

Perimeter guidance on personal recommendations on retail investments

Policy Statement

PS18/3

February 2018



This relates to

In this Policy Statement we report on the main issues arising from Consultation Paper 17/28 Financial Advice Market Review (FAMR): Implementation Part II and publish the final rules and guidance.

Please send any comments or queries to:

Advice and Distribution Team
Financial Conduct Authority
25 The North Colonnade
London E14 5HS

Telephone:

020 7066 1410

Email:

cp17-28@fca.org.uk

How to navigate this document onscreen



returns you to the contents list



takes you to helpful abbreviations

Contents

1	Overview	3
2	Perimeter guidance	7
Annex 1	List of non-confidential respondents	14
Annex 2	Abbreviations used in this paper	15
Appendix 1	Made rules (legal instrument)	

1 Overview

Introduction

- 1.1** In August 2017, we published consultation paper CP17/28¹ which set out a number of proposals designed to support the retail investment advice sector. These included amendments to guidance in our Perimeter Guidance Manual (PERG) on what amounts to a personal recommendation.
- 1.2** In December, we published PS17/25² which responded to all aspects of this consultation other than the proposals for new PERG material. Stakeholders responded broadly positively to the draft perimeter guidance. However, some asked for more detailed guidance in some areas. We decided to respond to this part of the consultation at a later date, to ensure that we properly addressed the feedback.
- 1.3** In this Policy Statement (PS), we summarise the feedback we received on the PERG material and indicate where we have adjusted our approach to take respondents' views into account.
- 1.4** We are also publishing final Handbook Guidance which will take effect from 23 February 2018. At the same time, we are also retiring FG15/1, which includes our existing non-Handbook Guidance on personal recommendations.
- 1.5** We are also publishing a consumer guide³, which explains what to expect from advice and guidance, including the differing kinds of service and regulatory protections.

Who does this affect?

- 1.6** Our PS will be relevant to:
- financial advisers
 - consumers and organisations representing consumers
 - providers of retail investment products (RIPs), particularly those with direct-to-consumer distribution channels
 - trade and professional bodies that represent financial advisers, product providers, and other firms involved in the distribution of RIPs
 - compliance consultants and other firms that assist stakeholders
 - discretionary investment managers

¹ www.fca.org.uk/publication/consultation/cp17-28.pdf

² www.fca.org.uk/publication/policy/ps17-25.pdf

³ www.fca.org.uk/consumers/understanding-advice-guidance



Is this of interest to consumers?

- 1.7** This PS introduces new guidance on the regulatory perimeter. This is unlikely to be of direct interest to consumers. However, our new perimeter guidance is designed to help firms operating, or setting up, new services that support consumers making their own investment decisions, which we hope will benefit consumers.
- 1.8** The consumer guide⁴ on advice and guidance will be of direct interest to consumers. It is designed to help them seek support when making decisions about some investment, pension and insurance products.

Context

Perimeter Guidance

- 1.9** In August 2015, the FCA and the HM Treasury launched the Financial Advice Market Review (FAMR) to identify ways to make the UK's financial advice market work better for consumers. The final FAMR report⁵, published in March 2016, set out 28 recommendations intended to tackle the barriers to consumers accessing advice in markets for retail investments, protection and retirement income planning.
- 1.10** Respondents to the FAMR Call for Input told us that some firms are deterred from providing services that help customers make their own investment decisions. It was suggested that this was in part because of uncertainty about whether such services might be a personal recommendation. FAMR recommended that the FCA should consult on new guidance on what constitutes a personal recommendation.
- 1.11** The activity of advising on investments is set out in Article 53(1) of the Regulated Activities Order (RAO) and includes two types of advice:
- Advice which constitutes a personal recommendation; and
 - Any other regulated advice within Article 53(1) which does not amount to a personal recommendation.
- 1.12** The RAO was recently amended with effect from 3 January 2018, so that most authorised firms do not need an Article 53(1) permission to provide guidance.
- 1.13** The main aim of our new Perimeter Guidance is to give greater confidence to authorised firms that offer, or might wish to offer guidance, information and support to consumers by helping them understand the personal recommendation boundary.
- 1.14** In response to the FAMR recommendation, the FCA published GC17/4 in April 2017, setting out our thinking on areas of uncertainty identified by firms in responses to the FAMR Call for Input.⁶ We also asked a number of discussion questions to determine where stakeholders would value new guidance on personal recommendations.

⁴ www.fca.org.uk/consumers/understanding-advice-guidance

⁵ www.fca.org.uk/publication/corporate/famr-final-report.pdf

⁶ www.fca.org.uk/publication/call-for-input/famr-cfi.pdf

1.15 In August 2017, we published CP17/28, which set out our proposals for new perimeter guidance, taking into account the feedback to GC17/4. We also proposed retiring our existing non-Handbook Guidance on personal recommendations in FG15/1 and relocating it into PERG.

1.16 A number of the illustrative examples in our Perimeter Guidance also involve activities that would not be within the perimeter of Article 53(1) at all, for example because the activity does not relate to a specific product. Unauthorised firms are reminded that they cannot conduct any activity under Article 53(1) without being authorised.

FCA consumer information on advice and guidance

1.17 Some respondents to the FAMR Call for Input suggested that the various terms used to describe financial advice lacked clarity and could undermine consumers' ability to understand the nature of the services available and choose between them. FAMR noted that improving the way in which services are described to consumers has the potential to improve consumer understanding and encourage engagement with financial advice.

1.18 FAMR recommended that the FCA and HM Treasury should form a Financial Advice Working Group (FAWG) to support progress of the FAMR recommendations. In particular, FAMR recommended that the FAWG should publish a shortlist of terms to describe 'guidance' and 'advice'.

1.19 The FAWG published its findings in April 2017.⁷ The FAWG concluded that, based on its research, there were no new terms for 'advice' and 'guidance' that on their own explained the two services better than the existing terms and recommended that these terms should not be changed. However, the FAWG recommended that the market should adopt a single consistent set of consumer-friendly explanations for 'advice' and 'guidance'. In particular, it recommended that the FCA should mandate the use of such explanations by firms.

1.20 In response to the FAWG recommendation, we have decided to publish our own consumer guide which outlines the typical differences between 'advice' and 'guidance'. We hope that this will be useful to consumers who are considering their options for advice and other services. Firms may also refer to the availability of the guide on the FCA website to improve customer understanding in this area if it is helpful.

Summary of feedback and our response

1.21 In general, respondents to CP17/28 were supportive of our proposed perimeter guidance and the retirement of FG15/1.

1.22 However, some respondents asked for clarification of aspects of our proposed guidance. Others asked for additional illustrative examples of ways in which firms can support customers without giving personal recommendations.

1.23 Having taken into account this feedback, we propose to proceed with our proposals broadly as consulted upon, with some drafting changes to clarify the issues raised. We have also added some new illustrative examples, which we hope will help firms.

7 www.fca.org.uk/publication/research/fawg-consumer-explanations-advice-guidance.pdf



Equality and diversity considerations

- 1.24** We have considered the equality and diversity issues that may arise from the proposals in this Policy Statement.
- 1.25** Overall, we do not consider that our new PERG material should adversely impact any of the groups with protected characteristics ie age, disability, sex, marriage or civil partnership, pregnancy and maternity, race, religion and belief, sexual orientation and gender reassignment. We did not receive any response to our consultation that would alter this view.
- 1.26** Our consumer guide on advice and guidance will be on the FCA website. We recognise that this may not be as helpful for those less likely to use the internet (eg older people). To mitigate this we will consider whether there are other ways this guide can be promoted and distributed. It may also be of less use to those with comprehension issues. Even so, we believe that overall it will help people (including many with protected characteristics) to understand the different services available to help them make investment decisions.

Next steps

What do you need to do next?

- 1.27** Firms that provide services that support customers without giving a personal recommendation (or firms that might wish to provide such services) should consider our new perimeter guidance. Firms that provide advice and/or guidance services might wish to consider making our consumer guide available to consumers.

What will we do?

- 1.28** The publication of our new perimeter guidance is the final step in the FCA's implementation of the FAMR recommendations. We propose to conduct a review of the impacts of the FAMR recommendations in 2019 and publish our findings in 2020.

2 Perimeter guidance

2.1 In this chapter, we summarise feedback from stakeholders on our proposed perimeter guidance in CP17/28. Most respondents supported our proposals. However, some asked for clarification of aspects of the guidance and others asked for new illustrative examples.

2.2 We propose to introduce the new PERG material largely as consulted on but we have made some amendments and included some new illustrative examples, in light of feedback. The feedback falls broadly into the following categories, which we address below:

- relocating and retiring FG15/1
- general issues
- requests for new illustrative examples
- requests for clarification on our consultation draft
- ongoing support from the FCA

Relocating and retiring FG15/1

2.3 In January 2015, we published FG15/1, which provided guidance on a number of issues about advice on retail investments. This included our views on determining whether a service amounts to a personal recommendation.

2.4 In CP17/28 we proposed relocating the FG15/1 material on personal recommendations into PERG⁸. We also proposed retiring FG15/1 as a standalone document, as part of our work to consolidate guidance for firms offering investment advice, once all the relevant material had been incorporated into PERG. We asked for views on our transposition of this guidance into PERG. In particular, on whether anything was inaccurate or had been missed.

2.5 Respondents were generally happy with our proposals. However, some respondents asked for amendments to the table of illustrative examples at PERG 8 Annex 1G to improve clarity, in particular:

- i. changing the heading of the second column to 'Is this a personal recommendation?'

⁸ FG 15/1 also included material that did not relate to personal recommendations. Much of this was incorporated into FG 17/8: 'Streamlined Advice and related consolidated guidance' following GC 17/4: Financial Advice Market Review (FAMR): Implementation Part 1.



- ii. adding an introductory note for the third column which explains whether each example constitutes regulated advice and make it clear that this may not be directly relevant for firms that make use of a recent amendment to the RAO⁹
- iii. clarifying whether references to 'advising on investments' refer to a personal recommendation or all regulated advice

Our response

We have amended the table of examples in line with the suggestions above. We will incorporate the guidance based on material from FG 15/1 into PERG as consulted on, subject to some minors clarificatory amendments. We will retire FG15/1 with immediate effect.

Some responses appear to conflate the terms 'regulated advice' with 'personal recommendation' when commenting on this section. We believe that the changes we have made will help address any potential confusion.

General issues

- 2.6** In CP17/28 we proposed new guidance to help firms determine whether a service might amount to a personal recommendation. This was based on feedback to discussion questions that we published as part of GC17/4: 'Financial Advice Market Review Implementation Part 1'¹⁰, as well as other feedback received in the course of our work on FAMR. We also proposed changes to reflect a recent amendment to the scope of the regulated activity of advising on investments in Article 53(1) of the RAO.
- 2.7** We sought views from stakeholders on the proposed new guidance. The majority of respondents broadly supported our proposals. However, some raised general points in response to the consultation. In particular, we were asked:
- i. Could the FCA take a less conservative approach to the assessment of what might constitute a personal recommendation, particularly with regard to implicit recommendations?
 - ii. Could we provide illustrative examples which more effectively address the difficult 'grey areas' of interpretation in the legislation?
 - iii. Would the proposed PERG material have retrospective effect?
 - iv. Would the proposed PERG material impact the boundary between investment advice and corporate finance advice. In particular, would it affect the application of paragraph 85 in the European Securities and Markets Authority's (ESMA) 'Q&A Understanding the definition of advice under MiFID'¹¹?

⁹ www.fca.org.uk/firms/financial-advice-market-review-famr/changes-regulated-activities-order

¹⁰ www.fca.org.uk/publication/guidance-consultation/gc17-04.pdf

¹¹ www.esma.europa.eu/sites/default/files/library/2015/11/10_293.pdf

- v. For clarity on when an appropriateness test is required and how this relates to the guidance on personal recommendations.

Our response

- i. The regulatory perimeter is set by Parliament in legislation. The FCA cannot change the perimeter. Where we give perimeter guidance, we are setting out what the courts have already said about the legislation and our views about how the courts may interpret it in the future. In doing so, we must take account of the relevant case law, EU legislation and European Supervisory Authority (ESA) guidelines. Guidance issued by the Committee of European Securities Regulators (CESR), now ESMA, explains that a personal recommendation can be implicit.¹² Where a reasonable observer would view the adviser as presenting a recommendation as suitable for the customer or based on a consideration of their circumstances, then this must be treated as a personal recommendation. We cannot exercise discretion on this. Furthermore, as we explained in CP 17/28, we agree that such interactions should be treated as a personal recommendation.
- ii. To decide whether advice has been given, the individual facts of each case must be carefully examined. To be accurate, our guidance must reflect this. We recognise this means that our examples are illustrative and case-specific. They cannot and do not provide a clear line between what is and is not advice in all circumstances but should be helpful to firms in making judgments about whether they are providing a personal recommendation in the context of particular circumstances. It is not possible to provide an exhaustive series of examples that would apply to every possible circumstance that a firm might encounter.
- iii. Our guidance on legislation does not alter its application to firms either now or retrospectively. There are elements of our new PERG material that deal with the recent change to the RAO. This will only be relevant for business which takes place after the RAO amendment entered into force on 3 January 2018.
- iv. We can confirm that the new PERG material does not change the boundary between investment advice and corporate finance advice. As such, there is no change to the application of the ESMA Q&A.
- v. The new PERG material does not alter firms' obligations in relation to our rules on appropriateness tests. The circumstances in which firms do not need to assess appropriateness, including the requirement that the service is provided at the 'initiative of the client', are set out in COBS 10.4 and COBS 10.4A. MiFID requires that a service should be considered to be at the 'initiative of the client' unless the client requests the service in response to a personalised communication from the firm which either invites or is intended to influence the client in respect of a specific financial instrument or specific transaction. Guidance



on what is meant by 'the initiative of the client' and what constitutes a 'personalised communication' is set out in COBS 10.5 and COBS 10.5A. It is beyond the scope of this consultation to provide guidance on what constitutes a 'personalised communication'; however, a 'personal communication' in this context is not the same as a personal recommendation. If a firm decides that a communication is not a personal recommendation, it may still be a 'personal communication' for the purposes of COBS 10 or COBS 10A.

New illustrative examples

2.8 We were asked to give further illustrative examples to show how firms can:

- Support execution only clients who might not have considered all the relevant options – eg where a customer asks to set up an annuity which will only provide a very small income.
- Present product options in a way that links them to general investment objectives and other factors – eg where a firm wishes to make pension accumulation customers aware of the investment options available to them.
- Make personalised communications to customers regarding product options – eg where a firm wishes to write to customers to make them aware of product changes.
- Help customers determine pension contribution rates – eg where a firm provides a customer with tools to allow them to calculate the required contribution rates to deliver the desired level of retirement income.

2.9 We were also asked for guidance on:

- i. How the guidance should apply to one-to-one sales, particularly telephone sales (noting that much of the proposed guidance described distribution of investment products through websites)?
- ii. Whether firms can make communications regarding certain products only to relevant segments of a firm's customer base without making a personal recommendation? In particular, we were asked if a firm could present different versions of a best buy list to customers logging into its website based on information the firm holds about those customers? For example, filtering out lifetime ISA products for customers over 50.
- iii. Whether firms can recommend a particular product for an investor seeking a certain outcome?
- iv. How a firm can offer a risk profiling tool alongside the ability to filter products that meet particular risk categories?

Our response

We have included new drafting and illustrative examples that cover the areas outlined under paragraph 2.8.

One respondent asked how they could inform customers that a product they hold has been removed from the firm's best buy list and replaces it with a substitute. We explain in the new PERG material that where a firm contacts specific customers who hold the relevant product in these circumstances it is likely that this would be a personal recommendation. We have suggested how firms might be able to communicate general updates about best buy lists without giving a personal recommendation.

Our response to the points in paragraph 2.9 is as follows:

- i. We have added guidance which confirms that the same principles apply when considering whether advice has been given, irrespective of the sales channel. However, a one-to-one format could be more likely to lead a customer to think that they have received a personal recommendation, both because of the more personal nature of the interaction and because the content of the conversation cannot always be as tightly controlled as an on-line process.
- ii. Our guidance, in particular at 8.30B.18 already indicates that sending communications to a segment of customers based on certain characteristics may not amount to a personal recommendation. PERG 8.30B.16G to 20 sets out factors that firms may consider when sending out a communication to multiple customers.
- iii. We have added some further guidance to clarify how firms might recommend a particular product for investors seeking a certain outcome.
- iv. We believe that this is already addressed in the existing guidance, specifically in examples D(1) to (6).

Requests for clarification on our consultation draft

2.10 Some respondents also asked us to clarify the following points in our draft guidance¹³:

- i. references in 8.30B.22G to communications being made to the 'public'; in particular whether an email sent to a specific addressee list is addressed to the 'public'
- ii. the meaning of the phrase 'presented neutrally' in Example F(2) and give more expansive guidance on this term
- iii. whether presenting the benefits of consolidating pension pots can be considered 'factual' in Example F(3)

¹³ Please note that where we refer to responses on specific examples, the example number given in this PS is the number that it had in the draft instrument. However as a result of amendments we have made these numbers might have changed in the final instrument.



- iv. if Example F(5) represents best practice for firms contacting a customer and whether the firm in question might be putting pressure on a client to take advice

Our response

- i. We have amended our drafting at 8.30B.24G to clarify what we mean by recommendations or other communications that are made to the 'public'.
- ii. We have not provided additional guidance on how material can be presented 'neutrally'. Ensuring the presentation of material neutral way is a familiar concept across both PERG and many of our disclosure requirements. Firms should take care not to express views on suitability, but we do not consider additional guidance helpful given each situation will need to be considered in context of the facts, delivery channel and context of each case.
- iii. We believe that it is possible to describe the benefits of consolidating pensions in a way that is factual and we have amended the drafting to make it clear that where a firm does so it will be generic advice and not regulated advice.
- iv. PERG is designed to help firms understand the regulatory perimeter set out in the relevant legislation. It does not set our expectations for how firms should comply with our rules, guidance or The Principles. The examples in the perimeter guidance are designed to provide illustrations of whether specific activity might amount to a personal recommendation or general regulated advice. They are not examples of good practice. Whether a communication amounts to undue pressure on a client to take advice would depend on the particular content and context of the communication.

Ongoing support from the FCA

- 2.11 Respondents asked us to consider the ongoing support we could provide. In particular, stakeholders asked that, where we give guidance on the perimeter to individual firms, we make this available to the market as a whole.

Our response

In June 2017, we announced that we were expanding the remit of the Advice Unit to provide feedback to firms developing automated or partially automated non-advised propositions. Firms which meet the eligibility criteria can apply for individual regulatory feedback on their guidance model.¹⁴

14 www.fca.org.uk/firms/advice-unit/prepare-application

We have also committed to publishing tools and resources for all firms developing automated advice or non-advised propositions based on the Advice Unit's experiences with individual firms.¹⁵ As part of FG 17/8, we published guidance based on individual steers given to firms as part of the first and second cohorts that the Advice Unit assisted. We will continue to provide guidance informed by our work with firms, including those developing non-advised propositions, which could include perimeter guidance.



Annex 1

List of non-confidential respondents

Chartered Institute for Securities and Investment

Fidelity

LEBC Group

Lloyds Banking Group

LV=

Personal Investment Management and Financial Advice Association

R2 Finance

Simply Biz

The Investment Association

The Personal Finance Society

The Society of Pension Professionals

UK Workplace Solutions Ltd.

Virgin Money

Annex 2

Abbreviations used in this paper

COBS	Conduct of Business Sourcebook
CP	Consultation Paper
ESA	European Supervisory Authority
ESMA	European Securities and Markets Authority
FAMR	Financial Advice Market Review
FAWG	The Financial Advice Working Group
FCA	The Financial Conduct Authority
FG	Final Guidance
GC	Guidance Consultation
MiFID	Markets in Financial Instruments Directive (Directive 2004/39/EC)
MiFID II	Markets in Financial Instruments Directive (Directive 2014/65/EU)
PERG	Perimeter Guidance Manual
PS	Policy Statement
RAO	Regulated Activities Order
RIP	Retail Investment Product

We have developed the policy in this Policy Statement in the context of the existing UK and EU regulatory framework. The Government has made clear that it will continue to implement and apply EU law until the UK has left the EU. We will keep the proposals under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework in the future.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 9644 or email: publications_graphics@fca.org.uk or write to: Editorial and Digital team, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS



Appendix 1

Made rules (legal instrument)

**ADVISING ON INVESTMENTS (ARTICLE 53(1) OF THE REGULATED
ACTIVITIES ORDER) (PERIMETER GUIDANCE) INSTRUMENT 2018**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of section 139A (Power of the FCA to give guidance) of the Financial Services and Markets Act 2000 (“the Act”).

Commencement

- B. This instrument comes into force on 23 February 2018.

Amendments to the Handbook

- C. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Conduct of Business sourcebook (COBS)	Annex A
Supervision manual (SUP)	Annex B

Amendments to the material outside the Handbook

- D. The Perimeter Guidance manual (PERG) is amended in accordance with Annex C to this instrument.

Citation

- E. This instrument may be cited as the Advising on Investments (Article 53(1) of the Regulated Activities Order) (Perimeter Guidance) Instrument 2018.

By order of the Board
22 February 2018

Annex A

Amendments to the Conduct of Business sourcebook (COBS)

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

6 Information about the firm, its services and remuneration

...

6.1A Adviser charging and remuneration

Application – Who? What?

...

- 6.1A.1A G ~~Guidance on the regulated activity of advising on investments (except P2P agreements) under article 53(1) of the Regulated Activities Order can be found in PERG 8.24 to PERG 8.29. A firm wishing to know when it will be giving advice but not making a personal recommendation should refer to PERG 13.3. PERG 8.30B (Personal recommendations) describes what is meant by a personal recommendation in the context of the definition of the regulated activity of advising on investments (except P2P agreements). That guidance is also relevant to the meaning of personal recommendation in this section in relation to a retail investment product. The guidance in PERG 8.24 to PERG 8.29~~ PERG 8.30B does not apply to the regulated activity of advising on P2P agreements.

...

6.1B Retail investment product provider, operator of an electronic system in relation to lending, and platform service provider requirements relating to adviser charging and remuneration

Application – Who? What?

...

- 6.1B.1A G ~~Guidance on the regulated activity of advising on investments (except P2P agreements) under article 53(1) of the Regulated Activities Order can be found in PERG 8.24 to PERG 8.29. A firm wishing to know when it will be giving advice but not making a personal recommendation should refer to PERG 13.3. PERG 8.30B (Personal recommendations) describes what is meant by a personal recommendation in the context of the definition of the regulated activity of advising on investments (except P2P agreements). That guidance is also relevant to the meaning of personal recommendation in this section in relation to a retail investment product. The guidance in PERG 8.24 to PERG 8.29~~ PERG 8.30B does not apply to the regulated activity of advising on P2P agreements.

...

Annex B

Amendments to the Supervision manual (SUP)

In this Annex, underlining indicates new text.

12 Appointed representatives

...

12.4 What must a firm do when it appoints an appointed representative or an EEA tied agent?

The permission that the firm needs

...

- 12.4.1C G Where the *principal* is appropriately authorised for the purposes of article 53(1A) of the *Regulated Activities Order* (and so does not need *permission* to provide *non-personal recommendation advice*), the terms of the *appointed representative's* appointment will still need to cover their business in carrying on *non-personal recommendation advice*. This is because an *appointed representative* providing *non-personal recommendation advice* will only be exempt from the *general prohibition* if the *principal* has accepted responsibility in writing for the *appointed representative* in carrying on such business. An *appointed representative* is not exempt from the general prohibition simply because the *principal* is appropriately authorised for the purposes of article 53(1A) of the *Regulated Activities Order* (see also PERG 8.24.1AG (Advising on investments)).

...

Annex C

Amendments to the Perimeter Guidance manual (PERG)

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

2 Authorisation and regulated activities

...

2.7 Activities: a broad outline

...

Advising on investments

~~[Note: The guidance in this section relating to the regulated activity of advising on investments (except P2P agreements) does not take into account the amendments to article 53(1) of the Regulated Activities Order made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 (SI 2017/500) and paragraph 2 of Schedule 3 to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701) which came into force on 3 January 2018.]~~

...

2.7.16 G ...

- 2.7.16-A G (1) The scope of the regulated activity of advising on investments (except P2P agreements) is narrower for a person who is authorised for the purposes of the Act to carry on certain regulated activities (as set out in (2)) than described in PERG 2.7.15G and PERG 2.7.16G.
- (2) The narrower scope of advising on investments (except P2P agreements) referred to in (1) applies to a person who is authorised for the purposes of the Act to carry on any regulated activity other than (or in addition to):
- (a) advising on investments (except P2P agreements); or
- (b) the regulated activity of agreeing to carry on a regulated activity in relation to (a).
- (3) A person in (2) is not advising on investments (except P2P agreements) except to the extent that they are providing a personal recommendation.

...

5 Guidance on insurance mediation activities

...

5.8 The regulated activities: advising on contracts of insurance

...

5.8.3 G ...

5.8.3A G (1) The scope of the *regulated activity of advising on investments (except P2P agreements)* is narrower for a *person* who is authorised for the purposes of the *Act* to carry on certain *regulated activities* (as set out in (2)) than as described in *PERG* 5.8.1G and *PERG* 5.8.2G.

(2) The narrower scope of *advising on investments (except P2P agreements)* referred to in (1) applies to a *person* who is authorised for the purposes of the *Act* to carry on any *regulated activity* other than (or in addition to):

(a) *advising on investments (except P2P agreements)*; or

(b) the *regulated activity of agreeing to carry on a regulated activity* in relation to (a).

(3) A *person* in (2) is not *advising on investments (except P2P agreements)* except to the extent that they are providing a *personal recommendation*.

(4) *PERG* 8.24 explains in more detail when *advising on investments (except P2P agreements)* is limited to providing *personal recommendations*.

(5) *PERG* 8.30B (Personal recommendations) explains what a *personal recommendation* is.

5.8.3B G (1) There is more detail on the definition of *advising on investments (except P2P agreements)* in *PERG* 8.24 to *PERG* 8.30B. A *person* interested in what activities come within the *regulated activity of advising on investments (except P2P agreements)* in relation to *contracts of insurance* should also read *PERG* 8.24 to *PERG* 8.30B.

(2) In particular:

(a) *PERG* 5.8.4G to *PERG* 5.8.5G reflect *PERG* 8.26 (The investment must be a particular investment);

(b) *PERG* 5.8.6G to *PERG* 5.8.7G reflect *PERG* 8.27 (Advice to be given to persons in their capacity as investors (on the merits of their investing as principal or agent));

- (c) PERG 5.8.8G to PERG 5.8.11G reflect PERG 8.28 (Advice or information);
- (d) PERG 5.8.12G to PERG 5.8.14G reflect PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment));
- (e) PERG 5.8.20G to PERG 5.8.23G reflect PERG 8.30 (Medium used to give advice or information);
- (f) PERG 5.8.15G to PERG 5.8.19G reflect PERG 8.30A (Pre-purchase questioning (including decision trees));
- (g) PERG 8.30B contains further material on decision trees; and
- (h) PERG 8.30B explains how PERG 8.24 to PERG 8.30A (and therefore the corresponding parts of PERG 5.8 as listed in (a) to (g)) apply to the definition of *personal recommendation*.

...

Exclusion: periodical publications, broadcasts and ~~web-sites~~ website

...

5.8.25 G ...

- 5.8.25A G (1) Where the definition of *advising on investments (except P2P agreements)* is limited to providing *personal recommendations*:
- (a) the exclusion described in PERG 5.8.24G does not apply; but
 - (b) advice given in a publication issued to the general public, in a broadcast or on a website accessible to the general public will generally not involve a *personal recommendation* and hence will not involve *advising on investments (except P2P agreements)*.
- (2) PERG 7 and PERG 8.30B (Personal recommendations) give more details.

...

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, structured deposits, relevant investments, P2P agreements, ~~or~~ home finance transactions or certain pension transfers or conversions* and who wishes to determine whether he will be carrying on the *regulated activities of advising on investments, advising on regulated credit agreements for the acquisition of land, ~~or~~ advising on a home finance transaction or advising on conversion or transfer of pension benefits*.

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, advising on regulated credit agreements for the acquisition of land, ~~or~~ advising on a home finance transaction or advising on conversion or transfer of pension benefits* (see *PERG 7.3* (Does the activity require authorisation));

...

...

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, advising on regulated credit agreements for the acquisition of land, ~~and~~ advising on a home finance transaction and advising on conversion or transfer of pension benefits* if:

...

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, advising on regulated credit agreements for the acquisition of land, ~~or~~ advising on a home finance transaction or advising on conversion or transfer of pension benefits*, or any or each of them, and will be doing so as a business in the *United Kingdom* (see *PERG 7.3*), he may wish to apply to the *FCA* 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.

...

7.3 Does the activity require authorisation?

~~Advising on investments and advising on home finance transactions~~ Regulated advice

~~[Note: Insofar as the guidance in this section relates to the regulated activity of advising on investments (except P2P agreements), it does not take into account the amendments made to article 53(1) of the Regulated Activities Order made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 (SI 2017/500) and paragraph 2 of Schedule 3 to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701) which came into force on 3 January 2018.]~~

- 7.3.1 G ~~Under article 53(1) 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 Article 53(1) of the Regulated Activities Order (Advising on investments) deals with giving advice in relation to a security, a structured deposit or a relevant investment.~~
 - (2) ~~it is advice on the merits of his doing any of the following (whether as principal or agent): A summary can be found in PERG 8.24 (Advising on investments). PERG 8.25 to PERG 8.30B give more detail.~~
 - (a) ~~buying, selling, subscribing for or underwriting a particular investment which is a security, structured deposit or a relevant investment; or~~
 - (b) ~~exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment.~~
 - (3) As described in PERG 8.24, for certain firms, the regulated activity only covers giving personal recommendations.

...

Carrying on the regulated activity by way of business

...

- 7.3.4 G ... 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*, *structured deposits*, *relevant investments*, *P2P agreements* or *home finance transactions* is given, then, in the FCA's view, the business of *advising on investments* or *advising on a home finance transaction* is being carried on. ...

...

Carrying on the regulated activity in the United Kingdom

...

- 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, advising on regulated credit agreements for the acquisition of land*, ~~or~~ *advising on a home finance transaction or advising on conversion or transfer of pension benefits*. 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, structured deposits 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 do not apply to the regulated activities that involve *advising on a home finance transaction*, ~~or~~ *advising on regulated credit agreements for the acquisition of land or advising on conversion or transfer of pension benefits*. The effect of this is that, where the principal purpose of an overseas periodical publication is to offer advice on *securities, structured deposits, relevant investments, P2P agreements, and home finance transactions and certain pension transfers or conversions*, 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 *home finance transactions or pension transfers or conversions*.

Exclusions and exempt persons

- 7.3.8 G If a *person* is carrying on the business of *advising on investments, advising on regulated credit agreements for the acquisition of land*, ~~or~~ *advising on a home finance transaction or advising on conversion or transfer of pension benefits* in the *United Kingdom*, he will not require *authorisation* if:
- (1) ...
 - (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, advising on regulated credit agreements for the acquisition of land*, ~~or~~ *advising on a home finance transaction or advising on conversion or transfer of pension benefits* as the case may be.

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*, *advising on regulated credit agreements for the acquisition of land*, ~~or~~ *advising on a home finance transaction* or advising on conversion or transfer of pension benefits is being carried on so that *authorisation* is required, the FCA'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. ...

...

7.4 Does the article 54 exclusion apply?

The formats

~~[Note: Insofar as the guidance in this section relates to the *regulated activity* of *advising on investments* (except *P2P agreements*), it does not take into account the amendments to article 53(1) of the *Regulated Activities Order* made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 (SI 2017/500) and paragraph 2 of Schedule 3 to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701) which came into force on 3 January 2018.]~~

...

- 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 structured deposits or *relevant investments* or *P2P agreements* or *home finance transactions* or amounts to carrying on *advising on conversion or transfer of pension benefits*; or
 - (2) to lead or enable *persons*:
 - (a) to *buy, sell*, subscribe for or underwrite *securities*, structured deposits or *relevant investments*; or

...

Formats in writing or other legible form

- 7.4.3 G ...
- (3) ... But, in the FCA's view, a news or information 'service' is not restricted only to the giving of news or information since this would not generally constitute the *regulated activity* of *advising on investments* (see *PERG* 8.28 (Advice or information)), *advising on regulated mortgage contracts* (see *PERG* 4.6.13G to *PERG* 4.6.16G

(Advice or information)), *advising on regulated credit agreements for the acquisition of land* (see *PERG 4.10A.20G*), *advising on conversion or transfer of pension benefits* (see *PERG 12.6*), *advising on a home reversion plan*, *advising on a home purchase plan* or *advising on regulated sale and rent back agreements*. So the exclusion applies to services providing material in addition to news or information, such as comment or advice.

...

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, structured deposits, relevant investments, P2P agreements or home finance transactions* (~~see *PERG 7.3.1G*~~) or amounts to carrying on advising on conversion or transfer of pension benefits; or
 - (2) to lead or enable *persons*:
 - (a) to *buy, sell*, subscribe for or underwrite *securities, structured deposits* or *relevant investments*; or
 - ...
 - (d) to enter as *home purchaser* into *home purchase plans* or to vary the terms of *home purchase plans* entered into by them as *home purchaser* on or after 6 April 2007; ~~or~~
 - (e) to enter as *SRB agreement seller* or *SRB agreement provider* into *regulated sale and rent back agreements* or to vary the terms of *regulated sale and rent back agreements* entered into by them as *SRB agreement seller* or *SRB agreement provider* where the agreement was originally established on or after 1 July 2009; ~~or~~
 - (f) to enter as a recipient of credit into a *regulated credit agreement* the purpose of which is to acquire or retain property rights in *land* or in an existing or projected building; or
 - (g) to do any of the things listed in *PERG 7.4.2G(2)(g)*.

...

- 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, advising on regulated credit agreements for the acquisition of land*, ~~or advising on a home finance transaction~~ or advising on conversion or transfer of pension benefits are being carried on must be taken into

account (see *PERG* 8.24 (Advising on investments)). ...

- 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*, *advising on regulated credit agreements for the acquisition of land*, ~~or~~ *advising on a home finance transaction or advising on conversion or transfer of pension benefits*; 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

...

In the *FCA*’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*, *structured deposits*, *relevant investments*, *P2P agreements*, ~~or~~ *home finance transaction transactions or pension scheme transfers*.

...

- 7.4.12 G ...

Personal recommendations

- 7.4.12A G (1) The exclusion does not apply to *advising on investments (except P2P agreements)* when the definition of that *regulated activity* is restricted to *giving personal recommendations*.

[Note: For these *personal recommendations*, see *PERG* 7.3.1G(3).]

- (2) In practice, advice given as described in *PERG* 7.4.1G is unlikely to be a *personal recommendation* in the first place, for the reasons set out in *PERG* 8.30B.2G(4) and *PERG* 8.30B.22G to *PERG* 8.30B.24G (Recommendation to the public).

...

8 Financial promotion and related activities

...

8.23 Regulated activities

- ...
- 8.23.4 G The *guidance* that follows is concerned with the *regulated activities* of *making arrangements with a view to transactions in investments* and *advising on investments (except P2P agreements)*. ...
- ...

8.24 Advising on investments

~~[Note: The guidance in PERG 8.24 to PERG 8.29 on the regulated activity of advising on investments (except P2P agreements) does not take into account the amendments to article 53(1) of the Regulated Activities Order made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2017 (SI 2017/500) and paragraph 2 of Schedule 3 to the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701) which came into force on 3 January 2018.]~~

- 8.24.-1 G The definition of the regulated activity of advising on investments (except P2P agreements) differs depending on the person giving the advice.
- 8.24.1 G Under article 53(1) of the *Regulated Activities Order*, for anyone except a person in PERG 8.24.1AG, advising on investments (except P2P agreements) covers advice which:
- (1) is given to a *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential investor; and
 - (2) is advice on the merits of his (whether as principal or agent):
 - (a) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular *investment* which is a *security*, a structured deposit or a *relevant investment*; or
 - (b) exercising or not exercising any right conferred by such an *investment* to *buy, sell, subscribe for or underwrite, exchange or redeem* such an *investment*.
- 8.24.1A G (1) However if a person is authorised for the purposes of the Act to carry on any regulated activity other than (or in addition to):
- (a) advising on investments (except P2P agreements); or
 - (b) the regulated activity of agreeing to carry on a regulated activity in relation to (a);
- that person only advises on investments (except P2P agreements) if it is providing a personal recommendation.
- (2) A person described in (1) is referred to in the Regulated Activities

Order as appropriately authorised.

- (3) PERG 8.30B describes *personal recommendations*.
- (4) The result is that for a *person* in (1), the definition of the *regulated activity of advising on investments (except P2P agreements)* only covers a subset of the advisory activities that apply to other *persons* giving advice.
- (5) In the *FCA's* view a *person* is only appropriately authorised for the purposes of (1) if it is a *firm* whose *permission* includes *regulated activities* other than (or in addition to) the ones listed in (1)(a) and (b).

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

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

recommendation.

(3) See PERG 8.24.1AG for what appropriately authorised means.

8.24.1D

G

(1) For:

(a) a firm that is not appropriately authorised (see PERG 8.24.1AG for what appropriately authorised means); and

(b) an unauthorised person;

all the material in this chapter about advising on investments (except P2P agreements) is relevant, except for PERG 8.30B (Personal recommendations).

(2) The definition of advising on investments (except P2P agreements) that applies to a person in (1) is the one in PERG 8.24.1G. It is not relevant to such a person whether or not the advice is a personal recommendation.

8.24.2

G

~~The effect of advice being given in the circumstances referred to in~~ For advice to be covered by PERG 8.24.1G is that:

...

8.24.3

G

(1) ~~Each of the aspects~~ requirements referred to in PERG 8.24.2G is considered in greater detail in PERG 8.25 to PERG 8.29.

(2) PERG 8.30 and PERG 8.30A have further material about the definition of advising on investments (except P2P agreements) found in PERG 8.24.1G.

(3) PERG 8.30B explains what a personal recommendation is.

~~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.~~

8.24.4

G

PERG 8.24 to PERG 8.30B only cover advising on investments (except P2P agreements). They do not cover the following regulated activities, which also cover giving advice:

(1) providing basic advice on a stakeholder product under article 52A of the Regulated Activities Order;

(2) advising on P2P agreements;

(3) advising on regulated mortgage contracts;

(4) advising on a home reversion plan;

- (5) advising on a home purchase plan;
- (6) advising on a regulated sale and rent back agreement;
- (7) advising on regulated credit agreements for the acquisition of land;
- (8) advising on conversion or transfer of pension benefits;
- (9) advising on syndicate participation at Lloyd's; or
- (10) debt counselling.

8.24.5 G PERG 5.8 (The regulated activities: advising on contracts of insurance) explains how the material in PERG 8.24 to PERG 8.30A applies in the specific context of contracts of insurance.

...

8.26 The investment must be a particular investment

...

8.26.3 G ~~In the FCA's view, PERG 8.30A includes material about guiding a person through a decision tree, should not, of itself, involve advice within the meaning of article 53(1) (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(1). 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 ...

- 8.26.5 G
- (1) Although giving generic advice is generally not a regulated activity, if it is given in the course of or in preparation for a regulated activity it can form part of that regulated activity.
 - (2) For example, if a firm gives generic advice (for instance about the merits of investing in Japan rather than Europe) and then goes on to identify a particular Japanese share, the generic advice will form part of the regulated activity of advising on investments (except P2P agreements).
 - (3) Another example is a firm that provides generic advice to a customer or a potential customer prior to or in the course of carrying on the regulated activity of arranging (bringing about) deals in investments for the customer. That generic advice is part of that regulated activity

of arranging (bringing about) deals in investments.

...

8.28 Advice or information

...

- 8.28.2 G (1) In general terms, simply giving information without making any comment or value ~~judgement~~ judgment on its relevance to decisions which an investor may make is not advice.
- (2) The provision of purely factual information does not become regulated advice merely because it feeds into the customer's own decision-making process and is taken into account by them.
- (3) Regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell.
- (4) A key to the giving of advice is that the information:
- (a) is either accompanied by comment or value judgment on the relevance of that information to the customer's investment decision; or
- (b) is itself the product of a process of selection involving a value judgment so that the information will tend to influence the decision.
- (5) Advice can still be regulated advice if the *person* receiving the advice:
- (a) is free to follow or disregard the advice; or
- (b) may receive further advice from another *person* (such as their usual financial adviser) before making a final decision.

...

8.28.4 G ...

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

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

- 8.28.7 G (1) A person can give advice without saying (or implying) categorically that the customer should invest. The adviser does not have to offer a definitive recommendation as to whether the customer should go ahead.
- (2) For example, saying the following can still be advice:
- (a) this investment is a very good buy but it is your decision whether or not to buy; or
- (b) this investment is a very good buy but I am going to leave it to you to decide because I don't know your up-to-date financial position.
- (3) The examples in (2):
- (a) involve advice and not just information; and
- (b) involve advice on the pros and cons of buying the investment (see PERG 8.29 (Advice must relate to the merits (of buying or selling a particular investment))).
- 8.28.8 G One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If an investor asks for a recommendation, any response is likely to be regarded as advice.
- 8.28.9 G On the other hand, if a customer makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that it does not give advice; or whether the adviser runs an advisory business.

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

- 8.29.1 G Advice must relate to the *buying, holding* or *selling* of an *investment* – in other words, the pros or cons of doing so.
- ...
- 8.29.3 G Neither does advice on the merits of using a particular stockbroker or investment manager₁ in his capacity as such₂ amount to advice for the purpose of article 53(1). This is because it is not advice on the merits of *buying or selling an investment* and it is not advice on the merits of exchanging, redeeming or holding one.
- ...
- 8.29.5 G Without an explicit or implicit recommendation on the merits of *buying₁ exchanging, redeeming, holding or selling an investment*, advice will not be

covered by article 53(1) if it is advice on:

...

...

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

Recommendation	Regulated under article 53(1) or not?
...	
I recommend that you move all of your investment in JKL <i>investment</i> from fund X into fund Y*.	...
<u>I recommend that you keep your investment in fund X*.</u>	<u>Yes. This is advice because it is advice to hold on to an <i>investment</i> and advice not to sell it.</u>
...	

...

After *PERG 8.30* (Medium used to give advice or information) insert the following new sections 8.30A and 8.30B. The text is not underlined.

8.30A Pre-purchase questioning (including decision trees)

Introduction

- 8.30A.1 G Pre-purchase questioning involves putting a sequence of questions in order to extract information from a *person* to help them best select an *investment* that meets their needs. A decision tree is an example of pre-purchase questioning. The process of going through the questions will usually narrow down the range of options that are available.
- 8.30A.2 G There are two aspects of the definition of *advising on investments (except P2P agreements)* that are particularly relevant to whether pre-purchase questioning involves *advising on investments (except P2P agreements)*:
- (1) the distinction between information and advice (see *PERG 8.28*); and

- (2) the fact that advice must relate to a particular *investment* (see *PERG* 8.29).
- 8.30A.3 G (1) This section deals with *advising on investments (except P2P agreements)* where it is not relevant whether there is a *personal recommendation* (see *PERG* 8.24.1AG for an explanation of when the definition of *personal recommendation* is relevant to the definition of *advising on investments (except P2P agreements)*).
- (2) *PERG* 8.30B.6G explains the relevance of this section where *advising on investments (except P2P agreements)* is restricted to making a *personal recommendation*.
- 8.30A.4 G (1) Whether or not pre-purchase questioning in any particular case is *advising on investments (except P2P agreements)* will depend on all the circumstances.
- (2) The pre-purchase questioning process may involve identifying one or more particular *investments*. If so, to avoid *advising on investments (except P2P agreements)*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the *person* as, assisting the *person* to make their own choice of product which has particular features which the *person* regards as important. The questioner will need to avoid providing any judgment on the suitability of one or more products for that *person*.
- 8.30A.5 G There is considerable potential for variation in the form, content and manner of scripted questioning, but there are two broad types, as described in *PERG* 8.30A.6G and *PERG* 8.30A.7G.

Identification of product based on facts

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

during the course of the scripted questioning, give information that considered on its own would not involve *advising on investments (except P2P agreements)*; but may, following the scripted questioning, identify one or more particular *investments*. The factors described in *PERG* 8.30A.8G are relevant to deciding whether or not the questioner is *advising on investments (except P2P agreements)*.

Identification of product based on judgment

- 8.30A.7 G (1) The second type of scripted questioning referred to in *PERG* 8.30A.5G involves providing questions and answers incorporating opinion, judgment or recommendations.
- (2) There are various possible scenarios, including the following.
- (3) One scenario is that the scripted questioning may not lead to the identification of any particular *investment*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on investments (except P2P agreements)*.
- (4) (a) Another scenario is that the scripted questioning may lead to the identification of one or more particular *investment*.
- (b) In principle this is likely to involve *advising on investments (except P2P agreements)* as regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to buy or sell (see *PERG* 8.28.2G).
- (c) However, the factors described in *PERG* 8.30A.8G are still relevant to deciding whether or not the questioner is *advising on investments (except P2P agreements)*.

Factors to take into account

- 8.30A.8 G (1) When the scripted questioning identifies particular *investments* (see *PERG* 8.30A.6G(5) and *PERG* 8.30A.7G(4)), the *FCA* considers that it is necessary to look at the process and outcome of the scripted questioning as a whole in deciding whether or not the process involves *advising on investments (except P2P agreements)*.
- (2) Factors that may be relevant include the following:
- (a) any representations made by the questioner at the start of the questioning relating to the service they are to provide;
- (b) the context in which the questioning takes place;
- (c) the stage in the questioning at which the opinion is offered

and its significance;

- (d) the role played by the questioner who guides a *person* through the pre-purchase questions;
- (e) the outcome of the questioning (whether particular *investments* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (f) whether the pre-purchase questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, and all that the questioner has done is help the *person* understand what the questions or options are and how to determine which option applies to their particular circumstances.

Filtering: introduction

- 8.30A.9 G A *firm* selling products through its website might make its list of the *investments* it sells easier to search by allowing the customer to filter products based on factors presented by the website and selected by the customer. Only products that meet the search criteria input by the customer are displayed.

Filtering based on objective factors

- 8.30A.10 G (1) The filtering described in *PERG* 8.30A.9G might be based upon simple objective factors like price.
- (2) This should not generally involve *advising on investments (except P2P agreements)*, as explained in *PERG* 8.30A.6G(3).

Filtering based on a factor involving judgment

- 8.30A.11 G The filtering described in *PERG* 8.30A.9G might, however, be based upon a factor such as riskiness, which is not a simple objective factor like price.
- 8.30A.12 G Where all a *firm* is doing is ranking its own *investments*' riskiness with reference to the specific investment objectives for those products, that *firm* is unlikely to be *advising on investments (except P2P agreements)* as long as it is clear to the customer that this is all the *firm* is doing. A description of a product's investment objectives is not advice, in the same way that an explanation of its terms is not advice (see *PERG* 8.28.3G).
- 8.30A.13 G Similarly, where the *firm* is offering *investments* that are issued by a third party and the level of riskiness is drawn directly from the *investment's* disclosure material, the *firm* is unlikely to be *advising on investments (except P2P agreements)* as long as it is clear to the customer that this is all the *firm* is doing. The level of riskiness is the factual representation of the *investment's* disclosure material and therefore information and not advice.

- 8.30A.14 G (1) A *firm* may rank third-party *investments* into risk categories using its own opinion of the level of risk of each *investment*. The ranking is self-generated and not drawn directly from the *investment's* disclosure material.
- (2) As explained in *PERG* 8.30A.7G(4), this is likely to involve *advising on investments (except P2P agreements)*.
- (3) *Advising on investments (except P2P agreements)* involves advice on the merits of the investor buying or selling *investments*. A factor like riskiness is in itself neutral, because riskiness is not necessarily a good or a bad thing. So the filtering is done on the basis of what the customer wants and not what is right for the customer.
- (4) However, (3) does not mean that the *firm* is not *advising on investments (except P2P agreements)*.
- (a) By selecting their preferred level of risk, the customer has effectively told the *firm*, via the website, what their investment objectives are; and the purpose of the filtering process is to identify *investments* that are suitable for the customer to buy based on these objectives.
- (b) In this scenario the *firm* is providing its opinion as to the riskiness of an *investment* to a *person* who is accessing the website in order to buy *investments*, i.e. in their capacity as investor. In that context that opinion (advice) would amount to an opinion about the pros and cons of investing in the particular product (see *PERG* 8.29.1G).
- (c) The *firm* is not just supplying information: it is making a skilled value judgment to determine the relative merits of products for an investor with a particular risk appetite.
- (5) It is the combination of self-generated rankings and the fact that these are given to someone in their capacity as an investor, that makes it likely to be *advising on investments (except P2P agreements)*.
- (6) As riskiness taken on its own is a neutral factor in the pros and cons of whether to buy an *investment*, an analysis of riskiness in a technical publication about investment issues rather than in a sales context may not involve *advising on investments (except P2P agreements)* by the *person* writing and issuing it.
- 8.30A.15 G (1) If the input from the customer is much more extensive than, and the way that those inputs interact on the website is much more complicated than, the processes described in *PERG* 8.30A.12G and *PERG* 8.30A.13G, the website is not simply displaying factual information about the design of the product.

- (2) In that case the production of a list of results uses an element of opinion and skill (albeit automated) in translating the customer's input into a display of a particular product or products. Either explicitly or implicitly this is presented as meeting the customer's requirements and wishes as input into the system.
 - (3) The result is that the filtering process is closer to the one in *PERG* 8.30A.11G than the one in *PERG* 8.30A.10G and so it is more likely that the *firm* is *advising on investments (except P2P agreements)*.
- 8.30A.16 G (1) The table in *PERG* 8 Annex 1 includes examples of when a *firm* is and is not *advising on investments (except P2P agreements)* when it sells products on a website that allows the customer to filter products based on input from the customer.
- (2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.

8.30B Personal recommendations

Purpose of this section

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

Basic definition of personal recommendation

- 8.30B.2 G A *personal recommendation* means a recommendation that:
- (1) is made to a *person* in their capacity as:
 - (a) an investor or potential investor; or
 - (b) agent for an investor or a potential investor;
 - (2) is for the *person* in (1) to do any of the following (whether as principal or agent):
 - (a) *buy, sell*, subscribe for, exchange, redeem, hold or underwrite a particular *investment* which is a *security*, a *structured deposit* or a *relevant investment*; or
 - (b) exercise or not exercise any right conferred by such an *investment* to *buy, sell*, subscribe for, exchange or redeem such an *investment*;
 - (3) is:

- (a) presented as suitable for the *person* to whom it is made; or
- (b) based on a consideration of the circumstances of that *person*; and
- (4) is not issued exclusively to the public.

Link to MiFID

- 8.30B.3 G (1) The definition of *personal recommendation* in the *Regulated Activities Order* is based on the definition of the *MiFID investment service or activity* of making a personal recommendation.
- (2) *Personal recommendation* should therefore be interpreted for the purpose of the *regulated activity of advising on investments (except P2P agreements)* consistently with *MiFID*.
- (3) However the types of *investments* to which the recommendation relates (as listed in *PERG 8.30B.2G(2)*) are not limited to ones covered by *MiFID*.
- 8.30B.4 G This section draws on the document “Question & Answers: Understanding the definition of advice under MiFID” (CESR/10-293), published by the Committee Of European Securities Regulators (now *ESMA*).

Examples

- 8.30B.5 G (1) *PERG 8 Annex 1* sets out some examples of what is and is not a *personal recommendation*.
- (2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.

Relevance of the guidance elsewhere in this chapter

- 8.30B.6 G (1) *PERG 8.25* to *PERG 8.30A* deal with the meaning of *advising on investments (except P2P agreements)* in *PERG 8.24.1G*, where it is not relevant whether there is a *personal recommendation*. That material also applies to whether the conditions in *PERG 8.30B.2G(1)* and (2) are met, as explained in (2) and (3).
- (2) If something is regulated advice under *PERG 8.25* to *PERG 8.30A* it meets the conditions in *PERG 8.30B.2G(1)* and (2). However it is not a *personal recommendation* unless it also meets the conditions in *PERG 8.30B.2G(3)* and (4).
- (3) If something is not regulated advice under *PERG 8.25* to *PERG 8.30A* it is not a *personal recommendation* as it does not meet the conditions in *PERG 8.30B.2G(1)* and (2).
- 8.30B.7 G Therefore:

- (1) for a communication to be a *personal recommendation* it must:
 - (a) relate to an *investment* which is a *security*, a *structured deposit* or a *relevant investment*, as described in *PERG* 8.25;
 - (b) be about a particular *investment*, as described in *PERG* 8.26;
 - (c) be given to *persons* in their capacity as investors or potential investors, as described in *PERG* 8.27 (although the material in *PERG* 8.27.5G about advice given in a periodical or website is not relevant);
 - (d) be advice (that is, not just information), as described in *PERG* 8.28; and
 - (e) relate to the merits of *buying*, holding or *selling* the *investment*, as described in *PERG* 8.29;
- (2) the medium used to give advice should make no difference to whether or not the communication comes within *PERG* 8.30B.2G(1) and (2), as described in *PERG* 8.30 (but advice given in periodicals, broadcasts and other news or information services will generally not be a *personal recommendation* for the reasons described in *PERG* 8.30B.22G to *PERG* 8.30B.24G);
- (3) the points in *PERG* 8.30A about whether pre-purchase questioning or filtering involves regulated advice are also relevant to whether the requirements in *PERG* 8.30B.2G(1) and (2) are met; and
- (4) a communication is not a *personal recommendation* unless it also meets the conditions in *PERG* 8.30B.2G(3) and (4).

Presenting a recommendation as suitable

- | | | |
|---------|---|--|
| 8.30B.8 | G | An <i>investment</i> might be presented as suitable for a customer in an explicit way using words such as, for example, “this product would be the best option for you”. This meets the condition in <i>PERG</i> 8.30B.2G(3)(a). |
| 8.30B.9 | G | <ol style="list-style-type: none"> (1) However, it is not necessary for a <i>firm</i> to tell a customer explicitly that a recommendation it is making is suitable for the customer in order for it to be a <i>personal recommendation</i>. If the <i>firm</i> implicitly presents an <i>investment</i> to the customer as suitable, that can still be a <i>personal recommendation</i>. (2) The following are examples of implicit recommendations of this type: <ol style="list-style-type: none"> (a) a <i>firm</i> may present several <i>investments</i>, with one of them highlighted for the customer by a phrase such as “people like you tend to buy this product”; and |

- (b) a *firm* may contact customers that hold units in a particular fund and say “Our research indicates that Fund X is no longer performing as our customers would wish. We have identified Fund Y as a replacement investment, which can be used to achieve the same investment outcomes”.

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

Recommendation based on a consideration of circumstances

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

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

8.30B.12 G Whether or not a *firm* will be viewed as providing a recommendation based on a consideration of a *person's* circumstances is likely to depend on factors such as the nature of the information it collects and the way that it presents its questions.

8.30B.13 G (1) For example, if:

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

it could be reasonable for the customer to expect that the *firm* will use this information when it makes a recommendation as part of the follow-on service.

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

8.30B.14 G On the other hand, if:

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

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

- 8.30B.15 G (1) If :
- (a) a *firm* makes a recommendation to a customer; and
 - (b) the *firm* presents it as being based on the customer's personal circumstances; but
 - (c) the *firm* in fact fails to use information about that customer's circumstances when making that recommendation;
- that recommendation is a *personal recommendation*.
- (2) So for example, if:
- (a) a *firm* has accumulated relevant information on a customer's circumstances (either during a single interview or during the course of an ongoing relationship); and
 - (b) it would be reasonable for the customer to expect that this information is being taken into account (see *PERG* 8.30B.13G to *PERG* 8.30B.14G);
- any recommendation will be treated as being based on a consideration of the customer's circumstances.

Where the same recommendation is sent to several customers

- 8.30B.16 G If a *firm* makes a recommendation to multiple customers this does not automatically mean that it is not a *personal recommendation*.
- 8.30B.17 G To assess whether a communication made to several customers is a *personal recommendation*, the following factors are relevant:
- (1) the target audience (*PERG* 8.30B.18G);
 - (2) the content of the message (*PERG* 8.30B.19G); and
 - (3) the language used (*PERG* 8.30B.20G).
- 8.30B.18 G Target audience:
- (1) For example, when the internal procedures of a *firm* specify that an *investment* may only be sold to a sample of customers selected on the

basis of certain factors, such as customers under a certain age or who hold no similar products, the selection of the target audience will not automatically mean that the *firm* is providing *personal recommendations*.

- (2) However, highlighting the particular personal circumstances that led the individual to be contacted, for example, is very likely to mean that the *investment* is being presented as suitable for the particular investor.
- (3) The key factor here is how the recommendation would appear to a reasonable investor and in particular whether it would appear to a reasonable investor contacted in this way that:
 - (a) the communication from the *firm* was sent to that investor because the *investment* is suitable for that investor; or
 - (b) the investor was selected because of their circumstances.

8.30B.19 G Content of the message:

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

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

Disclaimers

- 8.30B.21 G A disclaimer may help a *firm* to avoid inadvertently presenting *investments* as suitable for particular customers or as being based on a consideration of the customer's circumstances. However it will not always be sufficient. For example a disclaimer is unlikely to be effective if:
- (1) a *firm* states that the *investment* would suit a particular customer's needs; or
 - (2) it is reasonable for the customer to expect that the recommendation is based on a consideration of their circumstances.

Recommendation to the public

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

8.30B.23 G Advice about *investments* in a newspaper, a journal, a magazine, a website

accessible to the general public or in a radio or television broadcast should not amount to a *personal recommendation*.

- 8.30B.24 G (1) However, use of the internet does not automatically mean that a communication is made to the public and that as a result it is outside the definition of a *personal recommendation*.
- (2) Therefore, for instance, while advice on a generally accessible website is unlikely to be a *personal recommendation*, an email communication provided to a specific *person*, or to several *persons*, may amount to a *personal recommendation*.
- (3) *PERG* 8.30B.16G to *PERG* 8.30B.20G (Where the same recommendation is sent to several customers) deal with when a communication, including an email, sent to multiple customers can be a *personal recommendation*.
- (4) See *PERG* 8.30B.33G(5) for an example of when the output of a website may still be a *personal recommendation* even though the website is accessible to the general public.

Decision trees and filtering

- 8.30B.25 G (1) A *firm* may sell products through its website and that website may allow the customer to filter products based upon factors presented by the website and selected by the customer.
- (2) Someone deciding whether a filtering process meets the requirements in *PERG* 8.30B.2G(1) and (2) should look at *PERG* 8.30A (Pre-purchase questioning (including decision trees)).
- (3) However, if a filtering process is treated as giving regulated advice under *PERG* 8.30A it must also meet the requirements in *PERG* 8.30B.2G(3) and (4) if it is to be a *personal recommendation*.
- 8.30B.26 G (1) This section *PERG* 8.30B deals with two basic forms of filtering process.
- (2) The first type involves identifying *investments* based on factual matters, as described in *PERG* 8.30A.10G.
- (3) The second type involves factors incorporating opinion, judgment or recommendations, as described in *PERG* 8.30A.11G.
- 8.30B.27 G A filtering process based on factual matters will generally not involve a *personal recommendation* because it does not meet the requirements in *PERG* 8.30B.2G(1) and (2) (see *PERG* 8.30A.6G (as applied by *PERG* 8.30B.6G)).
- 8.30B.28 G In the *FCA*'s view, a filtering process based on a single subjective factor such as riskiness may meet the requirements in *PERG* 8.30B.2G(1) and (2) but still not be a *personal recommendation* because it does not meet the

requirements in *PERG* 8.30B.2G(3) and (4). It need not meet those requirements for the following reasons taken together.

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

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

- (1) *PERG* 8.30B.28G is not based on the view that an investment factor such as riskiness cannot be part of the customer's personal circumstances. The customer's attitude to risk can form part of the customer's personal circumstances.
- (2) *PERG* 8.30B.28G is not based on the view that there is no *personal recommendation* where the advice is about whether a product meets the customer's objectives rather than the product being good or bad. A *personal recommendation* may relate to the customer's objectives.
- (3) *PERG* 8.30B.28G is not based solely on the fact that the website only takes into account a narrow range of factors. The fact that a *firm* has not considered all the customer's circumstances does not

necessarily mean that there is no *personal recommendation*.

- 8.30B.30 G (1) The conclusion in *PERG* 8.30B.28G is given some support by the *ESMA* guidance referred to in *PERG* 8.30B.4G.
- (2) That guidance states that where the filtering process is limited to assisting the customer to make their own choice of product with particular features which the customer regards as important, then it is unlikely that the process will involve a *personal recommendation*.
- 8.30B.31 G (1) Whether or not a *personal recommendation* is given depends in part on whether the customer is led to think that one is being given.
- (2) Therefore it is important that the customer understands that:
- (a) the *firm* is not advising on whether the products are suitable for the customer; and
- (b) instead the *firm* is assisting the customer to make their own choice of product with particular features which the customer regards as important.
- (3) If buying the *investments* identified in the website's output is positioned as the appropriate action for the customer to take, the overall service might be viewed as a *personal recommendation*.
- (4) The customer should understand that, because the website takes into account a narrow range of the customer's personal circumstances and preferences and because the customer rather than the *firm* has established what those circumstances and preferences are, the result may be that the customer ends up with products that are unsuitable for them.
- 8.30B.32 G (1) As described in *PERG* 8.30B.21G, including a disclaimer is not enough on its own to prevent a *personal recommendation*.
- (2) For example, if the *firm* says that the filtered *investments* displayed by the website would suit the customer's needs, the inclusion of a disclaimer saying that this is not advice or a *personal recommendation* would be unlikely to change the nature of the communication.
- (3) A legalistic disclaimer is unlikely to be enough to prevent a *firm* from giving a *personal recommendation*. Instead, the material should prominently and clearly explain the limited nature of the service that the *firm* provides and the risk that the customer will end up with unsuitable *investments*.
- 8.30B.33 G (1) If the filtering is based on more than one factor chosen by the consumer that does not mean that the *firm* is making a *personal recommendation*.

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

- 8.30B.34 G (1) The approach described in *PERG* 8.30B.28G only applies if it is clear to the customer that the *firm* is presenting to the customer all the products it sells coming within the category selected by the customer (see *PERG* 8.28.4G (information presented on a selected basis)).
- (2) For example, if the customer filters the products based on how risky they are, the *firm* should present to the customer all the products it sells falling within the risk category the customer chooses.

- 8.30B.35 G (1) An example of *PERG* 8.30B.33G is a *firm* that presents a suggested portfolio of investments to the customer.
- (2) For example, if the customer filters the products based on how risky they are, and the *firm* presents a number of investment products and a suggestion of what percentage of the customer's investment should be invested in each, it is likely that the *firm* will be making a *personal recommendation*.
- 8.30B.36 G The examples in *PERG* 8 Annex 1 include examples of a *firm* selling products on a website which allows the customer to filter products based on input from the customer.

Amend the following as shown.

8.31 Exclusions for advising on investments

...

- 8.31.2 G ~~As respects~~ With regard to article 53(1), the main exclusion relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54: Advice given in newspapers etc). The exclusion applies if the principal purpose of any of these is not to give advice covered in article 53(1) or to lead or enable *persons* to acquire or dispose of *securities* or *contractually based investments*. This exclusion does not apply when the definition of *advising on investments* (except *P2P agreements*) is based on giving a *personal recommendation* (see *PERG* 8.24.1AG for when this is the case). All this is explained in greater detail, together with the provisions on the granting of certificates, in *PERG* 7.

...

After *PERG* 8.37 (AIFMD Marketing) insert the following new Annex. The text is not underlined.

8 Annex 1G Examples of what is and is not a personal recommendation and advice

- Notes:
- (1) The purpose of this annex is to give examples in general terms of what is and is not *advising on investments* (except *P2P agreements*). The examples are relevant both to someone who is not appropriately authorised and someone who is. See paragraph (5) for what appropriately authorised means.
- (2) If the answer in the column in the table of examples headed 'Is this regulated advice for someone other than a firm with an appropriate

authorisation?’ is that there is no regulated advice, then the example does not involve *advising on investments (except P2P agreements)* by anyone, whether or not they are appropriately authorised. Where this is the case, the column headed ‘Is there a personal recommendation?’ is marked ‘No’ because in those circumstances there is no *personal recommendation* either.

- (3) If the answer in the column in the table of examples headed ‘Is this regulated advice for someone other than a firm with an appropriate authorisation?’ is that there is regulated advice:
 - (a) the example involves *advising on investments (except P2P agreements)* for someone who is not appropriately authorised; and
 - (b) the example only involves *advising on investments (except P2P agreements)* for someone who is appropriately authorised if the column headed ‘Is there a personal recommendation?’ says that there is a *personal recommendation*.
- (4) Therefore:
 - (a) column (2) of the table (Is there a personal recommendation?) is not relevant to someone who is not appropriately authorised; and
 - (b) all columns of the table are relevant to someone who is appropriately authorised.
- (5) *PERG 8.24.1AG* explains what appropriately authorised means.
- (6) The examples should be read together with *PERG 8.24* to *PERG 8.30B*.
- (7) Except where stated otherwise, the examples all involve *firms* and so they are most relevant to a *firm* wanting to know whether it is *advising on investments (except P2P agreements)*.
- (8) The examples assume that the *person* in the example is not doing anything else relevant that is not described in the scenario set out in column (1) of the table.
- (9) The tables do not consider whether the examples involve *financial promotions*.

(A) Website with generic information without filtering		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p><i>Firm A</i> has a website through which it provides a range of information about the world of investments. This includes generic explanations of the different asset classes available and the likely risks that may attach to each, the benefits of diversification and the different types of investment strategies used in the market. The information does not have a bias towards a particular type of investment, strategy or asset allocation. There is no interactivity.</p> <p>The website provides lists of <i>investments</i> for purchase without additional comment (but has links to the relevant disclosure material for the individual products).</p>	No	Not regulated advice because simply giving information without making any comment or value judgment on its relevance to decisions which an investor may make does not involve advising on investments (see <i>PERG</i> 8.28.2G).

(B) Website without filtering but which classifies the available products		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>In each example the categorisation by <i>Firm B</i> is not interactive. The investments are not displayed or filtered in accordance with information input by the customer. The ranking is set out in the way it would be in a hard copy document.</p>		
<p>(1) <i>Firm B</i> ranks the products it sells into risk categories. One set of categories could be Low Risk, Low-Medium Risk, Medium Risk, Medium-High Risk and High Risk. <i>Firm B</i> allocates each investment using its own opinion on the level of risk of each product (i.e. it is self-generated and not drawn directly from each product's</p>	<p>Not a <i>personal recommendation</i>.</p> <p>The recommendation is not presented as suitable for the customer or based on a consideration of</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice.</p> <p>Please see the reasons in <i>PERG</i> 8.30A.14G.</p>

<p>disclosure material). For example a list of funds' riskiness based on the <i>firm's</i> analysis and metrics.</p> <p>The website also has material elsewhere explaining investment risk and material to help customers self-determine the level of risk they are willing and able to take. Each risk category description includes notional customer attitudes, the types of investments that may be found within funds/portfolios matching this risk level and also historic factual data on the volatility of such investments. Customers are prompted to read the risk category descriptions and to use this material to think about which category best fits their circumstances.</p>	<p>their personal circumstances. The customer reads both sets of information (list of products and explanatory material) and makes any investment decision on that basis.</p>	<p>Although that <i>guidance</i> refers to an Internet-based filtering process, this example (B1) is also based on value judgments about the relative merit of specific <i>investments</i> given to someone interested in buying or selling them.</p> <p>As explained in <i>PERG</i> 8.30A.14G(6) classifying products based on risk categories need not be regulated advice outside the sales context.</p>
<p>(2) <i>Firm B</i> classifies the products it sells by reference to a number of factors:</p> <ul style="list-style-type: none"> • Riskiness, as in example (B1). • High-level investment objectives, for example capital growth, income, or a balance of both. • Whether the <i>investments</i> are designed for long- or short-term investment. <p>For example, each fund may have three boxes next to it on the website. One box has a riskiness rating. One is about the investment objectives. The other is about whether it is designed for long- or short-term investment.</p> <p>There is material elsewhere on the website to help customers self-determine what their investment objectives should be.</p> <p>Each customer that uses the website sees the same information. The groups and investment objectives do not change based on information that the customer has provided to the <i>firm</i>.</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (B1).</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).</p>

<p>(3) Same as example (B2), except that the products are manufactured and issued by the <i>firm</i> itself and the website is describing the specific investment objectives for those products.</p>	<p>No</p>	<p>May not be regulated advice, for the reasons in <i>PERG</i> 8.30A.12G.</p>
<p>(4) <i>Firm B</i> gives each fund it lists a star rating based on whether the fund is good value. The star rating is supplied by an external unconnected party and does not reflect past performance. The rating is not exclusive to <i>Firm B</i> and is widely used in the industry. This might be something like the Morningstar Analysts' Rating.</p>	<p>Even if this involves regulated advice under column (3) of this example, it is not a <i>personal recommendation</i>, for the same reason as in example B1.</p>	<p>If the <i>firm</i>:</p> <ul style="list-style-type: none"> (a) is not providing its 'self-generated assessment of riskiness'; (b) is only providing the star rating supplied by a third party; and (c) is not endorsing the rating; <p>the <i>firm</i> is, depending on the circumstances, unlikely to be giving regulated advice. It will only be giving information.</p>
<p>(5) <i>Firm B</i> gives each fund it lists a star rating based on whether it thinks that the fund is good value. <i>Firm B</i> uses skill and expertise in putting together the ranking by, for example, adjusting figures from the product providers to take into account the different ways that the product providers calculate growth and the different reporting periods and by taking into account management charges.</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example B1.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice. The term 'good value' is itself implicit advice on the merits of buying.</p> <p>In addition, the reason in example (B1) applies to this example too. Good value is a strong example of a classification factor based on judgment and skill rather than simple objective facts.</p>

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

(D) Website with filtering		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p><i>Firm D</i> decides to make its list of the investment products it sells easier to search. The website allows the customer to filter products based upon specified factors. Only products that meet the search criteria input by the customer are displayed.</p>		
<p>(1) The website enables the customer to filter the products by reference to objective factors of the type in section (A) of this table (e.g. 'UK Equity funds').</p>	<p>No</p>	<p>Not likely to be regulated advice as the filtering tool is based on objective factors.</p> <p>The reason is explained in <i>PERG</i> 8.30A.10G.</p>

(2) The filtering is based on riskiness as described in example (B1).	Not a <i>personal recommendation</i> , for the reasons in <i>PERG</i> 8.30B.28G.	If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).
(3) The filtering is based on a number of factors as described in example (B2).	Not a <i>personal recommendation</i> , for the reasons in example <i>PERG</i> 8.30B.28G. The customer's inputs are filtered in a straightforward way and so the approach in <i>PERG</i> 8.30B.33G (multiple customer inputs means that there is a <i>personal recommendation</i>) does not apply.	If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the same reason as in example (B1).
(4) The filtered results are ranked by the <i>firm</i> manufacturing the investment in accordance with the investment objectives as described in example (B3).	No	Likely not to be regulated advice, for the reasons in example (B3)
(5) The filtered results are ranked in accordance with the ratings of a third party as described in example (B4).	No	Likely not to be regulated advice, for the reasons in example (B4)
(6) The filtered results are ranked based on the <i>firm's</i> judgment about how good value they are, in the way described in example (B5).	Not a <i>personal recommendation</i> , for the same reason as in example (D2).	If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, for the reasons in example (B5).
(7) Materials including narrative on investment risk alongside a risk profiling tool are used to help educate a customer make a decision on their investment.	No	Not likely to be regulated advice. The reason is the same as in example (A).
(8) A <i>firm</i> runs a <i>personal pension scheme</i> . It provides a filtering process of the type	No	Likely not to be regulated advice.

<p>described in example (D4).</p> <p>In addition, it provides an online calculation tool that allows its customers to calculate what their regular contribution rates would need to be to meet a level of income that the customer wishes to have in retirement.</p> <p>The tool also allows the customer to calculate their spare income, as in example (F17).</p> <p>The <i>firm</i> makes available information, from a neutral third party source like the Pensions Advisory Service, about suggested contribution rates.</p>		<p>The contribution calculator is not regulated advice taken on its own. It does not recommend that the customer buy any particular investment.</p> <p>It should also not involve regulated advice taken with the other customer tools in this example, for the following reasons taken together. The contribution calculator just helps the customer decide how much they want to invest and not whether they should invest. The contribution calculator provides additional information about the way that the <i>firm</i> has designed its funds to perform (see <i>PERG</i> 8.30A.12G).</p>
---	--	---

(E) Guided sales and limited advice		
(1) Example	(2) Is there a personal recommendation?	(3) Is this regulated advice for someone other than a firm with an appropriate authorisation?
<p>(1) The filtering process is not based solely on the customer's risk appetite and preferences in relation to other factors. The filtering process is also based on facts relating to the customer's life and situation. For example, it might take into account:</p> <ul style="list-style-type: none"> the customer's current use of tax wrappers; 	<p>This is likely to be a <i>personal recommendation</i>, for the reasons in <i>PERG</i> 8.30B.33G.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, as all the elements in <i>PERG</i> 8.24.2G are met. See <i>PERG</i> 8.30A.15G.</p>

<ul style="list-style-type: none"> • the customer's financial resources and commitments; • whether the customer is in a long-term relationship and the customer's marital status; • the customer's age; • the customer's plans for their family in the short- and long-term (e.g. a new car, work on the family home or school fees); • what other investments and assets the customer has; and • the customer's career and retirement plans. 		
<p>(2) <i>Firm E</i> provides advice on a limited straightforward issue at the request of the customer, such as which <i>ISA</i> product to invest in. The wider financial situation is not covered. The advice is limited to the specific issue in hand and the information collected on that basis. The treatment of suitability reflects that narrower customer objective.</p>	<p>This is a <i>personal recommendation</i>.</p> <p>This example is not about structured sales. Its purpose is to illustrate that the answer to example E1 is not based on the view that there is no <i>personal recommendation</i> unless the advice takes into account a wide range of factors. The point in example (E1) is that the range of the factors taken into account is relevant in the specific context of filtered sales, as explained in <i>PERG</i> 8.30B.29G.</p>	<p>If the <i>firm</i> is not appropriately authorised this is likely to be regulated advice, as all the elements in <i>PERG</i> 8.24.2G are met.</p>

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

<p>(2) A <i>firm</i> sends a communication to all of its existing customers who hold a self-invested <i>personal pension scheme</i> with the <i>firm</i> and who have not increased their monthly contributions over the previous five years.</p> <p>The communication alerts the customers to this fact and includes generic information about the benefits of pension investment and recommends that they contact an adviser to discuss their contribution rate.</p> <p>The <i>firm</i> does not highlight any particular product or pressure the customer into any course of action.</p>	No	<p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information is factual or generic (the benefits of pensions generally).</p> <p>A factor that would normally point towards this being regulated advice for someone who is not appropriately authorised is that the communication is made in the context of a possible purchase of a particular <i>investment</i> (e.g. a new payment into the customer's existing pension fund). However, in this example:</p> <ul style="list-style-type: none"> ● The customer was not asking for advice. Instead the <i>firm</i> has contacted the customer on its own initiative. ● The information is presented neutrally. ● The <i>firm</i> tells the customer to get advice elsewhere and that the <i>firm</i> is not advising the customer. ● The information is general and not detailed.
---	----	--

		<ul style="list-style-type: none"> ● The information is about the benefits of pensions generally not the benefit of this particular <i>personal pension scheme</i>. <p>This general context means that a reasonable customer would not think that this was an implicit recommendation.</p>
<p>(3) A <i>firm</i> sends a general communication to its customer base suggesting that they review the products that they hold on a regular basis.</p> <p>This communication explains the general risks of poor diversification and of underperforming products in a way that is not linked to any particular product.</p> <p>The communication also explains certain criteria that customers can look out for e.g. how a fund has performed against its benchmark.</p> <p>It suggests that if customers do have any concerns then they should speak to an adviser.</p>	No	<p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information does not identify any particular <i>investment</i> to be bought or sold.</p> <p>The risk of poor diversification is generic advice about investment strategy and is not linked to particular investments. It does not recommend anyone to buy or sell particular <i>investments</i>.</p>
<p>(4) A <i>firm</i> has a number of its customers that it believes are invested in products that do not align with their needs.</p> <p>The <i>firm</i> contacts those customers to inform them that based on a review of the customers' holdings, the <i>firm</i> believes that the products that they hold may not be suitable for their needs. It explains that:</p> <ul style="list-style-type: none"> ● the products the customer holds are poorly diversified; 	<p>If this does involve regulated advice under column (3) of this example it will also involve a <i>personal recommendation</i>.</p> <p>This is because the communication refers to the customer's individual portfolio and investment</p>	<p>If the <i>firm</i> does not identify either what part of the customer's portfolio should be sold or how the customer should reinvest the proceeds, the <i>firm</i> is giving advice but as that advice does not relate to particular <i>investments</i> it is not</p>

<ul style="list-style-type: none"> the portfolio of products has underperformed compared to the products' benchmarks; and the portfolio of products is not suitable for what the <i>firm</i> understands the customer's investment purpose to be (e.g. a high proportion of cash funds in a pension wrapper). <p>The <i>firm</i> invites the customers to contact an adviser with whom the customer may discuss alternative options.</p>	<p>purposes.</p> <p>The fact that the communication may in fact be standardised across a large number of customers does not mean that it is not a <i>personal recommendation</i>.</p>	<p>regulated advice.</p>
<p>(5) A <i>firm</i> sends a 'markets outlook and investment information' communication to its customers. This includes a summary of the <i>firm's</i> views of markets outlooks together with an appendix setting out high level 'house views' on specific investment products.</p> <p>This information is sent to customers on a general basis. It is not targeted on the basis that the customers hold specific products which are covered in the appendix.</p>	<p>Publishing 'house views' would not, in itself, normally be regarded as a <i>personal recommendation</i>.</p> <p>The communication is not addressed to a <i>person</i> as such but rather to the <i>firm's</i> entire customer base. It is not therefore presented as suitable for a particular <i>person</i> and is not based on a consideration of the circumstances of a particular <i>person</i>.</p>	<p>The markets outlook part of the communication is not likely to be regulated advice taken on its own.</p> <p>If the <i>firm</i> is not appropriately authorised, the house view appendix is likely to be regulated advice, as it is about the merits of specific identified products. All the elements in <i>PERG</i> 8.24.2G are met.</p>
<p>(6) A <i>firm</i> makes the communication in example (F5) available to a customer and later goes on to make a <i>personal recommendation</i> to that customer, basing that recommendation in part on the communication.</p>	<p>The <i>firm</i> has incorporated that communication into its <i>personal recommendation</i> so it forms part of that <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, this will be regulated advice, as all the elements in <i>PERG</i> 8.24.2G are met.</p>

<p>(7) A <i>firm</i> advises on <i>personal pension schemes</i>. It has a list of ‘Best Buy’ funds for investors with different risk appetites in which its pension customers can invest. It takes a fund off that list because of persistent underperformance and then replaces the fund on its list with an alternative fund. It writes to each of its customers who have invested in that fund telling them that it has done this.</p>	<p>This is a <i>personal recommendation</i>, for the reason in <i>PERG</i> 8.30B.9G(2).</p>	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice for the reasons in example (B5).</p>
<p>(8) A <i>firm</i> regularly publishes a newsletter on its website which among other things contains its most recent ‘Best Buy’ list of funds, including details of which funds have come on and off the list. It sends the list to its customers, who may include customers who have invested in those funds.</p> <p>In contrast to example (F7), the <i>firm</i> does not send the newsletter under cover of an email or letter that links the revised ‘Best Buy’ list to the customer’s circumstances.</p>	<p>This is not a <i>personal recommendation</i>. A recommendation included in a newsletter available to the general public does not become a <i>personal recommendation</i> just because some of the people who read it are existing customers affected by its recommendation. A customer reading it would not think that it addresses their personal circumstances.</p>	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice for the reasons in example (B5).</p>
<p>(9)(a) A <i>firm</i> (<i>firm</i> F) increases the annual management charge for a fund it manages. It informs investors in the fund that it has done so.</p> <p>A distributor (<i>firm</i> G) also sends a letter to its customers who hold this fund to inform them of the change.</p> <p>No other information is included in either communication.</p>	<p>No</p>	<p>Neither <i>firm</i> F nor <i>firm</i> G gives regulated advice by telling the customers of the change in management charges. They are giving information about the terms of the fund of the type described in <i>PERG</i> 8.28.3G.</p>

<p>(b) <i>Firm G</i> decides to remove the fund from its 'Best Buy' list. It tells its customers it has done so in the letter informing them of the increase in the charge.</p>	<p>If this does involve regulated advice under column (3) of this example it is likely also to involve a <i>personal recommendation</i>.</p>	<p><i>Firm G</i> does not necessarily give regulated advice. Whether or not there is a suggestion that the customer should sell any part of their holding in the fund would depend on the wording of the letter and the basis on which the 'Best Buy' products are selected by the <i>firm</i>.</p>
<p>(10) A customer is speaking with a <i>firm</i>. The customer tells the <i>firm</i> that they have a number of small <i>personal pension scheme</i> pots with a range of providers that they would like to consolidate into a single <i>personal pension scheme</i> with the <i>firm</i>.</p> <p>The <i>firm</i> informs the customer that it is possible to consolidate pensions and that this can be done through the <i>firm</i> or another provider. The <i>firm</i> tells the customer that this might make it easier for the customer to consider their pension holistically. However the <i>firm</i> also tells the customer that they should take advice from a financial adviser beforehand as the adviser will be able to consider whether any existing pensions have valuable benefits that could be lost if transferred.</p>	<p>No</p>	<p>Consolidating <i>personal pension scheme</i> pots involves <i>buying</i> and <i>selling investments</i>.</p> <p>This is similar to example (F2) as the information is factual or generic (the benefits of consolidating pensions generally). It is different as the communication is made in the context of an individual discussion with a single customer.</p> <p>However although the context of the communication is not quite the same, the answer is the same as it is for the example in (F2) as long as it is clear to the customer that they are not getting advice about whether to consolidate.</p>

<p>(11) A customer contacts a <i>firm</i> to purchase a specific investment fund from the <i>firm</i> on an execution- only basis. Over the course of their discussions with the <i>firm</i>, the customer mentions that they are purchasing the product because they would like to receive an income from it. However the fund in question has been designed for growth and all income is reinvested.</p> <p>The <i>firm</i> informs the customer that the fund is an accumulation fund and does not provide any income. The <i>firm</i> further informs the customer that the customer can proceed with the transaction if the customer wishes or the <i>firm</i> can provide the customer with information about the income funds that the <i>firm</i> offers.</p>	No	<p>This will normally not be regulated advice.</p> <p>As explained in <i>PERG</i> 8.28.3G, an explanation of the terms of an <i>investment</i> need not be regulated advice.</p> <p>The fact that the <i>firm</i> gives the information pre-emptively should not change this.</p>
<p>(12) A customer over the age of 55 contacts a <i>firm</i> because they would like to take out an annuity with the <i>firm</i>. However they only have a very small <i>personal pension scheme</i> fund which will only generate an annuity income of a few pounds a month. In the <i>firm's</i> opinion this means that the transaction would not be a worthwhile thing to do.</p> <p>The <i>firm</i> tells the customer how much income an annuity bought with the customer's fund is likely to generate. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity.</p>	No	<p>The <i>firm</i> does not identify any particular <i>investment</i> that the customer should buy. This aspect of what the <i>firm</i> says should not be regulated advice.</p> <p>The next question is whether the <i>firm</i> is giving the customer regulated advice not to buy the annuity.</p>

It is likely that this will not be regulated advice if the *firm* tells the customer that they should not buy the annuity but makes it clear that this is not because this particular annuity is unsuitable but because it is likely that it will not be worthwhile for the customer to buy any annuity issued by any issuer. It is not regulated advice because it is generic advice rather than advice about a specific *investment*, as described in *PERG* 8.29 (Advice must relate to the merits (of buying or selling a particular investment)).

The *firm* will also not give regulated advice in these circumstances if it tells the customer that it will not sell an annuity to the customer. The *FCA* thinks that the definition of *advising on investments (except P2P agreements)* should not be interpreted in such a way that would require a *firm* to apply to include this *regulated activity* in its *permission* in order to turn down business it does not want to carry out. Refusing to do business with someone is not

		consistent with an advisory relationship with them.
<p>(13) The <i>firm</i> in example (F12) also gives the customer alternative options, such as taking the whole amount in cash. The <i>firm</i> explains the effect of each option and signposts sources of information on them. The <i>firm</i> includes taking advice as one of the options. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>	<p>No</p> <p>The <i>firm</i> may give a <i>personal recommendation</i> if it recommends an alternative option.</p>	<p>The answer in example (F12) applies. Presenting the range of alternative options in a neutral way should not involve regulated advice.</p> <p>If the <i>firm</i> is not appropriately authorised, it may give regulated advice if it recommends an alternative option.</p>
<p>(14) A customer with a short life expectancy (due to ill health) is seeking to buy from a <i>firm</i> a single life one-year guaranteed annuity with their <i>personal pension scheme</i> fund monies which is likely to provide very poor value for money.</p> <p>The <i>firm</i> tells the customer how much income their pension policy is likely to pay and that the customer may be able to take out a tax-free sum from the pension fund. The <i>firm</i> explains the other options and signposts sources of information on them, including an option to take advice. The <i>firm</i> explains the effect of each option. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity. The <i>firm</i> does not highlight any particular option or pressure the customer into any course of action.</p>	<p>The answers in examples (F12) and (F13) apply.</p>	<p>The answers in examples (F12) and (F13) apply.</p>
<p>(15) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer approaches the <i>firm</i> to draw out some money from that <i>personal pension scheme</i>. The <i>firm</i> wishes to draw the customer's attention to the tax consequences of what the customer wants to do. For example:</p>	<p>No</p>	<p>An explanation of the tax consequences of a proposed transaction need not be regulated advice, in the same way that, as explained in <i>PERG</i> 8.29.5G,</p>

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

<p>The <i>firm</i> informs the customer that the customer is able to draw down up to 25% of their pension pot tax free. The <i>firm</i> further informs the customer that if they wish to set up a regular income they will need to transfer to a different <i>personal pension scheme</i> product which allows this. The <i>firm</i> tells the customer that this can either be done through the <i>firm</i> or with another provider. The <i>firm</i> does not highlight any particular product or pressure the customer into any course of action.</p>		
<p>(17) A <i>firm</i> offers an online affordability calculator that helps a customer determine what their surplus income is once all their outgoings are taken into consideration. The website suggests a list of possible outgoings but allows the customer to add figures for others.</p> <p>There is a link to material that gives guidance on what a prudent size of someone's surplus income could be, taking into account both outgoings and payments for <i>investments</i>. The website suggests that the consumer takes this into account when deciding whether the <i>investment</i> is affordable for them.</p> <p>The calculator has its own page on the website which can be linked to using a ribbon at the top of the page from which the <i>firm</i> sells its products.</p>	No	<p>This will generally not be regulated advice because:</p> <ul style="list-style-type: none"> ● the advice about a prudent level of surplus income is not regulated advice on its own; ● the customer makes up their own mind what they can afford; ● the information that the customer inputs is purely factual; ● the calculator is straightforward as it just adds up the outgoings; and ● the calculator is in effect a method of organising information that the customer already has.
<p>(18) A <i>firm</i> operates a platform through which customers can purchase a range of funds from different providers.</p> <p>Its website includes a 'Best Buys' list of products which the <i>firm</i> believes to be of particularly high quality. The list appears on</p>	Publishing a list of 'best products' or 'funds of the month' would not, in itself, normally be regarded as a <i>personal recommendation</i> :	If the <i>firm</i> is not appropriately authorised, the 'Best Buys' list is likely to be regulated advice, for the same reason as in example (B5).

<p>a side bar.</p> <p>This information appears in a consistent way to all users of the website.</p>	<ul style="list-style-type: none"> ● As with example (F5), the communication is not personalised. ● As the information is provided on a public page of a website and appears in a consistent way to all users of the website, it can be seen as issued exclusively to the public. 	
<p>(19) A <i>firm</i> operates a platform through which customers can purchase a range of funds from different providers.</p> <p>The website includes a banner at the top which includes details of sponsored products and other offers where the <i>firm</i> has managed to negotiate a discount to product charges.</p> <p>This information appears in a consistent way to all users of the website.</p>	No	<p>Providing a list of products for which the <i>firm</i> has negotiated a discount is not, by itself, regulated advice, in the same way that an explanation of the terms of an <i>investment</i> is not (as explained in <i>PERG</i> 8.28.3G).</p>
<p>(20) <i>Firm F</i> is a <i>personal pension scheme</i> provider. It provides a number of products into which pensioners can invest pension monies on retirement.</p> <p>It has a product specially designed for investors who cannot or will not take advice on what to do with their pension monies. The sales literature specifically explains this.</p> <p>A distributor (<i>Firm G</i>) sets out this information alongside these products on its platform.</p>	No	<p><i>Firm F</i> will generally not be giving regulated advice, for the same reason as in <i>PERG</i> 8.30A.12G.</p> <p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in <i>PERG</i> 8.30A.13G.</p>
<p>(21) A product provider (<i>Firm F</i>) designs its products for a particular target market, which may be the same for each product or different.</p>	No	<p><i>Firm F</i> will generally not be giving regulated advice, for similar reasons to the</p>

<p>The target market is defined by reference to high level characteristics such as investment duration, risk profile and investment objectives.</p> <p>A distributor (<i>Firm G</i>) sets out this information alongside these products on its platform.</p>	No	<p>ones in examples (D4) and (F20).</p> <p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in example (F20).</p>
<p>(22)(a) A <i>firm</i> runs a <i>personal pension scheme</i>. The <i>firm</i> has a range of lifestyling options for investors with different intentions at retirement. For example, those options could be ones designed for investors who want to buy an annuity, draw down income and take the sum in cash. The <i>firm</i> has a website through which a customer can invest in the scheme and choose which of these options they wish to be applied.</p>	No	<p>This will generally not be regulated advice, for the same reasons as in example (F21).</p> <p>If the <i>firm</i> uses sales material of the kind described in paragraphs (b) or (c) of example (F23) there will generally not be regulated advice for the reasons described in those paragraphs.</p>

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

<ul style="list-style-type: none"> • During the first part of an investor's working life an investor will generally look for capital growth and as a result invest in higher risk funds. • When moving towards retirement an investor generally looks for capital protection and as a result will generally invest in lower risk funds. 		
<p>(b) The <i>firm</i> combines the information in (a) with information about the investment strategy of the different funds in its scheme and how they are designed to work through a typical lifecycle of a customer. This information is contained in standardised written information, either in hard copy or online.</p>	No	This will generally not be regulated advice, because describing the investment objectives of a fund is not itself regulated advice (see <i>PERG</i> 8.30A.12G).
<p>(c) The <i>firm</i> has case studies to help their investors decide the funds into which they are to invest and the amount of their contribution. The examples are based on age, salary, attitude to risk and intentions about what they will do with the pension fund on retirement.</p>	No	This will generally not be regulated advice. It involves presentation of the information in (b) and the contribution calculator in example (D8) in a different format and so the same answer should apply.
<p>(d) The <i>firm</i> gives the information in (a) to (c) to the customer on a one-to-one basis.</p>	See the answer to example (F24)	See the answer to example (F24)
<p>(e) The <i>firm</i> tells the customer that it thinks that their present fund is unsuitable given how near to retirement they are and that they should get out of it and go into another fund.</p>	This is a <i>personal recommendation</i> to sell.	If the <i>firm</i> is not appropriately authorised, this is regulated advice to sell.

<p>(24) A <i>firm</i> sells <i>investments</i> using the processes described in examples (D2) to (D8) except that the filtering process takes place face-to-face or over the telephone and is carried out by the <i>firm's</i> representative asking questions.</p>	<p>Where examples (D2) to (D8) say that there is regulated advice under the definition in <i>PERG</i> 8.24.1G (definition of advice that does not refer to a <i>personal recommendation</i>) but no <i>personal recommendation</i>, there may be a <i>personal recommendation</i> in this example (F24).</p> <p>For the reasons in column (3) of this example, it is more likely that a customer will think that an <i>investment</i> identified by the process is being presented as suitable for them or based on a consideration of their circumstances.</p> <p>Also, an online filtering process of the type in <i>PERG</i> 8.30B.28G is different from the filtering process in this example as the customer can:</p> <ul style="list-style-type: none"> • stop and start the online process at any time; • repeat it when and as often as they like; and • put in different figures or answers either to check the result of different scenarios or just out of curiosity. 	<p>The one-to-one format is more likely to lead a customer to think that they have received advice on the merits of investing in a particular <i>investment</i>, both because of the more personal nature of the interaction between the <i>firm</i> and customer and because what happens during the conversation cannot always be as tightly controlled as an online process.</p> <p>The factors in <i>PERG</i> 8.30A.8G are relevant to what impression the customer is given.</p>
---	---	---

<p>(25) A <i>firm</i> operates funds. It classifies its funds on the basis of riskiness as described in example (D4). A customer completes an online questionnaire on their attitude to risk. The <i>firm</i> follows this up with a telephone call to provide details of funds matching the customer's risk tolerance as established by the questionnaire.</p> <p>The only subject discussed during the telephone call is the terms and conditions of the fund. The customer can agree to buy the fund during the conversation although the formal subscription document will be sent by post later. The <i>firm</i> does not discuss the personal circumstances of the customer. The <i>firm</i> does pressure the customer into any course of action.</p>	No	<p>In principle (as with example (D4)), if the scope of the conversation is narrowly restricted in the way described in the example, the <i>firm</i> should not be giving regulated advice as long as it is made clear to the customer that no advice is being given.</p> <p>However, the answer in example (F24) applies. The answer in a particular case depends on exactly what is said and the surrounding circumstances, as described in <i>PERG</i> 8.30A.8G.</p>
<p>(26) A customer has a <i>personal pension scheme</i> with a <i>firm</i>. The customer takes tax-free cash from that <i>personal pension scheme</i> at 55 and enters into drawdown with the remainder of their pot in cash. The <i>firm</i> has provided them with additional material about options available but the money remains in cash. The <i>firm</i> prompts the customer to consider basic questions about what they want to do upon eventual retirement, and describes the different options the customer can take with their pension pot. The <i>firm</i> does not highlight any particular option, does not pressure the customer into any course of action and does not repeatedly contact the customer.</p>	No	<p>A <i>firm</i> that is not appropriately authorised is not likely to give regulated advice merely by prompting a customer to think about options, for the first reason in example (F1).</p> <p>Describing the different options need not be regulated advice, because describing the investment objectives of a fund is not itself regulated advice (see <i>PERG</i> 8.30A.12G).</p>

<p>(27) The <i>firm</i> in example (F26) tells the customer that it has selected the options presented to the customer by selecting those relevant to people with a similar age and risk profile as the customer.</p>	<p>If there is regulated advice it is likely that the <i>firm</i> will be giving a <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, this may involve regulated advice.</p> <p>It may be reasonable for a customer to take the material as implicit advice that the identified products are suitable for them.</p>
<p>(28) An <i>unauthorised person</i> that is a professional services business (F) has a customer approaching retirement. The customer wants to decide whether to use their <i>personal pension scheme</i> fund to buy an annuity. F advises the customer whether or not this is a good idea. This advice is given about annuities generally and not a particular annuity.</p> <p>If F advises that buying an annuity is a good idea, it does not advise on what annuity to buy.</p> <p>If F advises that buying one would be a bad idea it does not advise on the alternative options and in particular does not recommend whether the customer should do nothing or should crystallise or realise their benefits in some other way.</p> <p>F does not itself sell <i>investments</i> and the customer will go to another adviser if they decide to buy an annuity or an alternative product.</p>	<p>No</p>	<p>This is not likely to be regulated advice. It is generic advice of the type described in <i>PERG</i> 8.26.4G.</p>
<p>(29) A <i>firm</i> advises a customer whether to exercise an option under their <i>personal pension scheme</i> to take a lump sum or whether they should leave their <i>personal pension scheme</i> pot untouched for the moment.</p>	<p>This is a <i>personal recommendation</i>.</p>	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice (see Q16 and Q17 in <i>PERG</i> 12.3 (Rights under a <i>personal pension scheme</i> scheme)).</p>

<p>(30) A <i>firm</i> makes available an online questionnaire to potential customers. It contains questions on their:</p> <ul style="list-style-type: none"> • personal circumstances; • investment knowledge; • personal investment objectives; • trading experience; and • financial circumstances, with a view to establishing what level of losses they can bear. <p>On the basis of the information provided, an algorithm creates a suggested model portfolio.</p>	<p>If the <i>firm</i> gives regulated advice under column (3) of this example, this is a <i>personal recommendation</i> (see <i>PERG</i> 8.30B.35G).</p>	<p>If the <i>firm</i> is not appropriately authorised, this is regulated advice (see <i>PERG</i> 8.30A.15G).</p> <p>If however the customer just receives a suggestion which lists different asset classes or industries, given in percentages, without naming any specific <i>investments</i>, the <i>firm</i> is giving unregulated generic advice.</p>
---	--	---

Amend the following as shown.

13 Guidance on the scope of MiFID and CRD IV

...

13.3 Investment Services and Activities

...

Q19. What is a ‘personal recommendation’ for the purposes of MiFID (article 9 of the MiFID Org Regulation)?

...

This is similar to the UK regulated activity of *advising on investments* but is narrower in scope insofar as it requires the recommendation to be of a personal nature. A personal recommendation does not include advice given to an issuer to issue securities, as the latter is not an “investor” for the purposes of MiFID or article 53 of the *RAO*.

As explained in *PERG* 8.24.1AG, there are circumstances in which the UK regulated activity is also based on giving personal recommendations. *PERG* 8.30B (Personal recommendations) gives *guidance* on the definition in the context of the UK regulated activity. In the *FCA*’s view that *guidance* is also relevant to the meaning of ‘personal recommendation’ under MiFID.

...

