PERIMETER GUIDANCE (MiFID SCOPE) INSTRUMENT 2007

Powers exercised

A. The Financial Services Authority makes this instrument in the exercise of the power in section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

B. This instrument comes into force on 1 November 2007.

Amendments to the Perimeter Guidance manual (PERG)

C. PERG is amended in accordance with the Annex to this instrument. The general guidance in PERG does not form part of the Handbook.

Citation

D. This instrument may be cited as the Perimeter Guidance (MiFID Scope) Instrument 2007.

By order of the Board
22 March 2007
Annex

Amendments to the Perimeter Guidance manual (PERG)

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.2.3  G  …

For the meanings of defined terms used in PERG, see the Glossary. It is essential that readers refer to these definitions. In the case of those parts of PERG which take the form of Q&A, however, to ensure greater accessibility of the text we have only italicised Handbook terms in those places where we think that it would be helpful to the majority of readers.

…

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 UK statutory provisions and European legislation to fill in the detail (which can be extensive).

…

Modification of certain exclusions as a result of Investment Services MiFID and the 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 MiFID 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 MiFID, and PERG 5 (Insurance mediation activities), as respects the Insurance Mediation Directive.

Investment services and activities

2.5.4  G  It remains the Government's responsibility to ensure the proper implementation of the Investment Services Directive MiFID. In this Directive, Certain persons (called 'investment firms') who are caught by the Directive subject to the requirements of MiFID must be brought within the scope of regulation under the Act. A core element of MiFID is the concept of “investment firm”. An investment firm is any person whose ordinary regular occupation or business is involves the provision to third parties on a professional basis of one or more core investment services to third parties or the performance of one or more investment activities on a professional basis (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. An investment firm is not subject to MiFID requirements if it falls within one or more of the exemptions in article 2 MiFID. Further information about these exemptions is contained in PERG 13.5. To the extent that an investment firm falls within one of these exemptions, it will not be a MiFID investment firm. Where a firm is not a MiFID investment firm because one or more of the exemptions in article 2 apply, it may still be carrying on exempt activities and therefore require authorisation unless it is an exempt person.

2.5.4A

The UK has exercised the optional exemption in article 3 of MiFID. Further information about this exemption is contained in Q48 to 53 in PERG 13.5. It is a requirement of article 3 MiFID that the activities of firms relying on the exemption are “regulated at national level”. The investment services to which article 3 apply (namely reception and transmission of orders and investment advice in relation to either transferable securities or units in collective investment undertakings) correspond to regulated activities (see PERG 13 Annex 2 Tables 1 and 2).

2.5.5

G For persons who are MiFID investment firms, the activities that must be caught by the Regulated Activities Order are those that are caught by the Investment Services Directive—MiFID. To achieve this result, some of the exclusions in the Order (that will apply to persons who are not caught by the MiFID Directive) have been made unavailable to MiFID investment firms when they provide or perform investment services and activities. A “MiFID investment firm”, for these purposes, includes credit institutions to which MiFID applies (see PERG 13, Q5 and 9) and UCITS investment firms providing the services of portfolio management and personal recommendations in relation to financial instruments or the ancillary service of safekeeping and administration in relation to units of collective investment undertakings. The same exclusions are also unavailable to third country investment firms when they provide investment services and activities. 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:

…

(4A) professions or businesses not involving regulated activities (see PERG 2.9.5G);

(5) sale of goods (see PERG 2.9.7G);

(6) groups and joint enterprises (see PERG 2.9.9G);

(7) sale of a body corporate (see PERG 2.9.11G); and
(8) business angel-led enterprise capital funds (see PERG 2.9.20G to PERG 2.9.22G).

... G The specified investment category of options is limited to comprises:

(1) 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);

(2) options to acquire or dispose of other property and falling within paragraphs 5, 6, 7 or 10 of Annex 1 to MiFID (see article 83(2) of the Regulated Activities Order and PERG 13, Q32 to Q34 for guidance about these instruments), but only where they are options in relation to which a MiFID investment firm or a third country investment firm provides or performs investment services and activities on a professional basis; and

(3) options to acquire or dispose of an option to which (2) applies. See article 83(1)(e) of the Regulated Activities Order.

2.6.20A G It follows therefore that options not falling within PERG 2.6.20G(1), for example physically settled options on non-precious metals, such as copper options, will not be options unless they meet the conditions in PERG 2.6.20G(2). Moreover, where the option in question is one to which PERG 2.6.20G(2) applies, it will be an option only in relation to the investment services and activities, or ancillary services where relevant, provided by that person. The same applies in the case of options falling within PERG 2.6.20G(3), for example an option on a physically settled copper option traded on a regulated market.

Futures

... G As with options, there is an additional category of instruments which are futures only when they are the object of investment services or activities provided or performed by certain persons. These are contracts as described in PERG 2.6.21G:

(1) that would not be regarded as having been entered into for investment purposes because they fail one of the tests mentioned in PERG 2.6.22G;
that fall within paragraphs 5, 6, 7 or 10 of Annex 1 to MiFID (see PERG 13, Q32 to Q34 for guidance about these derivatives); and

in relation to which a MiFID investment firm or a third country investment firm provides or performs investment services and activities on a professional basis.

See article 84(1A)-(1D) of the Regulated Activities Order.

The transposition of MiFID does not have the effect of turning spot or forward foreign exchange contracts into financial instruments where such instruments satisfy the commercial purpose test in article 84(2) of the Regulated Activities Order. In our view, very few instruments are likely to fall within PERG 2.6.22AG in practice, given that this category only applies in the case of instruments not falling within PERG 2.6.22G. An example of an instrument falling within PERG 2.6.22AG could be rights under a contract for a derivative which provides for physical delivery of a commodity at a future date and which is entered into on a multilateral trading facility.

Contracts for differences

The specified investment category of contracts for differences covers:

(1) rights under contracts for differences;

(2) 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; and

(3) other derivative contracts (not within (1) or (2)) falling within paragraph 8 of Annex 1 to MiFID, that is derivative instruments for the transfer of credit risk (see PERG 13, Q30 to Q31 for guidance about these instruments), but only where a MiFID investment firm or a third country investment firm provides or performs investment services and activities on a professional basis.

The factors mentioned in (2) include: In addition to fluctuations in the value or price of property of any description or in an index, those factors also include fluctuations or 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.

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unenforceable as gaming contracts were it not for section 412 of the Act (Gaming contracts). Examples of instruments that count as specified investments under this category are spread bets and interest rate swaps.

…

Operating a multilateral trading facility

2.7.7D G Guidance on the MiFID investment service of operating a multilateral trading facility is given in PERG 13, Q24. So far as the regulated activity of operating a multilateral trading facility is concerned, this does not comprise the activities of dealing in investments as agent, dealing in investments as principal, or arranging deals in investments. Where a firm carries on one or more of these activities in addition to operating a multilateral trading facility, these are separate regulated activities for which it requires permission.

…

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, operating a multilateral trading facility or carrying on any of the activities that are regulated in relation to collective investment schemes, …

…

2.8.4C G The exclusions referred to in PERG 2.8.4G(1), (2), (5) and (6)(b), (c) and,(d) will not be available to persons who, in when carrying on the activity of dealing in investments as principal, are investment firms MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)),

…

2.8.5A G The exclusions referred to in PERG 2.8.5G(1), (2) and (3)(a), (b), (c), (d) and (j) will not be available to persons who, in when carrying on the activity of dealing in investments as agent, are investment firms MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

…

2.8.6B G The exclusions referred to in PERG 2.8.6AG (4) and PERG 2.8.6AG (13)(b), (c), (d), (e) and (l) will not be available to persons who, in when carrying on an arranging activity, are investment firms MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).
The exclusion in article 38 of the *Regulated Activities Order* and the exclusions referred to in PERG 2.8.7G (2), PERG 2.8.7G (3) and PERG 2.8.7G (5) will not be available to persons who, when carrying on the activity of managing investments, are investment firms MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

The exclusions referred to in PERG 2.8.12AG(1)(b) and (2)(a), (b), (c) and (g) will not be available to persons who, when carrying on the activity of advising on investments are MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

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). The exclusion is also disapplied for persons who, when carrying on the relevant regulated activity, are MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

The exclusions are also disapplied for persons who, when carrying on the relevant regulated activity, are MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

The exclusions referred to 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). The exclusions are also disapplied for persons who, when carrying on the relevant regulated activity, are MiFID investment firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

...
firms or third country investment firms (see PERG 2.5.4G to PERG 2.5.5G (Investment services and activities)).

2.9.15 G This group of exclusions applies, in specified circumstances, to the regulated activities of: …

(3B) operating a multilateral trading facility;

2.9.16 G …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). Nor will a person be able to rely on the exclusions in PERG 2.9.15G (1) to (4) if when carrying on the relevant regulated activity it is a MiFID investment firm and its Home State is the United Kingdom.

2.9.21A The exclusions for business angel-led enterprise capital funds are also disapplied for persons who, in when carrying on the relevant regulated activity, are MiFID investment firms or third country investment firms (see PERG 2.5.4G (Investment services and activities)).

PERG 2 Ann 2G
2 Table
Table 1: Regulated Activities [see note 1 to Table 1]

<table>
<thead>
<tr>
<th>Designated investment business [see notes 1A and 1B to Table 1]</th>
<th>(in relation to (d) to (g) and (h) to (l) security [expanded in Table 3]; or contractually based investment [expanded in Table 3].)</th>
</tr>
</thead>
<tbody>
<tr>
<td>...</td>
<td>...</td>
</tr>
<tr>
<td>(ga) operating a multilateral trading facility (article 25D) [see note 2A]</td>
<td>securities or contractually based investments which are financial instruments (see PERG 13 Annex 2 G Table 2 and note 2A to Table 1).</td>
</tr>
</tbody>
</table>
### Notes to Table 1:

#### Note 1:
In addition to the regulated activities 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:

- effecting and carrying out contracts of insurance (article 10);
- operating a multilateral trading facility (article 25D)

#### Note 2A:

*PERG* 13 Ann 2 Table 2 contains a map indicating which securities and contractually based investments correspond to financial instruments. A firm’s permission should comprise each of the categories of security and contractually based investment in relation to which it carries on the activity of operating a multilateral trading facility.

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### Advice in publications and broadcasts and MiFID

<table>
<thead>
<tr>
<th>7.3.2A G</th>
<th>Advice about financial instruments in a newspaper, journal, magazine, publication, internet communication or radio or television broadcast should not normally be a personal recommendation under MiFID (see <em>PERG</em> 13, Q18 to Q21).</th>
</tr>
</thead>
</table>

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<table>
<thead>
<tr>
<th>8.31.3A G</th>
<th>The exclusion in article 67 will not apply to a person who is advising on investments when he does so as a MiFID investment firm or a third country investment firm (see <em>PERG</em> 2.5.4G to 2.5.5G (Investment services and activities)).</th>
</tr>
</thead>
</table>

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<table>
<thead>
<tr>
<th>8.33.7 G</th>
<th>The exclusion in article 29 will not apply to a person who is carrying on an arranging activity when he does so as a MiFID investment firm or a third country investment firm (see <em>PERG</em> 2.5.4G to 2.5.5G (Investment services and activities)).</th>
</tr>
</thead>
</table>
10.1 **Background**

Q1. ...

... The Q&As complement the general guidance on regulated activities in Chapter 2 of our Perimeter Guidance Manual ("PERG"), the general guidance on insurance mediation activities in Chapter 5 of PERG (PERG 5), the guidance about the scope of the Markets in Financial Instruments Directive in Chapter 13 of PERG (PERG 13) and the relevant legislation. In addition, Chapter 12 of PERG (PERG 12) has further guidance about the regulated activities relating to the operation and sale of personal pension schemes that came into force on 6 April 2007. ...

10.4 ...

**Q32. What are the exclusions that might apply to me as a pensions administration service provider?**

One or more of the following exclusions might be available to you depending on the nature and scope of the services you provide:

- *dealing in investments as agent* and *arranging* with or through an *authorised person* (articles 22 and 29 of the Regulated Activities Order);

- *dealing in investments as agent, arranging and advising on investments* as a necessary part of providing other non-regulated services (article 67 of the Regulated Activities Order); and

- services provided to a member of your *group* (article 69 of the Regulated Activities Order).

But none of these exclusions will apply to you if, in carrying on the relevant *regulated activity*, you are an *investment firm* and do not benefit from any of the...
exemptions under MiFID (see Chapter 13 of PERG, including Q42).

...  

10.4A The application of EU Directives

Q41A. Are pension scheme trustees and administration service providers likely to be subject to authorisation under the Markets in Financial Instruments Investment Services Directive or subject to the Capital Adequacy Directive?

This is possible, but in many instances it is likely that pension scheme trustees and service providers will either not be carrying on an investment service for the purposes of, or otherwise be exempt under article 2.21 of, the Markets in Financial Instruments Investment Services Directive. The following table expands on this in broad terms.

As for the re-cast Capital Adequacy Directive, this will only apply to persons who are MiFID ISD investment firms or BCD credit institutions.

Detailed guidance on the scope of MiFID and the re-cast Capital Adequacy Directive is in PERG 13.

<table>
<thead>
<tr>
<th>Activity</th>
<th>Potential MiFID ISD investment activity or service?</th>
<th>Potential application of MiFID ISD or of a MiFID ISD article 2.21 exemption?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dealing in scheme assets as trustee</td>
<td>Dealing in investments for own account</td>
<td>MiFID ISD will not apply provided the trustees are either not acting by way of business or otherwise are not holding themselves out as persons who provide a dealing service to third parties. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis.</td>
</tr>
<tr>
<td></td>
<td>Execution of orders on behalf of clients</td>
<td>Where the pension scheme is a collective investment undertaking In any event, the trustee should be exempt under article 2.21 (h) as manager or depositary (or both) of the scheme a pension fund</td>
</tr>
<tr>
<td>Issuing rights under a</td>
<td>None – the rights are not MiFID ISD investments</td>
<td>MiFID ISD does not apply</td>
</tr>
<tr>
<td>Stakeholder or personal pension scheme to members</td>
<td>Financial instruments</td>
<td>MiFID ISD will potentially apply where the investments are MiFID ISD financial instruments (such as shares, debt securities or units)</td>
</tr>
<tr>
<td>---</td>
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<td>---</td>
</tr>
<tr>
<td><strong>Pension scheme service provider:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. dealing in scheme assets as agent for the trustees</td>
<td>a. Executing orders other than for own account</td>
<td></td>
</tr>
<tr>
<td>b. arranging deals in scheme assets as agent for the trustees</td>
<td>Execution of orders on behalf of clients</td>
<td></td>
</tr>
<tr>
<td>c. arranging for persons to join the scheme or to switch or dispose of, or to acquire further, rights under the scheme</td>
<td>b. Receiving and transmitting orders</td>
<td></td>
</tr>
<tr>
<td></td>
<td>c. None – the rights are not MiFID financial instruments and neither are any rights to or interests in financial instruments that the scheme member may acquire under the scheme</td>
<td></td>
</tr>
<tr>
<td>Managing the assets of the scheme</td>
<td>Investment management</td>
<td>MiFID ISD will not apply to trustees provided they are either not acting by way of business or otherwise are not holding themselves out as, or additionally remunerated for, providing investment management services. This is because the</td>
</tr>
</tbody>
</table>

However, many pension schemes will be employee participation schemes, the administration of which is exempt under article 2.21 (de)

Where the service provider is providing services exclusively for the benefit of a corporate trustee who is a member of its group, the exemption in article 2.21 (b) should apply. And article 2.1(f) will provide for the exclusions in 2.1(b) and 2.1(e) to be combined where the service provider is both administering an employee participation scheme and providing services to a trustee who is a group member

Where the activity is receiving and transmitting orders and the service provider is authorised, the optional intermediaries exemption in article 2.1 (g) 3 of MiFID may apply

Where the pension scheme is a collective investment undertaking, the scheme administrator may. If the service provider is acting as the operator of a stakeholder or personal pension scheme (for example, as the scheme administrator), he should be exempt under article 2.21 (h) as manager of the scheme a pension fund
trustees would not be regarded as providing an investment service to third parties on a professional basis

Also, where the pension scheme is a collective investment undertaking, the scheme administrator may, and the In any event, the trustees will, be exempt under article 2.2 (h) in respect of anything they do in the capacity of manager or depositary of the scheme respectively should be exempt under article 2.1 (h) as manager or depositary (or both) of a pension fund

If a service provider is acting as the operator of a stakeholder or personal pension scheme, he should also be exempt under article 2.1(h) as manager of a pension fund

But a service provider who is merely managing the assets of a pension fund without being the manager or depositary of the scheme will not be exempt under article 2.1(h). The manager and depositary are those persons charged with responsibility for managing the fund or safeguarding its assets and not persons to whom such functions may be delegated or outsourced

<table>
<thead>
<tr>
<th>Service Provided</th>
<th>Exemption Requirement</th>
<th>Detail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safeguarding and administering the scheme assets</td>
<td>None</td>
<td>Safekeeping and administration of investments is an <strong>MiFID ISD non-core ancillary service</strong></td>
</tr>
<tr>
<td>Establishing, operating or winding up a stakeholder or personal pension scheme</td>
<td>None</td>
<td><strong>MiFID ISD does not apply</strong></td>
</tr>
<tr>
<td>Advising trustees or members of</td>
<td>Investment advice</td>
<td><strong>Investment advice is an ISD non-core service</strong></td>
</tr>
</tbody>
</table>
| **prospective members** | MiFID will potentially apply where the advice concerns MiFID financial instruments (such as shares, debt securities or units) and so may apply to advice given to the trustees about scheme assets. However, beneficial interests in financial instruments held under the trusts of a pension scheme will not themselves be financial instruments under MiFID. And rights under a personal pension or stakeholder pension scheme are also not financial instruments. So, advice given to scheme members or prospective members should not be investment advice under MiFID.  

MiFID will not apply to trustees who are advising their fellow trustees for the purposes of the trust provided they are not additionally remunerated for providing investment advisory services.  

Also, trustees will be exempt under article 2.1 (h) in respect of anything they do in the capacity of manager or depositary of a pension fund (including advising their fellow trustees).  

If a service provider is acting as the operator of a stakeholder or personal pension scheme, he should also be exempt under article 2.1(h) as manager of a pension fund if he gives advice to the trustees.  

Where the service provider is providing advice to a corporate trustee who is a member of its group, the exemption in article 2.1 (b) may apply (and may be combined with the exemption for administration of an employee participation scheme under article 2.1(f) where relevant). |
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>a. Pension scheme trustee advising fellow trustees or members or prospective members</strong></td>
<td></td>
</tr>
<tr>
<td><strong>b. Pension scheme service provider advising trustees or members or prospective members</strong></td>
<td></td>
</tr>
</tbody>
</table>
Q41B. Will the implementation of the Markets in Financial Instruments Directive be likely to affect the current position of pension scheme trustees and administration service providers under the Investment Services Directive and the Capital Adequacy Directive?

This is unlikely to be the case. The position under the Markets in Financial Instruments Directive should not be materially different to the position under the Investment Services Directive (or, as a result, the Capital Adequacy Directive) as regards the usual activities of pension scheme trustees and administration service providers. The one possible exception to this concerns investment advice which will become an investment service for the first time under the Markets in Financial Instruments Directive. This will not apply to advice given to scheme members about their rights under the scheme as those rights will not be financial instruments for the purposes of the Directive. But the Directive will apply to advice in the form of a recommendation to scheme trustees or members about their buying or selling a particular financial instrument for the purposes of the scheme. Financial instruments will include shares, debt securities and units in a collective investment scheme but not life policies or deposits. This will be subject to the possible availability of an exemption in article 2.1 of the Directive.

Draft guidance on the changes in regulatory scope that will be caused by the implementation of the Markets in Financial Instruments Directive and its effect on the application of the Capital Adequacy Directive was issued as Annex 5 to Consultation Paper 06/9 (Organisation systems and controls) and will, in due course, form Chapter 13 to PERG...[deleted]