

Finalised guidance

The use of the group exclusion and the CREST regulated activity



March 2013

1. This guidance applies to all CREST sponsor firms, but does not relate to rules and is not being consulted on. It will be published on the FSA website on 5 March.
2. Sending dematerialised instructions through the CREST system is a regulated activity under Article 45 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544 (RAO). The purpose of this guidance is to give the FSA's views on the availability of the groups exclusion for the regulated activity in Article 45 of the RAO. The Article 45 regulated activity is referred to as the CREST regulated activity in this guidance.
3. The precise issue covered by this guidance is the following. Say that a firm (Firm A) acts as a broker or a portfolio manager for its clients. The investments are held by a nominee company in Firm A's group (Firm N). The question is whether the RAO group exclusion means that Firm A is not carrying on the CREST regulated activity when it sends instructions through CREST in relation to the investments held by Firm N for Firm A's clients.
4. Under Article 45 of the RAO, the following are regulated activities:
 - i. Sending, on behalf of another person, dematerialised instructions relating to certain types of investment where those instructions are sent by means of the CREST system.
 - ii. Causing dematerialised instructions relating to certain types of investment to be sent on behalf of another person by means of the CREST system, where the person causing them to be sent is a system-participant.
5. Under Article 69(7) of the RAO, a person who is a member of a group does not carry on the CREST regulated activity where they send a dematerialised instruction, or causes one to be sent, on behalf of another member of the same group, if the investment the instruction relates to is one that a member of the same group is registered to as a holder in the appropriate register of securities, or will be registered to as a result of the instruction.
6. There is an argument that the group exclusion applies to the case covered by this guidance. A trustee, such as Firm N, is the legal owner of the assets. The argument is then that a trustee acts on its own account and not on behalf of the beneficiaries of its trust, so someone acting for the trustee is acting for the trustee and not the beneficiaries. On this approach Firm A is sending the instructions on behalf of Firm N and not the clients.

7. In our view this is not right. If the group exclusion applied, Firm A could avoid regulation when sending instructions on behalf of its clients, by making sure that the clients' investments are held by a group nominee. It is unlikely that the RAO would be drafted in a way that makes avoidance so simple. In our view the underlying principle of the CREST regulated activity is that, in a transaction chain (from the underlying client to the CREST participant), at least one link needs to hold the relevant permission.
8. In addition, the fact that the client's investments are held with a group nominee does not mean that Firm A is no longer acting on behalf of its clients. A client relationship can continue even after a trustee has been appointed.
9. Support for this approach can be seen in the trustee exclusion in Article 66. Although Article 66 is not directly relevant to the current question, it is useful as it shows how a trustee is treated for the purposes of the CREST regulated activity.
10. Article 66(5) of the RAO says that a person does not, by sending or causing to be sent a dematerialised instruction, carry on the CREST regulated activity if the instruction relates to an investment which that person holds as trustee or personal representative. However, the CREST regulated activity is drafted so that it only applies if the instruction is sent on behalf of another person. The fact that it was still thought necessary to provide an exclusion for trustees in Article 66 shows that, for the purposes of the CREST regulated activity, a trustee can be treated as acting on behalf of its beneficiaries. So this is inconsistent with the view that a trustee or nominee should automatically be treated as acting on its own account. In turn that means that the argument in paragraph 6 of this guidance that the trustee is acting on its own behalf should not be applied rigidly.
11. Despite all this, a firm should not in all cases be treated as acting on behalf of the beneficiaries of a trust when it sends CREST instructions. There must be some relationship between the firm sending the CREST instruction and the beneficiary other than the mere relationship through the trustee. In particular, Firm A will be acting on behalf of the beneficiaries if under our rules Firm A has to treat the beneficiary as a client or if for some other reason Firm A has an ongoing client relationship with the beneficiary.

Financial Services Authority

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