated Activities Order*, *advising on investments* 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) *buying, selling*, subscribing for or underwriting a particular *investment* which is a *security* or a *relevant investment* or exercising any right conferred by such an *investment* to *buy, sell*, subscribe for or underwrite such an *investment*.

8.24.2 G The effect of advice being given in the circumstances referred to in *PERG 8.24.1G* is that:

- (1) it must relate to an *investment* which is a *security* 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 aspects referred to in *PERG 8.24.2G* is considered in greater detail in *PERG 8.25* to *PERG 8.29*. In addition, under article 52A of the *Regulated Activities Order*, *providing basic advice on a stakeholder product* is a *regulated activity* and under article 56 of the *Regulated Activities Order*, advising a *person* to become, or continue

or cease to be a *member* of a particular Lloyd's *syndicate* is a *regulated activity*.

- 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 of the *Regulated Activities Order*, a *security* or *relevant investment* is any one of the following:
- (1) *shares*;
 - (2) *debentures*;
 - (3) *government and public securities*;
 - (4) *warrants*;
 - (5) *certificates representing certain securities*;
 - (6) *units in collective investment schemes*;
 - (7) *stakeholder pension schemes*;
 - (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 does not apply to advice given on any of the following:
- (1) *deposit* or other *bank* or *building society* accounts (but note that *providing basic advice on a stakeholder product* including stakeholder deposit accounts is a separate *regulated activity* under article 52A of the *Regulated Activities Order* - see the *guidance in PERG 2.7.14AG* (Providing basic advice on stakeholder products));
 - (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*.

8.26 The investment must be a particular investment

8.26.1 G For the purposes of article 53, 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. 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 In the *FSA's* view, guiding a *person* through a decision tree should not, of itself, involve advice within the meaning of article 53 (it should be generic advice). For example, helping a *person* to understand what the questions or options are and how to determine which option applies to his particular circumstances. But a recommendation that the *person* concerned should, if the results of using the decision tree so indicate, buy a stakeholder personal pension from a particular provider (or any other particular *investment*) would be advice for the purpose of article 53. An *unauthorised person* guiding another through a decision tree needs to make it clear that the decision tree aids generic decisions and that the *person* doing the guiding is not recommending any particular *investment*.

- 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
 - (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.
- 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, 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 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 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 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 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 *FSA*’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 In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make is not advice.

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 *FSA'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.
- 8.29 Advice must relate to the merits (of buying or selling a particular investment)
- 8.29.1 G Advice must relate to the *buying* 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. This is because it is not advice on the merits of *buying* or *selling* an *investment*.
- 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* or *selling* an *investment*, advice will not be covered by article 53 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 in some circumstances.
- 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* 8.31.2G), the medium used to give advice should make no difference to whether or not it is caught by article 53.
- 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 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* 8.31.2G 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 (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.

- 8.31 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 As respects article 53, 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 or to lead or enable *persons* to acquire or dispose of *securities* or *contractually based investments*. 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.
- 8.31.4 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 mediation* or *reinsurance mediation*. This results from the requirements of the *Insurance Mediation Directive* and is explained in more detail in *PERG 5* (Insurance mediation 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
 - (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 *FSA'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 *FSA'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 *FSA'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 *FSA'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 *FSA'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 FSA'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 mediation* or *reinsurance mediation*, certain exclusions to article 25 are not available. This results from the requirements of the *Insurance Mediation Directive* and is explained in more detail in *PERG 5.6* (Insurance mediation activities 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 8.12.11G* 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 *FSA'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 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*. However, certain other exclusions do apply. This results from implementation of the requirements of the *Insurance Mediation Directive* 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).

8.34 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 *FSA'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 *FSA'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.

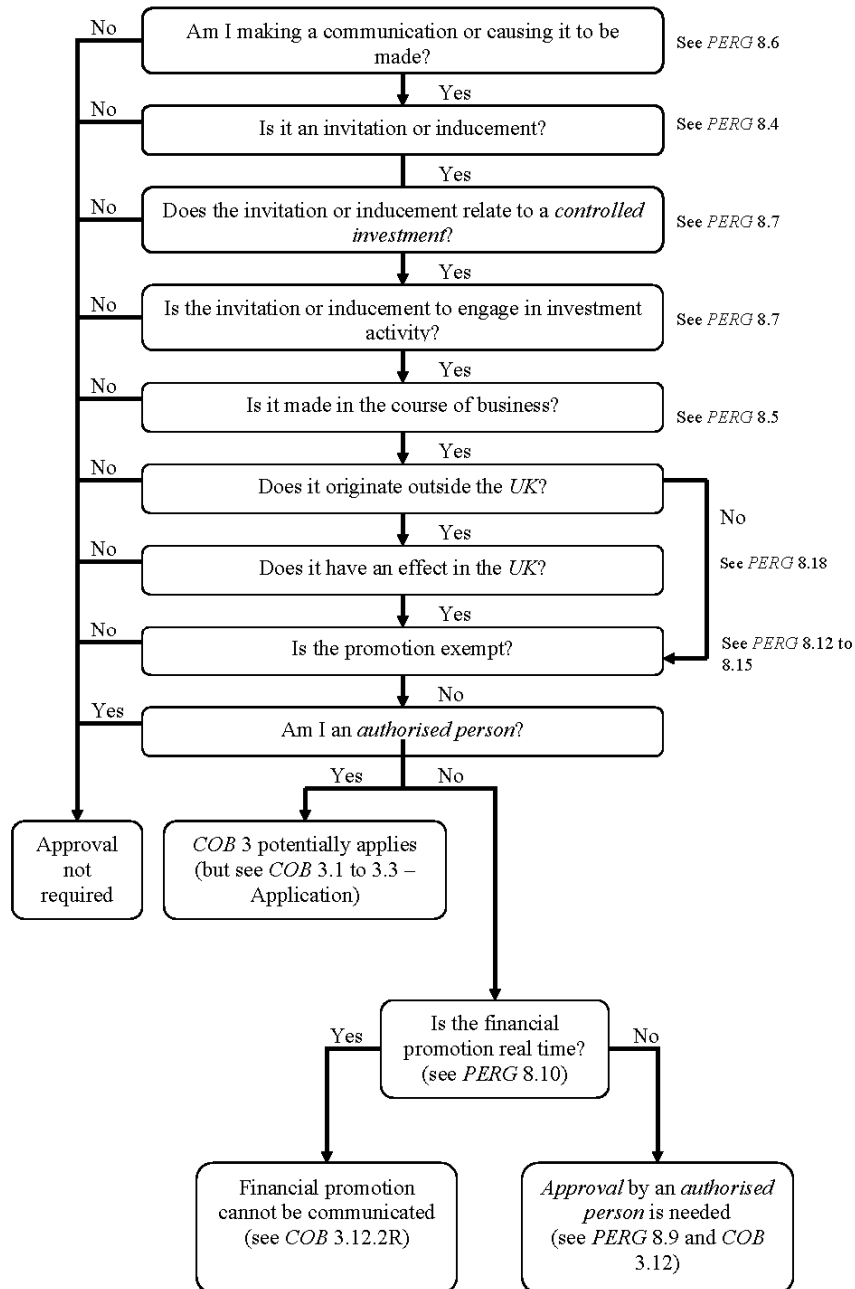
8.35 Authorisation and exemption

8.35.1 G 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. *AUTH* explains about the *authorisation* process and the procedures for obtaining *Part IV permission* and for the approval of individuals. 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 G 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* 8.2.5G.



Controlled activities and controlled investments

8.36.2 G 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 8.7.2G*.

8.36.3 G Table Controlled activities

| | |
|------|---|
| 1. | Accepting deposits |
| 2. | Effecting and carrying out contracts of insurance |
| 3. | Dealing in securities and contractually based investments |
| 4. | Arranging deals in investments |
| 5. | Managing investments |
| 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 |
| 10A. | Arranging qualifying credit etc |
| 10B. | Advising on qualifying credit etc |
| 11. | Agreeing to do anything in 3 to 10B above |

8.36.4 G Table Controlled investments

| | |
|----|---|
| 1. | A deposit. |
| 2. | Rights under a contract of insurance. |
| 3. | Shares etc. |
| 4. | Instruments creating or acknowledging indebtedness (referred to in the Glossary as 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. |
| 10. | Options. |
| 11. | Futures. |
| 12. | Contracts for differences etc. |
| 13. | Lloyd's syndicate capacity and syndicate membership. |
| 14. | Funeral plan contracts |
| 15. | Agreements for qualifying credit |
| 16. | Rights to or interests in anything falling under 1 to 15 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 8.11.2G* and *PERG 8.14.1G*.

8.36.6 G Table Application of Exemptions to Forms of Promotions

| Financial Promotion Order | | Applies to | | |
|---------------------------|--|-----------------------|---------------------|--|
| Article No. | Title and <i>PERG 8</i> reference (where applicable) | Unsolicited real time | Solicited real time | Non-real time (solicited or unsolicited) |
| 12 | Communications to overseas recipients (8.12.2G) | * ¹ | * | * |

| Financial Promotion Order | | Applies to | | |
|---------------------------|--|-----------------------|---------------------|--|
| Article No. | Title and <i>PERG</i> 8 reference (where applicable) | Unsolicited real time | Solicited real time | Non-real time (solicited or unsolicited) |
| 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) | * | * | * |
| 18 | Mere conduits (8.12.18G) | * | * | * |
| 18A | Outgoing electronic commerce communications: mere conduits, caching and hosting | * | * | * |
| 19 | Investment professionals (8.12.21G and 8.21.5G) | * | * | * |
| 20 | Communications by journalists (8.12.23G) | | | * |

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

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

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

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

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

| Financial Promotion Order | | Applies to | | |
|---------------------------|---|-----------------------|---------------------|--|
| Article No. | Title and <i>PERG</i> 8 reference (where applicable) | Unsolicited real time | Solicited real time | Non-real time (solicited or unsolicited) |
| 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 | * | * | * |
| 66 | Takeovers of relevant unlisted companies: application forms | * | * | * |

| Financial Promotion Order | | Applies to | | |
|---------------------------|--|-----------------------|---------------------|--|
| Article No. | Title and <i>PERG</i> 8 reference (where applicable) | Unsolicited real time | Solicited real time | Non-real time (solicited or unsolicited) |
| 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 in connection with listing applications | | * | * |
| 71 | Promotions included in listing particulars etc | | | * |
| 72 | Promotions included in prospectus for public offer of unlisted securities (8.21.20G) | | | * |
| 73 | Material relating to prospectus for public offer of unlisted securities | | | * |
| 74 | Approval of communication prior to Order coming into force | * 4 | * 4 | * |
| | | | | |

| Financial Promotion Order | | Applies to | | |
|--|--|-----------------------|---------------------|--|
| Article No. | Title and <i>PERG</i> 8 reference (where applicable) | Unsolicited real time | Solicited real time | Non-real time (solicited or unsolicited) |
| | | | | |
| 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 | | | | |
| ⁴ although article 74 applies to real time communications it may be unlikely to do so in practice. This is because it relates to advertisements which are approved under section 57 of the Financial Services Act 1986 or communications approved in accordance with COB 3. Such advertisements and communications are likely to be non-real time communications. | | | | |

MEANING OF OPEN-ENDED INVESTMENT COMPANY

9 Meaning of open-ended investment company

9.1 Application and Purpose

Application

- 9.1.1 G This *guidance* applies to *persons* who need to know whether a *body corporate* is an *open-ended investment company* as defined in section 236 of the *Act* (Open-ended investment companies). This would mean that it is a *collective investment scheme*.

Purpose

- 9.1.2 G The purpose of this *guidance* is to outline the circumstances in which a *body corporate* will be an *open-ended investment company* and, in so doing, to:

- (1) give an overview of the definition (see *PERG 9.3* (The definition)) and describe its three main elements:
 - (a) an *open-ended investment company* must be a *collective investment scheme* (see *PERG 9.4* (Collective investment scheme (section 235 of the *Act*)));
 - (b) it must satisfy the ‘property’ condition in section 236(2) of the *Act* (see *PERG 9.5* (The property condition (section 236(2) of the *Act*))); and
 - (c) it must satisfy the ‘investment’ condition in section 236(3) of the *Act* (see *PERG 9.6* (The *investment* condition (section 236(3) of the *Act*): general) to *PERG 9.9* (The investment condition: the ‘satisfaction test’ (section 236(3)(b) of the *Act*))); and
- (2) outline the implications for a *body corporate* if it does, or does not, fall within the definition of an *open-ended investment company* (see *PERG 9.10* (Significance of being an open-ended investment company)).

Effect of guidance

- 9.1.3 G This *guidance* is issued under section 157 of the *Act* (Guidance). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person’s* obligations. If a *person* acts in line with the *guidance* in the circumstances it contemplates, the *FSA* will proceed on the footing

that the *person* has complied with aspects of the requirement to which the *guidance* relates. Rights conferred on third parties cannot be affected by *guidance* given by the *FSA*. This *guidance* represents the *FSA*'s view, and does not bind the courts. For example, it would not bind the courts in relation to an action for damages brought by a *private person* for breach of a *rule* (see section 150 of the *Act* (Action for damages)), or in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (Enforceability of agreements)). A *person* may need to seek his own legal advice. Anyone reading this *guidance* should refer to the *Act* and to the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*.

Other guidance that may be relevant

- 9.1.4 G The only kind of *body corporate* of an open-ended kind that may currently be formed under the law of the *United Kingdom* is one that is authorised by the *FSA*. A *person* intending to form an open-ended *body corporate* that has its head office in Great Britain should refer to the Open-ended Investment Companies Regulations 2001 (SI 2001/1228). *Bodies corporate* formed under these Regulations are referred to in the *Handbook* as *investment companies with variable capital* (or ' *ICVCs* '). *COLL 2* (Authorised fund applications) and *CIS 16* (Application and notification) contain *rules* and *guidance* on forming such *bodies corporate*. An open-ended *body corporate* whose head office is in Northern Ireland should refer to the Open-Ended Investment Companies Regulations (Northern Ireland) 2004 (Statutory Rule of Northern Ireland 2004/335).
- 9.1.5 G *Open-ended investment companies* constituted in other *EEA States* which are seeking to exercise rights conferred by the *UCITS Directive* should refer to *COLL 9* (Recognised schemes) and *CIS 17* (Recognised Schemes) for *guidance* on the requirements of section 264 of the *Act* (Schemes constituted in other EEA States).
- 9.1.6 G *Electronic commerce activities* carried on by, or in relation to, any *open-ended investment company* will be subject to the provisions of the *E-Commerce Directive*. *Guidance* on the carrying on of *electronic commerce activities* is contained in the E-Commerce Directive sourcebook (*ECO*).
- 9.2 Introduction
- 9.2.1 G The nature of many *bodies corporate* means that they will, in most if not all circumstances, come within the definition of *collective investment scheme* in section 235(1) to (3) of the *Act* (Collective investment schemes). The property concerned will generally be managed as a whole under the control of the directors of the *body*

corporate or some other *person* for the purpose of running its business. The idea underlying the investment is that the investors will participate in or receive profits or income arising from the operation of the *body corporate's* business.

- 9.2.2 G However, there are a number of exclusions that apply to prevent certain arrangements from being a *collective investment* scheme. These are in the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme). The exclusion in paragraph 21 of the Schedule to that Order is of particular significance for *bodies corporate*. It excludes from being a *collective investment scheme* certain specified *bodies corporate* (such as *building societies* and *friendly societies*) as well as any other *body corporate* except a *limited liability partnership* or an *open-ended investment company*. This means that if a *body corporate* is an *open-ended investment company* it will not be excluded from the definition in section 235(1) to (3) of the *Act*. So it will be a *collective investment scheme*. Of course, it may be that other exclusions in the Schedule to the Order are available but this will depend on the circumstances of a particular *body corporate* (see *PERG 9.4.5G* (Collective investment scheme (section 235 of the *Act*))).
- 9.2.3 G Certain consequences flow according to whether or not a *body corporate* is an *open-ended investment company*. Different requirements apply to the marketing of the shares or securities issued by a *body corporate* which is an *open-ended investment company*, compared with one that is not (see *PERG 9.10.1G* to *PERG 9.10.6G* (Marketing of shares or securities issued by a *body corporate*)). In addition, the *regulated activities* that require *permission* may differ (see *PERG 9.10.7G* to *PERG 9.10.10G* (Implications for regulated activities)).
- 9.2.4 G *Guidance* on the application of the definition in particular circumstances is in *PERG 9.11* (Frequently asked questions)).
- 9.3 The definition
- 9.3.1 G For a *body corporate* to be an *open-ended investment company*, as defined in section 236(1) of the *Act*:
- (1) it must be a *collective investment scheme*;
 - (2) it must satisfy the property condition in section 236(2); and
 - (3) it must satisfy the investment condition in section 236(3).
- 9.3.2 G Each of these aspects of the definition is considered in greater detail in *PERG 9.4* (Collective investment scheme (section 235 of the *Act*)) to *PERG 9.9* (The investment condition: the ‘satisfaction test’

(section 236(3)(b) of the Act)). Although the definition has a number of elements, the *FSA* considers that it requires an overall view to be taken of the *body corporate*. This is of particular importance in relation to the investment condition (see *PERG* 9.6.3G and *PERG* 9.6.4G (The investment condition (section 236(3) of the Act: general))).

- 9.3.3 G An *open-ended investment company* may be described, in general terms, as a *body corporate*, most or all of the *shares* in, or *securities* of, which can be realised within a reasonable period. Realisation will typically involve the redemption or repurchase of shares in, or securities of, the *body corporate*. This realisation must be on the basis of the value of the property that the *body corporate* holds (that is, the net asset value).
- 9.3.4 G In the *FSA*'s view, all of the elements of the definition are clearly objective tests. In applying the definition to any particular case, a *person* would need to have regard to all the circumstances. This includes any changes in the way that the *body corporate* operates.
- 9.3.5 G The *FSA* understands that the aim of the definition in section 236 of the *Act* is to include any *body corporate* which, looked at as a whole, functions as an open-ended investment vehicle. The definition operates against a background that there is a wide range of different circumstances in which any particular *body corporate* can be established and operated. For example, the definition applies to *bodies corporate* wherever they are formed. So, in the application of the definition to different cases, the law applicable to, and the detailed corporate form of, particular *bodies corporate* may differ considerably.
- 9.3.6 G For a *body corporate* formed outside the *United Kingdom*, there is an additional issue as to how the applicable corporate law and the definition of *open-ended investment company* in the *Act* relate to one another. The *FSA* understands this to operate as follows. The term 'body corporate' is defined in section 417(1) of the *Act* (Interpretation) as including 'a body corporate constituted under the law of a country or territory outside the United Kingdom'. So, whether or not any particular overseas person is a body corporate will depend on the law applicable in the country or territory in which it is constituted. But if it is a *body corporate* under that law, the question whether it is an *open-ended investment company* is determined, as a matter of *United Kingdom* law, by the definition in section 236 of the *Act*. This is regardless of whether or not the *body corporate* would be considered to be open-ended under the laws of the country or territory in which it is constituted.
- 9.4 Collective investment scheme (section 235 of the Act)

- 9.4.1 G The first element of the definition is that *open-ended investment companies* are a corporate form of *collective investment scheme*. This means that they must have the features in section 235 of the *Act*.
- 9.4.2 G Section 235(1) states that a *collective investment scheme* means any arrangements with respect to property of any description. The purpose or effect of the arrangements must be to enable the *persons* taking part in them to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The participants must not have day-to-day control over the management of the property (section 235(2)) and the arrangements must provide:
- (1) for the contributions of the participants and the profits or income to be pooled (section 235(3)(a)); or
 - (2) for the property to be managed as a whole by or on behalf of the operator of the scheme (section 235(3)(b)); or
 - (3) for both (1) and (2).
- 9.4.3 G In the *FSA*'s view, it is the very existence of the *body corporate* that is the *collective investment scheme*. There are a number of statutory references that support this view. For example, it is clear that paragraph 21 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme) is drafted on the basis that it is the *body corporate* itself that is (or would be) the *collective investment scheme*. This provision states that 'no body corporate other than an open-ended investment company, amounts to a collective investment scheme'. So, any particular *body corporate* is either an *open-ended investment company* or it is not. It cannot be both at the same time, although it may change from one to the other over time (see *PERG 9.7.5G* (The investment condition: the 'reasonable investor') for further *guidance* on this point).
- 9.4.4 G Analysing a typical corporate structure in terms of the definition of a *collective investment scheme*, money will be paid to the *body corporate* in exchange for *shares* or *securities* issued by it. The *body corporate* becomes the beneficial owner of that money in exchange for rights against the legal entity that is the *body corporate*. The *body corporate* then has its own duties and rights that are distinct from those of the holders of its shares or securities. Such arrangements will, in the *FSA*'s view, qualify as arrangements of the kind described in *PERG 9.4.2G*. The holders of the *shares* or *securities* in the *body corporate* do not have day-to-day control over the management of the property (as specified in section 235(2) of the *Act*) and the property is managed as a whole by or on behalf of the *body corporate* (as

specified in section 235(3) of the *Act*).

9.4.5 G Where a *body corporate* does come within the definition of a *collective investment scheme* in section 235(1) to (3), the only relevant issue is to determine whether or not it is excluded. As *PERG* 9.2.2G (Introduction) explains, the exclusions are in the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062) (Arrangements not amounting to a collective investment scheme). If a *body corporate* satisfies any of the exclusions in paragraphs 1 to 20 of the Schedule to the Order it will not be a *collective investment scheme*. This means that it will not then be necessary to consider whether or not it is an *open-ended investment company*. In any other case, it will be necessary to consider whether the *body corporate* is an *open-ended investment company* to see whether the exclusion in paragraph 21 of the Schedule to the Order (Bodies corporate) for *bodies corporate* other than *open-ended investment companies* and *limited liability partnerships* applies.

9.4.6 G In the *FSA's* view, the question of what constitutes a single scheme in line with section 235(4) of the *Act* does not arise in relation to a *body corporate*. This is simply because the *body corporate* is itself a *collective investment scheme* (and so is a single scheme). Section 235(4) contemplates a 'separate' pooling of parts of the property that is subject to the arrangements referred to in section 235(1). But to analyse a *body corporate* in this way requires looking through its corporate personality and ignoring the legal entity that exists separately from the holders of *shares* or *securities* and their rights. As a corporate entity, it cannot be broken up into component parts in this way. This is so even though a *body corporate* may issue *shares* or *securities* of deferred classes or of classes carrying different rights.

9.5 The property condition (section 236(2) of the *Act*)

9.5.1 G If a particular *body corporate* ('BC') comes within the definition of a *collective investment scheme*, the second element in the definition is whether the property to which the scheme relates meets the property condition. This condition is that the property must belong beneficially to, and be managed by or on behalf of, BC. In addition, BC must have as its purpose the investment of its funds to:

- (1) spread investment risk; and
- (2) give its members the benefit of the results of the management of those funds by or on behalf of BC.

9.5.2 G The property belonging to BC may be property of any description, including money. For example, the arrangements may relate to real estate, works of art or a particular enterprise or rural activity. It must, of course, be possible to value the property if the requirements of the

investment condition concerned with the link to net asset value are to be met (see *PERG 9.9* (The investment condition: the ‘satisfaction test’ (section 236(3)(b) of the Act))).

- 9.5.3 G The property of the *collective investment scheme* must belong beneficially to BC, although the legal title to it may be held by a third party. However, the holders of shares or securities issued by BC may not have a beneficial interest in that property. In exchange for their contributions, they will only have rights against BC.
- 9.5.4 G The purpose of BC will need to be determined bearing in mind its constitutional instruments and any other relevant material: for example, material in a prospectus or offer document or other promotional material. The prevailing law may also be relevant.
- 9.5.5 G In the *FSA’s* view, the question of whether funds are invested by BC with the aim of spreading investment risk is not affected by the levels of risk involved in particular investments. What matters for these purposes is that the aim is to spread the risk, whatever it may be. For example, the value of each of BC’s investments, if taken separately, might be subject to a high level of risk. However, this would not itself result in BC failing to satisfy the property condition as long as it could be said that the range of different investments demonstrated that the aim was to spread investment risk.
- 9.6 The investment condition (section 236(3) of the Act): general
- 9.6.1 G If BC comes within the definition of a *collective investment scheme*, the third element in determining whether it is an *open-ended investment company* is whether the ‘investment condition’ is satisfied. This condition is that, in relation to BC, a reasonable investor would, if he were to participate in the scheme:
- (1) expect that he would be able to realise his investment in the scheme, within a period appearing to him to be reasonable; his investment would be represented, at any given time, by the value of the shares in, or securities of, BC held by him as a participant in the scheme; and
 - (2) be satisfied that his investment would be realised on a basis calculated wholly or mainly by reference to the value of the property for which the scheme makes arrangements.
- 9.6.2 G Under the investment condition, the reasonable investor is looking to satisfy two criteria. Both of these are fundamental to his decision to invest. But the thresholds referred to in *PERG 9.6.1G(1)* and *PERG 9.6.1G(2)* are different. In the *FSA’s* view, a *person* expects something where he regards it as likely to happen or anticipates that events will turn out in a particular way. A *person* is satisfied of something where he has made up his mind or is persuaded that it is

the case. The first of these criteria is referred to in this *guidance* as the ‘expectation test’ and the second as the ‘satisfaction test’.

- 9.6.3 G Section 236(3) of the *Act* states clearly that the investment condition must be met 'in relation to BC'. In the *FSA's* view, this means that the investment condition should not be applied rigidly in relation to specific events such as particular issues of shares or securities or in relation to particular points in time. The requirements of the investment condition must be satisfied in relation to the overall impression of the *body corporate* itself, having regard to all the circumstances.
- 9.6.4 G In the *FSA's* view, and within limits, the investment condition allows for the possibility that a *body corporate* that is an *open-ended investment company* may issue shares or securities with different characteristics. Some shares or securities may clearly satisfy the condition whereas others may not. The *FSA* considers that a reasonable investor contemplating investment in such a *body corporate* may still take the view, looking at the *body corporate* overall, that the investment condition is satisfied. In the *FSA's* view, a *body corporate* issuing a number of different classes of shares or securities on different terms might be expected to satisfy the investment condition where the overall balance between those that do and those that do not is strongly in favour of those that do satisfy the investment condition. The *FSA* considers that, in any case where there is a genuine and reasonable doubt as to where the balance between the different classes lies, it is very likely that the *body corporate* would not be an *open-ended investment company*. *PERG 9.8.8G* (Some relevant factors in applying the 'expectation test') comments further on this aspect of the investment condition in the specific context of the ‘expectation test’.
- 9.6.5 G Certain matters are to be disregarded in determining whether the investment condition is satisfied. Section 236(4) of the *Act* states that, for these purposes, no account is to be taken of any actual or potential redemption or repurchase of *shares* or *securities* under:
- (1) Chapter VII of Part V of the Companies Act 1985; or
 - (2) Chapter VII of Part VI of the Companies (Northern Ireland) Order 1986; or
 - (3) corresponding provisions in force in another *EEA State*; or
 - (4) provisions in force in a country or territory other than an *EEA State* which the Treasury has, by order, designated as corresponding provisions (no orders have yet been made).
- 9.6.6 G The *FSA* considers that the reference in *PERG 9.6.5G*(3) to corresponding provisions in force in another *EEA State* will include

provisions that derive from the maintenance of capital requirements of the Second Council Directive on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies (77/91/EEC).

- 9.6.7 G The *FSA*'s views on the following three elements of the investment condition are explained separately:
- (1) the 'reasonable investor' (see *PERG* 9.7 (The investment condition: the 'reasonable investor'));
 - (2) the 'expectation' test (see *PERG* 9.8 (The investment condition: the 'expectation test' (section 236(3)(a) of the Act))); and
 - (3) the 'satisfaction' test (see *PERG* 9.9 (The investment condition: the 'satisfaction test' (section 236(3)(b) of the Act))).

9.7 The investment condition: the 'reasonable investor'

- 9.7.1 G The investor is specifically a reasonable investor and not just a reasonable *person*. This simply means that the objective standard to be applied is that of the reasonable investor. In all other respects the test is the same as any other objective test applying the standards of the reasonable *person*.
- 9.7.2 G The characteristics that a reasonable investor can be expected to have will inform the use of judgment required by the 'expectation test' and the 'satisfaction test'. These tests relate to the investor's ability to realise an investment within a reasonable period and to do so on the basis of the net value of its assets. In the *FSA*'s view, the characteristics of the reasonable investor include:
- (1) sound judgment based on good sense;
 - (2) some knowledge of, and possibly experience in, the field of investment in property of the same kind as that in which the *body corporate* is to invest; and
 - (3) some knowledge of the characteristic features of collective investment.

Where investment in a particular *body corporate* is clearly targeted at investors with certain characteristics, the reasonable investor can be assumed to have those characteristics.

- 9.7.3 G The reasonable investor is a hypothetical investor. The implications of this are that the test does not relate to actual investment by a particular *person* at a particular time or in relation to a particular issue of any class of shares or securities. In the *FSA*'s view, what

underlies the test is what a reasonable investor would think he was getting into if he were contemplating investment in a particular *body corporate*. In addition, because the investor is hypothetical, the investment condition is capable of operating on a rolling basis over time.

- 9.7.4 G In practice, the assessment of the nature of a particular *body corporate* will have to be made by applying the definition whenever an *authorised person* proposes to communicate an invitation or inducement to others for them to participate in the *body corporate* by buying shares or securities issued by it.
- 9.7.5 G After an initial assessment, however, the *FSA's* view is that subsequent applications of the investment condition could produce a different result, but only if there is a change to the constitution or practice of the *body corporate* which is significant and sustained. For example, this may happen if there is a change in the *body corporate's* published intentions or regular practices. As the Economic Secretary to the Treasury said in parliamentary debate when commenting on the definition, "It is a test that can be applied from time to time to allow for the possibility that a closed-ended company can become open-ended and vice versa, on account of significant changes to the way in which the operation of the company and its constitution are structured and which push the company over the boundary between the two types". (Hansard HC, 5 June 2000 Col 123).
- 9.7.6 G Section 236(3) uses the words "the investor would, if he were to participate in the scheme". This is consistent with the fact that the reasonable investor is hypothetical. But applying the test at this early stage makes it clear that there must be objectively justifiable grounds on which the reasonable investor could base the expectation in section 236(3)(a). And on which he could be satisfied on the matters in section 236(3)(b). In the *FSA's* view, this requires, for example, that there must be something in the nature of the *body corporate* or the law applicable to it to give rise to the required expectation or on which to satisfy the investor. The established practice of the *body corporate* may also provide the necessary grounds.
- 9.8 The investment condition : the 'expectation test' (section 236(3)(a) of the Act)
- 9.8.1 G The test in section 236(3)(a) of the *Act* is whether the reasonable investor would expect that, were he to invest, he would be in a position to realise his investment within a period appearing to him to be reasonable. In the *FSA's* view, this is an objective test with the appropriate objective judgment to be applied being that of the hypothetical reasonable investor with qualities such as those mentioned in *PERG 9.7.2G* (The investment condition: the 'reasonable investor').

‘Realisation’ of investment

- 9.8.2 G In the *FSA*’s view, the ‘realisation’ of an investment means converting an asset into cash or money. The *FSA* does not consider that ‘in specie’ redemptions (in the sense of exchanging shares or securities of BC with other shares or securities) will generally count as realisation. Section 236(3)(a) refers to the realisation of an investment, the investment being represented by the ‘value’ of shares or securities held in BC. In the *FSA*’s view, there is no realisation of value where shares or securities are simply replaced by other shares or securities. However, an ‘in specie’ redemption might, in limited circumstances, satisfy the expectation test. This is where shares or securities are exchanged for other shares or securities in the same *body corporate* and those replacement shares or securities can be converted into cash or money within a period which, for both transactions taken together, can be said to be ‘reasonable’. This involves looking through the series of transactions and considering whether their overall effect would satisfy the expectation test.
- 9.8.3 G The most typical means of realising BC’s shares or securities will be by their being redeemed or repurchased, whether by BC or otherwise. There are, of course, other ways in which a realisation may occur. However, the *FSA* considers that these will often not satisfy all the elements of the definition of an *open-ended investment company* considered together. For example, the mere fact that shares or securities may be realised on a market will not meet the requirements of the ‘satisfaction test’ for the reasons given in *PERG 9.9.4G* to *PERG 9.9.6G* (Effect of realisation on a market).
- 9.8.4 G An investor in a *body corporate* may be able to realise part, but not all, of his investment. The *FSA* considers that the fact that partial realisations may take place at different times does not prevent the *body corporate* coming within the definition of an *open-ended investment company*. But, in any particular case, the ‘expectation test’ will only be met if the overall period for realising the whole of the investment can be considered to be reasonable. Apart from this, the simple fact that an investor has the opportunity to realise part of his investment at pre-determined times would not itself make a *body corporate* open-ended.

Illustrations of ‘expectation’

- 9.8.5 G The use of an expectation test ensures that the definition of an *open-ended investment company* is not limited to a situation where a holder of shares in, or securities of, a *body corporate* has an entitlement or an option to realise his investment. It is enough if, on the facts of any particular case, the reasonable investor would expect that he would be able to realise the investment. The following are examples of circumstances in which the *FSA* considers that a reasonable investor

may have such an expectation.

- (1) Where a *body corporate*, in practice, regularly redeems or repurchases its shares or securities.
- (2) Where a *body corporate* has a declared policy of redeeming or repurchasing its shares or securities; even if it is possible for the *body corporate* to change its policy, the *FSA* takes the view that the *body corporate* is open-ended unless and until it does so. In such cases it would, however, be necessary for the change of policy to be documented and for there to be a public statement or other public evidence of the change.
- (3) Where a *body corporate* makes a public announcement that it will redeem or repurchase its shares or securities on a number of pre-arranged occasions that are identified at the time of the announcement. The issue here is whether there is a demonstrable intention to redeem or repurchase the whole of a *person's* investment. If there is, then a *body corporate* may be an *open-ended investment company* even before it has carried out any actual redemption or repurchase. This is provided that the redemption or repurchase can take place within a reasonable period. In contrast, a *body corporate* that simply offers the possibility that it may, at some stage, decide to offer redemption, or partial redemption, at certain specified times would not, in the *FSA's* view, give rise to the expectation required by section 236(3)(a).

- 9.8.6 G However, a reasonable investor's expectation of being able to realise his investment is not displaced simply because, in certain circumstances, no active steps need to be taken to realise the investment. This might happen where a redemption or repurchase of shares or securities may become compulsory as a result of some aspect of the applicable law.

Some relevant factors in applying the 'expectation test'

- 9.8.7 G In the *FSA's* view, the fact that a *person* may invest in the period shortly before a redemption date would not cause a *body corporate*, that would not otherwise be regarded as such, to be open-ended. This is because the investment condition must be applied in relation to BC as a whole (see *PERG 9.6.3G* (The investment condition (section 236(3) of the Act): general).
- 9.8.8 G Similarly, if BC issues shares or securities on different terms as to the period within which they are to be redeemed or repurchased (see *PERG 9.6.4G* (The investment condition (section 236(3) of the Act): general), BC must be considered as a whole. Whether or not the expectation test is satisfied in relation to a particular *body corporate* is bound to involve taking account of the terms on which its shares or

securities, or classes of shares or securities, are issued. But this is only one of a number of factors to be taken into account. It is subject to any indications there may be in the other relevant factors (such as those in *PERG 9.8.9G*).

- 9.8.9 G As indicated in *PERG 9.3.5G* (The definition), the potential for variation in the form and operation of a *body corporate* is considerable. So, it is only possible in general *guidance* to give examples of the factors that the *FSA* considers may affect any particular judgment. These should be read bearing in mind any specific points considered elsewhere in the *guidance*. Such factors include:
- (1) the terms of the *body corporate's* constitution;
 - (2) the applicable law;
 - (3) any public representations that have been made by or on behalf of the *body corporate*;
 - (4) the actual behaviour of the *body corporate* or of a *person* acting on its behalf in relation to investors seeking to realise their investment in it;
 - (5) whether investors in the *body corporate* are in a position to take advantage of fluctuations in property value in the particular market in which the *body corporate* invests;
 - (6) the existence of a guarantee, which may mean that a longer period may appear reasonable than would be the case without the guarantee;
 - (7) where the underlying property in which the *body corporate* invests is relatively illiquid; in this case, the period within which realisation of an investment may be regarded as reasonable may be longer than it would be for property which has greater liquidity;
 - (8) the levels of disclosure of the terms on which investment is made;
 - (9) the nature of the investment objectives or policy of the *body corporate*; and
 - (10) the appropriateness of the name of the *body corporate*.
- 9.9 The investment condition : the ‘satisfaction test’ (section 236(3)(b) of the Act)

- 9.9.1 G The test in section 236(3)(b) of the *Act* is whether the reasonable investor would, before he makes a decision to invest, be satisfied that the value of his investment would be realised on a basis calculated wholly or mainly by reference to the value of the property belonging to BC.
- 9.9.2 G In the *FSA*'s view, this means that the reasonable investor must be satisfied that what he will get when he realises his investment is his proportionate share in the value of BC's underlying assets, less any dealing costs. In other words, that he is satisfied he will get net asset value. The investment condition focuses on the way the *body corporate* operates over time, and not by reference to particular issues of shares or securities (see *PERG* 9.6.3G (The investment condition (section 236(3) of the *Act*): general)). This means that this part of the investment condition looks to the general method used to calculate the value of the investment.
- 9.9.3 G For the 'satisfaction test' to be met, there must be objectively justifiable grounds on which the reasonable investor could form a view. He must be satisfied that the value of BC's property will be the basis of a calculation used for the whole, or substantially the whole, of his investment. The *FSA* considers that the circumstances, or combination of circumstances, in which a reasonable investor would be in a position to form this view include:
- (1) where the basis of net asset valuation is stated in constitutional documents of BC;
 - (2) where there is a separate agreement or arrangement made outside BC's constitution under which a *person* other than BC undertakes:
 - (a) to redeem or repurchase any shares or securities issued by BC; or
 - (b) to take steps to ensure that the market value of the shares or securities reflects the value of BC's property (see *PERG* 9.9.4G (Effect of realisation on a market)); and
 - (3) where an undertaking to intervene in the market to support the price of the shares or securities at net asset value has been made publicly known by BC or by another *person* (see *PERG* 9.9.4G (Effect of realisation on a market)).

Effect of realisation on a market

- 9.9.4 G *PERG* 9.9.3G(2) and *PERG* 9.9.3G(3) refer to circumstances where the reasonable investor may be satisfied that he can realise his investment at net asset value because of arrangements made to ensure

that the shares or securities trade at net asset value on a market. There may, for example, be cases of market dealing where the price of shares or securities will not depend on the market. An example is where BC or a third party undertakes to ensure that the market value reflects the value of BC's property. This includes taking steps such as intervening in the market. In this case, it seems to the *FSA* that such an undertaking will constitute the necessary objective grounds on which an investor can be satisfied as to the basis on which the value of his investment will be realised. Unless arrangements of this kind exist, the *FSA* considers that the satisfaction test will not be met if the primary means for realising any investment in BC is on a market.

9.9.5 G However, where there is a market, the *FSA* does not consider that the test in section 236(3)(b) would be met if the price the investor receives for his investment is wholly dependent on the market rather than specifically on net asset value. In the *FSA*'s view, typical market pricing mechanisms introduce too many uncertainties to be able to form a basis for calculating the value of an investment (linked to net asset value) of the kind contemplated by the satisfaction test. As a result, the *FSA* takes the view that, subject to *PERG* 9.9.4G, market dealings or facilities relating to the shares in, or securities of, BC will generally not be relevant in assessing whether or not BC comes within the definition of an *open-ended investment company*.

9.9.6 G The fact that the definition must be applied to BC as a whole (see *PERG* 9.6.3G (The investment condition (section 236(3) of the Act): general)) is also relevant here. So, for example, in a take-over situation the fact that a bidder may be willing to provide an exit route for an investment at net asset value will be irrelevant within the context of the definition. This is so even if an investor invests in particular shares or securities in the knowledge or expectation or in anticipation of such an offer being made. In the *FSA*'s opinion, this is not a typical situation and does not affect the nature of BC as a whole or the manner in which it functions characteristically.

‘Wholly or mainly’

9.9.7 G The expression ‘wholly or mainly’ in section 236(3)(b) determines the extent of the permissible departure from the link between the price of BC's shares or securities and the value of its net assets. The word ‘mainly’ introduces some flexibility to the process to allow for limited account to be taken of factors other than the value of BC's assets that may result in the sum realised failing to reflect the true net asset value. Such factors may include:

- (1) the payment by the investor of charges; or
- (2) the payment by the investor of an early redemption penalty; or

- (3) a discount on a repayment or repurchase of the shares or securities to reflect the payment by or on behalf of BC of the charges required to fund payment from a source other than BC's assets; for example, this might be a loan that is to be repaid from BC's assets once they are available.

9.10 Significance of being an open-ended investment company

Marketing of shares or securities issued by body corporate

- 9.10.1 G A number of controls apply under the *Act* to the promotion of *shares* or *securities* that are issued by any *body corporate*. These controls differ according to whether the *person* making the promotion is an *unauthorised person* (see *PERG* 9.10.2G) or an *authorised person* (see *PERG* 9.10.3G to *PERG* 9.10.6G). In addition, where a *body corporate* is not an *open-ended investment company*:
- (1) the requirements of the Public Offers of Securities Regulations 1995 will apply if its *securities* are offered to the public in the *United Kingdom*; and
 - (2) the listing requirements under Part VI of the *Act* (Official listing) will apply if its *securities* are to be *listed*.
- 9.10.2 G The controls under the *Act* that apply to promotions of *shares* or *securities* by *unauthorised persons* are in section 21 of the *Act* (Restrictions on financial promotion). These controls apply where an *unauthorised person* makes a *financial promotion* in, or from, the *United Kingdom* that relates to the *shares* in or *securities* of any *body corporate*. The same controls apply regardless of whether the *shares* or *securities* being promoted are issued by a *body corporate* that is an *open-ended investment company* or one that is not. There are a number of exemptions from the restriction in section 21 of the *Act*. These are explained in *PERG* 8 (Financial promotion and related activities).
- 9.10.3 G Promotions made by *authorised persons* in the *United Kingdom* are generally subject to the controls in *COB* 3 (Financial Promotion). However, in the case of shares in, or securities of, a *body corporate* which is an *open-ended investment company*, additional controls are imposed by Chapter II of Part XVII of the *Act* (Restrictions on promotion of collective investment schemes) (see *PERG* 8.20). Section 238 of the *Act* (Restrictions on promotion) prevents an *authorised person* communicating any invitation or inducement to buy shares or securities issued by an *open-ended investment company*. Section 240 of the *Act* (Restriction on approval of promotion) prevents an *authorised person* approving a *financial promotion* to be communicated by an *unauthorised person*. This is if the *authorised person* would not be able to promote the share or

security himself.

9.10.4 G The restrictions mentioned in *PERG* 9.10.3G are subject to a number of exemptions. For example, the controls in sections 238 and 240 do not apply to *financial promotions* about certain kinds of *collective investment scheme*. These are:

- (1) *open-ended investment companies* formed in Great Britain and authorised by the *FSA* under the Open-ended Investment Companies Regulations 2001;
- (2) *authorised unit trust schemes*; and
- (3) *collective investment schemes* that are *recognised schemes* (see *COLL* 9 (Recognised schemes) and *CIS* 17 (Recognised schemes)).

The position with respect to the promotion by *authorised persons* of *open-ended investment companies* formed in Northern Ireland will be considered as part of the implementing process for the relevant Northern Ireland legislation (see *PERG* 9.1.4G (Other guidance that may be relevant)).

9.10.5 G There are a number of other exemptions in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (SI 2001/1060). In general terms, these exemptions are equivalent to the exemptions from section 21 of the *Act* that apply to *units*. There is *guidance* on those exemptions in *PERG* 8.20.3G (Additional restriction on the promotion of collective investment schemes).

9.10.6 G The *FSA* has also made *rules* under section 238(5) which allow *authorised persons* to *communicate* or *approve* a *financial promotion* for an *open-ended investment company* that is an *unregulated collective investment scheme* (that is, one that does not fall within *PERG* 9.10.4G). The circumstances in which such a communication or approval is allowed are explained in *COB* 3 Ann 5R (which is introduced by *COB* 3.11).

Implications for regulated activities

9.10.7 G In the *Regulated Activities Order*, shares in or securities of an *open-ended investment company* are treated differently from *shares* in other *bodies corporate*. They are treated as *units* in a *collective investment scheme* under article 81 of the *Regulated Activities Order* (Units in a collective investment scheme) rather than *shares* under article 76 (Shares etc).

9.10.8 G A *person* who carries on in the *United Kingdom* the business of engaging in any *regulated activity* that relates to *units* or *shares* will

need to be an *authorised person* (see *PERG 2.7* and *PERG 2.8* (Authorisation and regulated activities)).

9.10.9 G In order to be *authorised*, a *person* must have *permission* to carry on the *regulated activities* in question. What the *permission* needs to cover may differ according to whether the *regulated activity* being carried on relates to *units* or *shares*. So, for example, a *body corporate* that is an *open-ended investment company* will need *permission* if it carries on the *regulated activity of dealing as principal or agent, arranging* (bringing about) or *making arrangements with a view to transactions* in its own shares or securities in the *United Kingdom*. This applies also to a *body corporate* that is not an *open-ended investment company* except that it will not need *permission* to issue or arrange for the issue of its own *shares* or *securities*.

9.10.10 G A *person* carrying on the *regulated activity of establishing, operating or winding up a collective investment scheme* that is constituted by an *open-ended investment company* will need *permission* for those activities. In line with section 237(2) of the *Act* (Other definitions), the *operator* of a *collective investment scheme* that is an *open-ended investment company* is the *company* itself. But where the *open-ended investment company* is incorporated outside the *United Kingdom*, it will only require *permission* if its operation takes place in the *United Kingdom*.

9.11 Frequently Asked Questions

9.11.1 G Table There are some frequently asked questions about the application of the definition of an *open-ended investment company* in the following table. This table belongs to *PERG 9.2.4G* (Introduction).

| Question | | Answer |
|----------|---|--|
| 1 | Can a <i>body corporate</i> be both open-ended and closed-ended at the same time? | In the <i>FSA</i> 's view, the answer to this question is 'no'. The fact that the investment condition is applied to BC (rather than to particular shares in, or securities of, BC) means that a <i>body corporate</i> is either an <i>open-ended investment company</i> as defined in section 236 of the <i>Act</i> or it is not. Where BC is an <i>open-ended investment company</i> , all of its securities would be treated as <i>units</i> of a <i>collective investment scheme</i> for the purpose of the <i>Act</i> . A <i>body corporate</i> formed in another jurisdiction may, |

| Question | Answer |
|----------|---|
| | <p>however, be regarded as open-ended under the laws of that jurisdiction but not come within the definition of an <i>open-ended investment company</i> in section 236 (and vice versa).</p> |
| 2 | <p>Can an <i>open-ended investment company</i> become closed-ended (or a closed-ended body become open-ended)?</p> |
| | <p>In the <i>FSA's</i> view, the answer to this question is 'yes'. A <i>body corporate</i> may change from open-ended to closed-ended (and vice versa) if, taking an overall view, circumstances change so that a hypothetical reasonable investor would consider that the investment condition is no longer met (or vice versa). This might happen where, for example, an <i>open-ended investment company</i> stops its policy of redeeming shares or securities at regular intervals (so removing the expectation that a reasonable investor would be able to realise his investment within a period appearing to him to be reasonable). See also <i>PERG 9.7.5G</i>.</p> |
| 3 | <p>Does the liquidation of a <i>body corporate</i> affect the assessment of whether or not the body is an <i>open-ended investment company</i>?</p> |
| | <p>The <i>FSA</i> considers that the possibility that a <i>body corporate</i> that would otherwise be regarded as closed-ended may be wound up has no effect at all on the nature of the <i>body corporate</i> before the winding up. The fact that, on a winding up, the shares or securities of any investor in the <i>body corporate</i> may be converted into cash or money on the winding up (and so 'realised') would not, in the <i>FSA's</i> view, affect the outcome of applying the expectation test to the <i>body corporate</i> when looked at as a whole. The answer to Question 4 explains that investment in a closed-ended fixed term <i>company</i> shortly before its winding up does not, in the <i>FSA's</i> view, change the closed-ended nature of the <i>company</i>. For <i>companies</i> with no fixed term, the theoretical possibility of a winding up at some uncertain future point is not, in the <i>FSA's</i> view, a matter that would generally carry weight with a reasonable investor in assessing whether he could expect to be able to realise his investment within a</p> |

| Question | | Answer |
|----------|---|--|
| | | reasonable period. |
| 4 | Does a fixed term closed-ended investment <i>company</i> become an <i>open-ended investment company</i> simply because the fixed term will expire? | <p>In the <i>FSA's</i> view, the answer to this is 'no'. The termination of the <i>body corporate</i> is an event that has always been contemplated (and it will appear in the <i>company's</i> constitution). Even as the date of the expiry of the fixed term approaches, there is nothing about the <i>body corporate</i> itself that changes so as to cause a fundamental reassessment of its nature as something other than closed-ended. Addressing this very point in parliamentary debate, the Economic Secretary to the Treasury stated that the "aim and effect [of the definition] is to cover companies that look, to a reasonable investor, like open-ended investment companies". The Minister added that "A reasonable investor's overall expectations of potential investment in a company when its status with respect to the definition is being judged will determine whether it meets the definition. The matter is therefore, definitional rather than one of proximity to liquidation". (Hansard HC, 5 June 2000 col 124).</p> |
| 5 | In what circumstances will a <i>body corporate</i> that issues a mixture of redeemable and non-redeemable shares or securities be an <i>open-ended investment company</i> ? | <p>In the <i>FSA's</i> view, the existence of non-redeemable shares or securities will not, of itself, rule out the possibility of a <i>body corporate</i> falling within the definition of an <i>open-ended investment company</i>. All the relevant circumstances will need to be considered (see <i>PERG</i> 9.6.4G, <i>PERG</i> 9.2.8.8G and <i>PERG</i> 9.8.9G). So the following points need to be taken into account.</p> <p>(1) The precise terms of the issue of all the shares or securities will be relevant to the question whether the investment condition is met, as will any arrangements that may exist to allow the investor to realise his investment by other means.</p> <p>(2) The proportions of the different share</p> |

| Question | | Answer |
|----------|---|--|
| | | <p>classes will be relevant to the impression the reasonable investor forms of the <i>body corporate</i>. A <i>body corporate</i> that issues only a minimal amount of redeemable shares or securities will not, in the <i>FSA</i>'s view, be an <i>open-ended investment company</i>. A <i>body corporate</i> that issues a minimal amount of non-redeemable shares or securities will be likely to be an <i>open-ended investment company</i>. A <i>body corporate</i> that falls within the definition of an <i>open-ended investment company</i> is likely to have (and to be marketed as having) mainly redeemable shares or securities. However, whether or not the <i>body corporate</i> does fall within the definition in any particular case will be subject to any contrary indications there may be in its constitutional documents or otherwise.</p> <p>(3) Where shares or securities are only redeemable after the end of a stated period, this factor will make it more likely that the <i>body corporate</i> is open-ended than if the shares or securities are never redeemable.</p> |
| 6 | <p>Does "realised on a basis calculated wholly or mainly by reference to...." in section 236(3)(b) apply to an investor buying investment trust company shares traded on a <i>recognised investment exchange</i> because of usual market practice that the shares trade at a discount to asset value?</p> | <p>In the <i>FSA</i>'s view, the answer is 'no' (for the reasons set out in <i>PERG 9.9.4G</i> to <i>PERG 9.9.6G</i>).</p> |

| Question | | Answer |
|----------|--|---|
| 7 | Does the practice of UK investment trust companies buying back <i>shares</i> result in them becoming <i>open-ended investment companies</i> ? | In the <i>FSA's</i> view, it does not, because its actions will comply with company law: see section 236(4) of the Act and <i>PERG</i> 9.6.5G. |
| 8 | Would a <i>body corporate</i> holding out redemption or repurchase of its shares or securities every six months be an <i>open-ended investment company</i> ? | In the <i>FSA's</i> view a period of six months would generally be too long to be a reasonable period for a liquid securities fund. A shorter period affording more scope for an investor to take advantage of any profits caused by fluctuations in the market would be more likely to be a reasonable period for the purpose of the realisation of the investment (in the context of the 'expectation' test, see <i>PERG</i> 9.8 and, in particular, <i>PERG</i> 9.8.9G which sets out the kind of factors that may need to be considered in applying the test). |
| 9 | Would an initial period during which it is not possible to realise investment in a <i>body corporate</i> mean that the <i>body corporate</i> could not satisfy the investment condition? | In the <i>FSA's</i> view, the answer to that question is 'no'. In applying the investment condition, the <i>body corporate</i> must be considered as a whole (see <i>PERG</i> 9.6.3G). At the time that the shares or securities in a <i>body corporate</i> are issued, a reasonable investor may expect that he will be able to realise his investment within a reasonable period notwithstanding that there will first be a short-term delay before he can do so. Whether or not the 'expectation test' is satisfied will depend on all the circumstances (see <i>PERG</i> 9.8.9G). |