

PERIMETER GUIDANCE (AMENDMENT NO 3) INSTRUMENT 2011

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 9 December 2011.

Amendments to the Perimeter Guidance manual

- 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 3) Instrument 2011.

By order of the Board
8 December 2011

Annex

Amendments to the Perimeter Guidance manual (PERG)

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

2.3 The business element

...

- 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) and the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011 (SI 2011/2304). 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:

...

(3) ...

(3A) A person who enters into a regulated sale and rent back agreement as SRB agreement provider is to be regarded as carrying on that activity by way of business except where that person is a related party in relation to the SRB agreement seller.

...

14.4A Activities relating to regulated sale and rent back agreements

...

Q37C. When will I be carrying on the activity of entering into a regulated sale and rent back agreement?

This will occur when you enter into the agreement at the outset as the agreement provider even if you do so only once. It can also occur at a later stage if all or part of the rights or obligations of the agreement provider are transferred to you or if you acquire all or part of the interest in land bought by the agreement provider (where you become an 'agreement transferee') ...

...

14.5 The ‘by-way-of-business’ test

Q38. How do I know if I am carrying on regulated activities by way of business?

A *person* will only need to be an ~~authorised person~~ *authorised person* or ~~exempt person~~ *exempt person* 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 home finance transactions (see Q38A).~~

Whether or not any particular *person* will meet the requirement that he carries on a *regulated activity* by way of business and so needs to be an *authorisation authorised person* or *exemption exempt person* will invariably depend on that *person's* individual circumstances. Generally speaking, a number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;
- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular regulated activity that is carried on.

However, there are in fact four different forms of business test that are applied to the home finance transactions (see Q38A). For example, the ordinary business test is significantly widened in scope in relation to *entering into a regulated sale and rent back agreement* (see Q38B).

...

Q38A. What are the ~~three~~ four different forms of business test referred to in Q38?

They are:

(1) the ‘by way of business’ test in section 22 of the *Act* applies unchanged in relation to the activity of *entering into a home finance transaction* other than *entering into a regulated sale and rent back agreement*;

(1A) in the case of *entering into a regulated sale and rent back agreement*, the effect of article 5 of the *Business Order* is that an *SRB agreement provider* is to be regarded as acting ‘by way of business’ unless that *person* is a *related party* in relation to the *SRB agreement seller*;

(2) ...

Q38B. How does the business test in the Business Order differ from the business test in section 22 of the Act?

The ‘by way of business’ test in article 5 of the *Business Order* is wider than the

'by way of business' test in section 22 of the Act because, for example, it does not require any degree of continuity; entering into just one *regulated sale and rent back agreement* is enough.

~~The~~ On the other hand, the 'carrying on the business' test in articles 3B to 3D of 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.

Q38C. Can you give me some examples of where the business test is unlikely to be satisfied?

Examples are:

(1) when an individual enters into a ~~one-off sale and rent back agreement~~ *regulated sale and rent back agreement* as ~~agreement provider~~ *SRB agreement provider* ~~for an agreement seller who is a friend or member of his family where that individual is a *related party* in relation to the *SRB agreement seller*~~ whether at market rates or not; and

(2) ...

Q38D. Will I meet the business test if I only enter into one home purchase plan, or home reversion plan ~~or regulated sale and rent back agreement~~ a year?

Yes, you might meet the business test. Whether or not you do will depend largely on the facts. The following issues may be helpful to bear in mind:

...

With this in mind, if you intend on entering into just one ~~sale and rent back agreement, home reversion plan~~ *home reversion plan* or ~~home purchase plan~~ *home purchase plan* each year this may be enough to meet the 'by way of business' test if the scale of this activity is likely to be significant in relation to your other activities.

Q38E. Will I meet the business test if I only enter into one sale and rent back agreement?

Yes, provided you are an *SRB agreement provider* that is not a *related party* in relation to the *SRB agreement seller*.

This is because of an amendment to the *Business Order* made by the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011 (SI 2011/2304) which came into force on 16 September 2011. This Order also provides that the amendment will cease to have effect on 1 January 2015. The Treasury is required to review the operation and effect of the amendment and to publish a report before the end of 2012. Following the review, the Treasury will decide whether the amendment should be allowed to expire, be revoked early, or be maintained in force with or without amendments. A further instrument would be needed to maintain the amendment in force or to revoke the amendment early.