

PERIMETER GUIDANCE (AMENDMENT NO 2) INSTRUMENT 2009

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.

Commencement

- B. This instrument comes into force on 6 August 2009.

Amendments to Handbook-related material

- C. The Perimeter Guidance manual (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 (Amendment No 2) Instrument 2009.

By order of the Board
23 July 2009

Annex

Amendments to the Perimeter Guidance manual (PERG)

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

- 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.~~ concerned with arrangements of an ongoing nature whose purpose is to facilitate the entering into of transactions by other parties. This activity has a potentially broad scope and typically applies in one of two scenarios. These are where a person provides facilities of some kind:
- (1) to enable or assist investors to deal with or through a particular firm (such as the arrangements made by introducers); or
 - (2) to facilitate the entering into of transactions directly by the parties (such as multilateral trading facilities of any kind other than those excluded under article 25(3) of the Regulated Activities Order, exchanges, clearing houses and service companies (for example, persons who provide communication facilities for the routing of orders or the negotiation of transactions)).
- 2.7.7BA G It is of note, however, that the regulated activity of making arrangements with a view to transactions in investments is not limited to arrangements that are participated in by investors. It is also not necessary that both the buyer and the seller under the transaction that is being arranged should participate in the arrangements. So, arrangements may come within the activity if they are participated in only by product companies with a view to their issuing investments. A person may be carrying on this regulated activity even if he is only providing part of the facilities for bringing about a transaction.

2.7.7BB G It is also the FSA's view that certain arrangements may come within the activity even though the parties may have already committed to the transaction using other arrangements. This would typically apply to a clearing house whose clearing and settlement facilities may be seen to be made with a view to the members of the clearing house, as participants in its arrangements, entering into transactions (usually through an investment exchange) which must be cleared through the clearing house to be completed. The clearing house is providing an essential part of the market infrastructure that is necessary to support trading activities. The same principle applies outside the markets context. So for example if a company that wishes to raise capital from private investors tells the potential investors, in order to increase their confidence, that all aspects of paying for and issuing shares will be handled by a particular firm, that firm may come within article 25(2) when it provides those services.

2.7.7BC G In the FSA's view, it is generally the case that providers of back office administration services do not carry out the regulated activity of making arrangements with a view to transactions in investments. This is based essentially on the fact that providers of back office administration services aim to assist a broker firm to deal with the aftermath of transactions it has entered into on behalf of its clients. The broker firm has assumed full responsibility to its clients for completing their transactions, thus enabling the view to be taken that the firm to whom it outsources functions is making arrangements to assist the broker to complete transactions rather than with a view to the broker entering into trades as agent for its clients. The provider of back office services does not carry out the regulated activity of making arrangements with a view to transactions in investments because the transaction has already been entered into by the time of its involvement.

2.7.7BD G (1) The scope of article 25(2) of the Regulated Activities Order (the subject of PERG 2.7.7BG) was considered by the High Court in the case of Watersheds Limited v. David Da Costa and Paul Gentlemen. The judgement suggests that the activity of 'introducing' does not itself constitute a regulated activity for the purposes of article 25(2) of the Regulated Activities Order. The FSA has considered whether the judgement necessitates any change to the views expressed in PERG 2.7.7BG and elsewhere in PERG. It appears to the FSA that the judgement should be considered in the light of the case to which it relates.

(2) Also, the court does not seem to have had the benefit of a relevant argument. The Regulated Activities Order provides an exclusion which has the effect of removing certain arrangements for making introductions from the scope of article 25(2) of the Regulated Activities Order. This exclusion can be found in article 33 of the Regulated Activities Order (guidance on this can be found in PERG 8.33 and PERG 5.6.17G to PERG 5.6.21G). This exclusion would not be necessary if all 'introductions' were outside the scope of article 25(2) of the Regulated Activities Order. Support for this can also be found in the fact that article 25A(2) is very similar to article

25(2) and there is an exclusion from it for certain introductions. The exclusion is in article 33A of the *Regulated Activities Order* and guidance on it can be found in *PERG 4.5.10G* and the following paragraphs. For these reasons, the *FSA* remains of the view that article 25(2) of the *Regulated Activities Order* includes certain types of arrangements for making introductions whilst recognising that the judgement in the *Watersheds* case introduces an element of doubt.

2.7.7BE G In determining whether particular arrangements fall within the scope of Article 25(2) of the *Regulated Activities Order*, it may be necessary to consider the purpose of the arrangements. Further guidance on this can be found in *PERG 8.32.3G*. Although this *guidance* is in relation to the activities of publishers, broadcasters, website operators and telephone marketing services, the principle is not limited to those activities.

2.7.7BF G In the *FSA*'s view, a mere passive display of literature advertising investments would not amount to the article 25(2) activity. Further *guidance* on this point can be found in *PERG 5.6.4G*. Although this *guidance* is in relation to *contracts of insurance*, the principle is not limited to them.

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12.2 Establishing, operating or winding up a personal pension scheme

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

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