

Financial Advice Market Review (FAMR): implementation Part II and insistent clients

Consultation Paper

CP17/28**

August 2017



How to respond

We are asking for comments on this Consultation Paper (CP) by 2 October 2017.

You can send them to us using the form on our website at: www.fca.org.uk/cp17-28-response-form.

Or in writing to:

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CP17-28@fca.org.uk

How to navigate this document onscreen



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1 Summary

Why we are consulting

- 1.1** We are publishing proposals that we have developed to support the advice sector in the UK. Some implement recommendations made by the Financial Advice Market Review (FAMR), specifically:
- Handbook changes arising from recent amendments to the definition of advice on retail investments
 - Guidance on personal recommendations
 - Guidance arising from experiences of the FCA's Advice Unit
- 1.2** We are also proposing new Guidance on insistent clients designed to address concerns raised by firms.
- 1.3** This CP also includes feedback to questions we asked about the definition of a personal recommendation from GC17/4 and sets out how we have incorporated stakeholder responses into our new draft Guidance.

Who this applies to

- 1.4** Chapters 3, 4 and 6 of this paper will be relevant to:
- consumers and consumer organisations
 - financial advisers
 - trade bodies that represent financial advisers, product providers, and other firms involved in the distribution of retail investment products (RIPs)
 - compliance consultants and other firms that assist stakeholders
 - RIP providers, particularly those with direct to consumer distribution channels
 - discretionary investment managers
 - qualification providers and Accredited Bodies
 - any authorised firm that provides information regarding RIPs to consumers



1.5 Chapter 5 of this paper may be relevant to:

- authorised or unauthorised firms which are currently providing, or developing, automated services; and¹
- firms which are providing advice or discretionary investment management services through traditional face-to-face models.

1.6 We also consider that the draft Guidance in Chapter 5 will be of interest to trade bodies, consumer groups, legal advisers, auditors of financial services firms, and consumers (particularly those thinking of using automated advice/discretionary investment management models).

The wider context of this consultation

1.7 FAMR was launched jointly by the FCA and HM Treasury in August 2015 with the aim of identifying ways to make the UK's financial advice market work better for consumers. FAMR's final report, 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. This consultation addresses three of those recommendations as described below.

What we want to change

1.8 We propose to make the following changes:

Handbook changes arising from amendments to the Regulated Activities Order

1.9 As part of the FAMR call for input, firms told us they were discouraged from giving customers information in case they inadvertently gave advice. In order to address this concern, FAMR recommended that the Treasury should consult on amending the definition of regulated advice on retail investments so that it is based on providing a personal recommendation. This amendment aims to give firms greater confidence to provide customers with a range of support services without giving advice.

1.10 In February 2017, the Treasury announced that, following consultation, it proposed amending the Regulated Activities Order (RAO) so that most authorised firms would be exempt from the regulated activity of 'advising on investments' specified in Article 53(1) of the RAO unless the firm is providing a personal recommendation. The changes will come into force on 3 January 2018.²

1.11 This consultation sets out how we propose to amend our Handbook for firms affected by the RAO amendment. These proposals are in Chapter 3.

Perimeter Guidance

1.12 We also propose to amend our Perimeter Guidance Manual (PERG) to give firms more clarity on what amounts to a personal recommendation. Our proposed changes also

1 These firms may or may not be looking to become authorised under the current regulatory regime

2 www.legislation.gov.uk/ukksi/2017/500/pdfs/ukxi_20170500_en.pdf

reflect the recent amendments to the RAO and consolidate earlier non-Handbook Guidance in this area. These proposals are in Chapter 4.

Guidance based on the experiences of the Advice unit

- 1.13** FAMR recommended that the FCA set up a dedicated team to help firms developing mass-market automated advice models bring them to market more quickly. So we set up our Advice Unit in May 2016, providing regulatory feedback to firms developing automated advice models.
- 1.14** We have provided feedback to several firms and have identified common areas of uncertainty where giving Guidance could benefit firms more generally. These proposals are in Chapter 5.

Guidance on insistent clients

- 1.15** We propose to make new Handbook Guidance for firms on the treatment of insistent clients. Firms have told us that they need more support in this area, particularly in light of the legislative requirement that consumers must receive regulated advice for any defined benefits (DB) where the value of the fund transferred exceeds £30,000. This can be found in Chapter 6.

Outcome we are seeking

- 1.16** The FAMR final report, published in March 2016, set out 28 recommendations intended to tackle the barriers to consumers accessing advice and foster a market with the following characteristics:
- i.** Good availability of affordable, high quality advice which supports consumers at all stages of their lives.
 - ii.** Greater innovation in the interests of consumers, encouraged by a flexible and well-understood regulatory framework for advice.
 - iii.** A range of channels through which consumers are able to access advice and other forms of support, including in the workplace, and appropriate flexibility in the way consumers are able to pay for advice.
 - iv.** Consumers that are engaged with their own financial affairs and so seeking out the advice and support that they need.

Unintended consequences of our intervention

- 1.17** The proposals in this consultation contribute to achieving a market with the characteristics set out above. We are concerned to ensure that our Guidance should be as clear and complete as possible and so not create a barrier to achievement of these aims. As part of the consultation process we will take into account feedback from stakeholders before finalising our Guidance. We will also continue to monitor developments in the advice market as part of the assessment of FAMR outcomes in 2019, as set out below.



Measuring success

- 1.18** FCA and the Treasury have developed indicators to provide an overview of the market for financial advice and establish a baseline to help monitor developments as the FAMR recommendations are implemented.³ These will serve as a benchmark against which the FAMR outcomes will be compared in future years against the success factors set out above. The assessment of the outcomes of FAMR will take place in 2019.

Next steps

- 1.19** Please send responses to Advice and Distribution Team, The Financial Conduct Authority, London, E14 5HS or cp17-29@fca.org.uk. Alternatively you can use the online form. **Please send any responses by 2 October 2017.**
- 1.20** During 2017, we are consulting on a number of measures to address a number of FAMR recommendations. We have set below a summary of the consultation timetable, which shows our next steps in the context of our earlier publications.

- **April:** we published GC17/4 FAMR: Implementation Part I, including draft Guidance on:
 - streamlined advice;
 - fact finds; and
 - a factsheet for employers and trustees, setting out the support they might provide to employees without needing authorisation.

We also asked for views on the extent to which we should retain earlier related Guidance in FG 12/10 and FG 15/1.

- **July:** we are publishing CP 17/28 FAMR: Implementation Part II, which includes proposals for
 - Handbook changes arising from amendments to the definition of advice on retail investments;
 - Guidance on personal recommendations;
 - Guidance arising from experiences of the FCA's Advice Unit; and
 - Guidance on the treatment of insistent clients.
- **September:** we propose to publish Final Guidance following the GC/17/4 consultation, including any retained Guidance from FG 12/10 and FG 15/1.
- **December:** we propose to publish a Policy Statement following the CP 17/28 consultation. At the same time, we also propose to publish consolidated non-Handbook Guidance which brings together in one place:

³ www.fca.org.uk/publications/research/financial-advice-market-review-famr-baseline-report

- Guidance published in September; and
- new Guidance based on the proposed Advice Unit Guidance in CP 17/28.

Regulatory changes in early 2018

1.21 Firms should note that a number of regulatory changes will take effect in early 2018. These include:

- The EU Packaged Retail Investment and Insurance Product (PRIIPs) Regulation, which comes into force on 1 January 2018, and which will change the disclosure regime for firms that manufacture, advise on or sell PRIIPs.⁴
- MiFID II,⁵ which will take effect from the 3 January 2018. In particular, the MiFID II obligations on firms providing investment advice build on the current MiFID I suitability provisions which are contained in our Handbook at Chapter 9 of COBS.
- The Insurance Distribution Directive (replacing the Insurance Mediation Directive), which takes effect on 23 February 2018 and covers the initial authorisation, passporting arrangements and ongoing regulatory requirements for insurance and reinsurance intermediaries, as well as organisational and conduct of business requirements for insurance and reinsurance undertakings. At the time of writing we are in the process of consulting on the transposition of various aspects of this Directive.

4 Regulation (EU) No. 1286/2014. See also PS17/6: FCA's disclosure rules following application of PRIIPs Regulation – Feedback to CP16/18 and final rules.

5 The recast Market in Financial Instruments Directive (Directive 2014/65/EU). See also www.fca.org.uk/publications/policy-statements/ps17-14-mifid-ii-implementation



2 The wider context

The harm we are trying to address

- 2.1** The Financial Advice Market Review (FAMR) was launched jointly by the FCA and HM Treasury in August 2015 with the aim of identifying ways to make the UK's financial advice market work better for consumers.
- 2.2** FAMR published its findings in March 2016 and made a series of recommendations designed to tackle barriers to consumers accessing and engaging with financial advice, with a focus on saving into a pension, taking income in retirement and investing. FAMR also recommended measures intended to help the industry to develop new and more cost-effective ways of delivering advice and other forms of support to consumers, in particular, through improved use of technology.
- 2.3** These proposals are part of this package of measures designed to make the UK advice market work better for consumers.

How it links to our objectives

Consumer protection

- 2.4** Our proposals for firms that benefit from the RAO amendment are designed to ensure a clear and consistent approach to consumer protection and redress.
- 2.5** The proposed Guidance for firms dealing with insistent clients aims to give firms greater certainty on their responsibilities towards clients who have received a personal recommendation but want to do something different. We hope that this will ensure better outcomes for consumers in these circumstances.

Competition

- 2.6** Publishing Guidance based on the experiences of the Advice Unit, should help firms operating or developing automated advice models and contribute to more effective competition in this market.
- 2.7** We also hope that the proposed additions to PERG will help support firms operating or setting up new services that support consumers making their own investment decisions, again fostering competition.

Wider effects of this consultation

- 2.8** If a wider range of services are available to support consumers then this should encourage a greater level of engagement and trust in financial services.

Equality and diversity considerations

- 2.9** We have considered the equality and diversity issues that may arise from our proposals. Overall, we do not consider that the proposals adversely impact any of the groups with protected characteristics under the Equality Act 2010. But we will continue to consider the equality and diversity implications of the proposals during the consultation period, and will revisit them when publishing the final rules. In the meantime we welcome your input to this consultation on this.



3 Handbook changes arising from amendments to the Regulated Activities Order

- 3.1** Firms that responded to the FAMR Call for Input told us that they want to provide support to customers when making their own investment decisions. However, they are deterred from doing so because they find the boundary between providing unregulated assistance and giving regulated advice is unclear and they are concerned that they might inadvertently provide regulated advice without the necessary permission.
- 3.2** In order to try and help firms provide more support to customers who take their own investment decisions, FAMR recommended that the Treasury should amend the definition of regulated advice in the Regulated Activities Order (RAO) so that it only includes personal recommendations. The Treasury published a consultation in line with this recommendation in 2016.⁶
- 3.3** Following this consultation, the Treasury announced in February 2017 that it would amend the RAO (the RAO amendment)⁷ so that – in broad terms – most authorised firms would not be carrying on the regulated activity specified in article 53(1) of the RAO except where they provide a personal recommendation.⁸
- 3.4** In this chapter, we set out our approach to applying the amendment to the RAO in our rules. A draft instrument is at Appendix 1.

Our proposed approach

- 3.5** Regulated advice currently consists of two elements for the purposes of Article 53(1) of the RAO:
- Advice which constitutes a personal recommendation;⁹ and
 - Any other regulated advice within Article 53(1) which does not amount to a personal recommendation.

⁶ www.gov.uk/government/consultations/amending-the-definition-of-financial-advice-consultation/amending-the-definition-of-financial-advice-consultation

⁷ www.handbook.fca.org.uk/handbook/glossary/G877.html?starts-with=P

⁸ The RAO amendment applies only to firms with a permission to carry on a regulated activity other than either the activity specified in article 53(1) or the activity of agreeing to carry on the article 53(1) activity and is limited to article 53(1). This means that, for example, the regulated activity specified in article 53(2) of the RAO, of advising on P2P agreements, remains unchanged. Legislation to bring about this change was laid before Parliament on 30 March 2017 and will come into force on 3 January 2018, at the same time as MiFID II. www.legislation.gov.uk/uksi/2017/500/pdfs/ukxi_20170500_en.pdf

⁹ In summary, this is a recommendation which is given to an investor or potential investor or to their agent, and which: is presented as suitable for that person or based on a consideration of their personal circumstances; and is a recommendation to buy, sell, subscribe for, or underwrite a particular investment, or exercise any right conferred by such an investment to buy, sell, subscribe for, or underwrite such an investment.

3.6 For the purposes of this CP, we refer to the latter as guidance where it is carried out by a firm that benefits from the RAO amendment. Any other services which do not involve the carrying on regulated advice within Article 53(1) are not included in what we describe as 'guidance' in this document. In particular, when using the term 'guidance' we are not referring to any service that only consists of generic advice on a type of financial investment or the provision of purely factual information.¹⁰ Such a service is already outside the definition of regulated advice.

3.7 The RAO amendment will mean that guidance will cease to be a 'regulated activity' for the majority of authorised firms. In future, generally, we propose that the same rules should apply to authorised firms when they provide guidance as apply to authorised firms carrying out other unregulated activities, such as the provision of factual information to customers.¹¹ This means that, for example, the following will apply to guidance to the same extent as to the provision of information:

- The Principles for Business¹²
- Client's best interest rule¹³
- Fair, clear and not misleading rule¹⁴

3.8 In general, treating guidance in this way would provide access for eligible complainants to the Financial Ombudsman Service. However, there are a few areas where we propose a clearer application of these rules and we summarise these below.

Complaints handling and access to the Financial Ombudsman Service

3.9 For firms that make use of the RAO amendment, we propose that eligible complainants¹⁵ should still be protected by our complaint handling rules in the Dispute Resolution (DISP) sourcebook.

3.10 Eligible complainants should also be able to refer complaints to the Financial Ombudsman Service about things done by the firm in providing guidance, for example whether they have failed to comply with relevant regulatory requirements such as those described above, for example if a firm provides misleading information. For the avoidance of doubt, where a customer does not receive a personal recommendation, firms would not be subject to the regulatory standards that apply when offering such advice.

3.11 We believe that this approach should make it easier for consumers to understand their position. It should also allow firms to give a much clearer description to consumers

10 Although the provision of purely factual information or generic advice is not generally regulated advice, if the information or generic advice is given in the course of providing regulated advice it can form part of that regulated activity. See recitals 15 and 16 of the MiFID Org Regulation.

11 But see footnote 10.

12 The Principles apply, amongst other things, where the provision of information by a firm to clients or customers forms part of a regulated activity, or where the provision of that information or advice to those persons is carried on in connection with a regulated activity or held out as being for the purposes of a regulated activity in relation to designated investment business or insurance mediation activity.

13 Currently applies where the provision of information is "in relation to designated investment business" carried on for a retail client, and in relation to MiIFD business, for any other client. MiFID requires this rule to apply to business carried on for all clients so an amendment is needed to reflect the amended scope of designated investment business once the RAO amendment comes into force.

14 Applies, amongst other things, where the provision of information involves a communication to a customer "in relation to designated investment business". MiFID requires this rule to apply to business carried on for all customers, so an amendment is needed to reflect the amended scope of designated investment business once the RAO amendment comes into force.

15 And from 3 January 2018, the MiFID complaints handling requirements will apply to complaints from clients (as defined in MiFID).



about their rights of complaint and redress which we believe will make such services more attractive.

- 3.12** Currently, the compulsory jurisdiction of the Financial Ombudsman Service includes regulated activities or 'any ancillary activities, including advice, that are carried on by the firm in connection with them'.¹⁶ We expect that most firms that will use the RAO amendment are likely to provide guidance in connection with another regulated activity.
- 3.13** Further, from 3 January 2018, we are amending the Financial Ombudsman Service's Compulsory Jurisdiction rules to implement MiFID II.¹⁷ This means that the Financial Ombudsman Service will consider complaints about guidance provided by a MiFID investment firm to the extent that it constitutes the MiFID ancillary service of 'investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments'.¹⁸
- 3.14** We also expect that our proposed approach will allow firms to maintain more straightforward complaints handling systems as they will not need to establish whether guidance is an ancillary activity in scope of DISP. MiFID investment firms will also not need to distinguish between different parts of their businesses.
- 3.15** In some circumstances it may not be clear cut whether advice was an integral part of a regulated activity or was ancillary to it at the outset of a complaint. Our proposed approach should improve certainty for both eligible complainants and firms regarding their rights and responsibilities rather than needing parties to wait until the Financial Ombudsman Service makes a determination.

Q1: Do you agree with the proposed approach to redress and the Financial Ombudsman Service? If not, please give reasons why.

Q2: Are there alternative approaches that we should consider?

Investor compensation

- 3.16** We propose that consumers should have access to the Financial Services Compensation Scheme (FSCS) where they have claims relating to guidance given by a firm using the RAO amendment¹⁹ that also carries out designated investment business or protected non-investment insurance business. (The FSCS will continue to be able to pay compensation where the claim is in respect of guidance given by other authorised firms²⁰). Again, we believe this approach will provide the best outcome both for authorised firms and their consumers.
- 3.17** The FSCS may pay compensation to an eligible claimant if it is satisfied that, amongst other things, the claim is in connection with protected investment business or protected non-investment insurance business. Very broadly, our proposals will require that where guidance is given by a firm using the RAO exemption, the FSCS must treat

16 See DISP 2.3.1R.

17 See DISP 2.3.1AR and article 75 of MiFID II.

18 See Annex 1, Section B, point 5, of MiFID II.

19 This also applies to any appointed representative of the firm.

20 Or their appointed representatives.

that guidance as being in connection with such business.²¹ This means that the FSCS may pay compensation to an eligible claimant without needing to determine whether the guidance was given in connection with the firm's designated investment business.

3.18 We believe that this approach will provide FSCS cover where, for example, misleading guidance is offered to customers (or potential customers) with a view to the firm selling an investment product. As with our approach to recourse to the Financial Ombudsman Service, this will mean that authorised firms will be able to give their consumers a more straightforward and comprehensible description of the available protection.

Q3: Do you agree with the proposed approach to the FSCS? If not, please give reasons why.

Q4: Are there alternative approaches that we should consider?

Training and Competence

3.19 The Training and Competence (TC) sourcebook currently sets out the activities to which TC applies.²² This includes requirements that apply to employees who advise on investments which fall within the scope of Article 53(1) of the RAO. We propose to narrow the scope of the RAO 53(1) activities to which TC applies by making clear that TC will only apply to staff providing personal recommendations on the relevant investments and not to those who only provide guidance. We propose to make this change for all staff at authorised firms irrespective of whether they are able to make use of the RAO amendment. Relevant staff would, for example, no longer need to hold appropriate qualifications listed in TC Appendix 4.²³ Where a member of staff carries on other activities which are subject to TC requirements outside the scope of the RAO amendment, they will still be subject to those TC requirements.

3.20 Firms must still comply with the requirements of the Senior Management Arrangements, Systems and Controls sourcebook (SYSC), in particular the high-level competent employee rules.²⁴ These rules require firms to employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.²⁵

3.21 For many existing advice firms we do not expect a significant impact as their client-facing staff are likely to be giving both guidance and personal recommendations, and the latter would trigger TC requirements.

3.22 We believe that the knowledge and expertise requirements in SYSC will ensure that staff offering guidance will have the necessary level of expertise and competence and we believe it is proportionate to take a consistent approach to all staff that provide guidance, whether the firm benefits from the RAO amendment or not.

21 Provided that the advice was in relation to a relevant investment, and the firm giving the advice had, or should have had, permission to carry on that business (or in the case of appointed representatives was exempt).

22 www.handbook.fca.org.uk/handbook/TC/App/1/?view=chapter

23 www.handbook.fca.org.uk/handbook/TC/App/4/?view=chapter

24 From 3 January 2018, some firms will be subject to the requirements of the MiFID Org Regulation. See also, the Markets and Organisational Requirements (MiFID 2) Instrument 2017 (FCA 2017/38) and the Markets in Financial Instruments Directive II Implementation – Policy Statement 1 (PS17/5).

25 See SYSC 3.1, SYSC 5.1 and Article 21(1) of the MiFID Org Regulation.



- 3.23** Please note that our approach to the ESMA Guidelines for the Assessment of Knowledge and Competence²⁶ is included in our recent Policy Statement on MiFID II implementation.²⁷

**Q5: Do you agree with our approach regarding qualifications?
If not please give reasons why.**

Inducements

- 3.24** In our consultation on the implementation of MiFID in CP16/29, we proposed amending the adviser charging rules in COBS 6.1A to prevent firms which provide personal recommendations on retail investment products from soliciting or accepting inducements (other than certain acceptable minor non-monetary benefits) in connection with a firm's wider advice business. We proposed a similar change to COBS 6.1B which would have banned retail investment product providers, operators of electronic systems in relation to lending and platform service providers from offering or paying inducements to other firms or third parties in connection with that firm's wider advice business or related services, subject to certain exceptions. We asked whether we should extend the MiFID ban on accepting inducements which applies where a firm provides investment advice to retail clients by bringing it into line with our proposal on the adviser charging rules.

- 3.25** Thematic work following the introduction of the Retail Distribution Review (RDR) indicated that firms continue to use various types of payment as a means of securing distribution which we regard as undermining the spirit of the RDR. This proposal was intended to address this concern.

- 3.26** The proposal received broad and we continue to believe that it is the correct approach. However, because CP16/29 was published before the completion of Treasury's consultation on the amendment of the RAO, we propose to consult again. We want to know whether you think we should reconsider any part of our approach in light of the RAO amendment.

Q6: Is there anything further that we need to take into consideration regarding this proposal given the RAO amendment?

Other rules

- 3.27** Certain regulatory requirements are likely to continue to apply to firms providing guidance. In particular:

- i. A firm that makes use of the RAO exemption will be subject to specific rules where guidance constitutes an ancillary service under MiFID and the firm is subject to MiFID.²⁸ In most cases the Handbook will make clear which requirements apply in respect of MiFID business and so no further amendments of the Handbook will be necessary. However, we are proposing two specific amendments to the application provisions relating to the client's best interests rule in COBS 2.1 and the rules on communicating with clients in COBS 4 to make clear that these requirements continue to firms in relation to MiFID business.

²⁶ www.esma.europa.eu/sites/default/files/library/esma71-1154262120-153_guidelines_for_the_assessment_of_knowledge_and_competence_corrigendum.pdf

²⁷ www.fca.org.uk/publications/policy-statements/ps17-14-mifid-ii-implementation

²⁸ The ancillary service of investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments.

- ii. Although we are not proposing any changes to the Principles or their application, the effect is that the Principles will continue to apply to firms that make use of the RAO exemption in respect of guidance which is given in connection with, or for the purposes of designated investment business or insurance mediation activities. We expect that most firms will offer guidance to customers or potential customers in connection with or for the purposes of such business (e.g. guidance given with a view to the client transacting through the firm) and in such a case the firm would remain subject to the Principles. The Principles will continue to apply to other Article 53(1) regulated advice services provided by a firm that is not able to make use of the RAO exemption because for those firms the giving of guidance will remain a regulated activity.

3.28 As a result of the RAO amendment, we are making a minor change to the Collective Investment Schemes sourcebook (COLL) to ensure that the scope of investment advice which a UCITS management company can carry on remains unchanged. A UCITS management company will still be able to provide both guidance and personal recommendations in relation to the funds that it manages, because this is within the scope of its permissions under article 51ZA of the RAO (managing a UCITS) and article 72AA (managers of UCITS and AIFs). Where a UCITS management company provides individual portfolio management as an ancillary activity, the effect of the RAO amendment is that the management company will also be able to provide guidance without needing any further permission. However, a UCITS management company will need permission to carry on the activity in article 53(1) of the RAO if it wishes to make personal recommendations concerning financial instruments other than the units of its own funds.

Q7: Do you agree with this approach? If not please set out your reasons why not.



4 Perimeter Guidance

- 4.1** In this chapter, we set out our proposed Guidance on whether or not a service is a 'personal recommendation'. We have prepared this Guidance to help firms that wish to develop services that support consumers making financial decisions.
- 4.2** We provide feedback to discussion questions we asked on this subject in GC17/4 and summarise our proposed changes to our Perimeter Guidance Manual (PERG) to give firms greater clarity. PERG provides Guidance on the circumstances in which firms are likely to be conducting regulated activities. The Guidance represents the FCA's views and does not bind the courts.

Feedback on GC 17/4

- 4.3** FAMR recommended that the FCA should consult on new Guidance to support firms offering services that help consumers making their own investment decisions without a personal recommendation.
- 4.4** In GC17/4: 'FAMR implementation Part I', we set out some initial thinking on areas of uncertainty that stakeholders highlighted in responses to the FAMR Call for Input. We have used feedback from stakeholders to develop the proposed Guidance and examples in this CP. We are grateful for the feedback we received from stakeholders, and have summarised it below with our response.

GC Q7 – Do you agree with the Guidance in this section?

- 4.5** We received 17 responses to our discussion questions. The thinking we set out alongside the questions was generally welcomed as providing useful additional clarity.
- 4.6** Two respondents argued that the FCA should develop a new approach which exempts implicit personal recommendations from being a personal recommendation.
- 4.7** Six respondents asked the FCA to make greater use of worked examples or scenarios in its Guidance. One particularly asked for more worked examples of activities that are not a personal recommendation. A further two argued in general terms that the format of our thinking meant that it was not sufficiently definitive.
- 4.8** Three respondents asked for further Guidance on situations where firms believe that clients appear to be making bad decisions, so that they can provide help without giving a personal recommendation.

Our response

- 4.9** We have taken on board this feedback and sought to incorporate more illustrative examples in the Guidance on which we are now consulting. Detail on this is set out below from paragraph 6.33 and in Appendix 1.
- 4.10** On the issue of implicit personal recommendations, we believe that 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 should be treated as a personal recommendation under our rules. This view is consistent with the Guidance issued by the Committee of European Securities Regulators (CESR) (now the European Securities and Markets Authority (ESMA)) on the definition of investment advice under MiFID.²⁹

- 4.11** We believe that where an adviser says ‘people like you buy this product’ or ‘this is what I would do if I were you’ it is likely to be viewed as a recommendation of what is suitable for the customer or based on a consideration of their circumstances and is therefore a personal recommendation. However, we have sought to provide new Guidance which we hope will support firms in navigating this issue in a way that will help consumers.

GC Q8 – Are there any further areas where there is insufficient clarity in existing Guidance?

- 4.12** Respondents asked for additional clarity in the following areas:

- The extent to which giving greater prominence to certain products amounts to a personal recommendation, in particular on the use of best buy lists, sponsored listings and special offers.
- How firms can personalise communications to clients without making a personal recommendation. In particular: informing clients that they have not used their ISA allowance or that they have not increased their pension contributions over time.
- How to communicate to clients the characteristics and investment objectives of products without giving a personal recommendation. In particular, firms asked for Guidance on how to provide information on a product’s target market determined by the product manufacturer without giving a personal recommendation.
- How implicit personal recommendations would interact with the new target market requirements in the Product Intervention and Product Governance sourcebook (PROD) that will come into force with MiFID II.
- The development of ‘affordability calculators’ that help consumers determine whether they ought to invest at all.
- The use of risk profiling.
- Whether Guidance on personal recommendations applies to advice on general insurance.

Our response

- 4.13** As set out in FG 15/1, the CESR Guidance includes five tests that need to be met to determine whether a service is a personal recommendation:

- *Does the service being offered constitute a recommendation? For example, firms would need to consider the difference between information and a recommendation and whether assisting a customer to filter information amounts to a recommendation.*
- *Is the recommendation in relation to one or more transactions in financial instruments? For example, firms would need to consider how to distinguish generic advice and general recommendations from MiFID investment advice.*

²⁹ www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_qas_markets_structures_issues.pdf



- *Is the recommendation: a) presented as suitable, or b) based on a consideration of the person's circumstances? For example, firms would need to consider how a financial instrument might implicitly be presented as suitable, the impact of disclaimers, and what it means to consider a person's circumstances.*
- *Is the recommendation issued otherwise than exclusively through distribution channels or to the public? For example, firms would need to assess recommendations delivered via the internet, assess recommendations given to multiple customers at once, and the effect of distributing investment research.*
- *Is the recommendation made to a person in their capacity as: a) an investor or potential investor, or b) an agent for an investor or potential investor? For example, firms would need to identify investors and their agents. Firms would also need to consider the distinction between corporate finance advice and investment advice.*

4.14 Context is vital to determining whether these tests are met. We have therefore included examples based on areas of uncertainty highlighted by firms, for example commenting on the general function of a product, personalising client communications and use of featured products.

4.15 On the use of risk profiling in a non-advised context, there is already an example in FG 15/1 which we have included in the draft instrument in Appendix 1.

4.16 The term 'personal recommendation' is used in a variety of contexts in our Handbook for example, in relation to retail investment products, P2P agreements and regulated mortgage contracts. The activity of 'advising on investments' in article 53(1) of the Regulated Activities Order covers investments which are a 'security' or a 'relevant investment'.³⁰ The definitions for these terms are set out in the Regulated Activities Order and clearly cover rights under a general insurance contract.

GC Q9 – Are there specific areas where further clarity will be needed as a result of the forthcoming amendment to the Regulated Activities Order?

4.17 Respondents asked for us to be clearer about the following areas:

- How firms may name guidance that they offer and whether FCA would restrict this in any way.
- Whether a firm may charge for guidance.
- How the 'thumbs and nudges' that the Financial Advice Working Group (FAWG) developed would sit in the current framework.³¹
- The qualifications that would apply to individual providing guidance. This is addressed in Chapter 3 of this consultation.
- Three firms also suggested that further recommendations need to be developed to help deliver the overall objectives of FAMR.
- A further respondent asked if we could set out all situations where advice is compulsory.

³⁰ From 3 January 2018, the activity will also cover advice on structured deposits.

³¹ www.fca.org.uk/publication/research/fawg-rules-of-thumb-nudges.pdf

Our response

- 4.18** We do not currently mandate the use of a particular terminology for advice or other services. This is something that was considered by the FAWG following the FAMR Final Report. The FAWG concluded that there was no case for requiring firms to use specific terms for advice or other forms of services to support consumers.³² Instead the FAWG recommended that the market should, subject to analysis, consultation and cost benefit analysis by the FCA, adopt a consistent set of explanations for different types of service. We are currently considering the FAWG's recommendation.
- 4.19** FCA adviser charging rules only apply where the firm provides a personal recommendation on a retail investment product or a P2P agreement. There are no rules that prevent a firm from charging for the provision of guidance. However, we propose to extend the ban on a firm accepting inducements to cover inducements which the firm may be offered in connection with its guidance business (see Chapter 3).³³
- 4.20** The Money Advice Service (MAS) is currently carrying out further work to test and refine the FAWG 'thumbs and nudges'. We cannot comment specifically on them until they are finalised. However, we support the work of FAWG and MAS and have sought to make clear in our draft guidance how general messages might be communicated to clients.
- 4.21** This consultation does not seek to revisit the overall objectives of FAMR. The FCA and the Treasury have recently published the FAMR Baseline Report which sets out the indicators that we propose to monitor in order to measure the impact of FAMR.³⁴ This baseline will also be used as a benchmark against which to review the outcomes of FAMR, which we are required to do in 2019.
- 4.22** The only circumstance where regulated advice is currently compulsory is under Section 48 of the Pension Schemes Act 2015 which requires that trustees or scheme managers check that advice has been taken before allowing a transfer to proceed where the proposed transfer involves a defined benefits pension or other safeguarded benefits worth more than £30,000.

Consolidation of Guidance

- 4.23** Earlier this year, the FCA published GC17/4: 'FAMR implementation Part I'³⁵ in which we explained our intention to consolidate our non-Handbook Guidance in FG 12/10 and FG 15/1.
- 4.24** FG 12/10 includes Guidance on simplified advice and FG 15/1 sets out Guidance on:
- whether a particular service might amount to a personal recommendation³⁶
 - simplified advice and
 - the application of suitability requirements to discretionary investment management

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

33 www.handbook.fca.org.uk/handbook/COBS/6/1A.html

34 www.fca.org.uk/publications/research/financial-advice-market-review-famr-baseline-report

35 www.fca.org.uk/publications/guidance-consultations/gc17-4-financial-advice-market-review-famr-implementation-part-i

36 www.handbook.fca.org.uk/handbook/glossary/G877.html?starts-with=P



4.25 We propose that that the Guidance on personal recommendations in FG15/1 should be included in PERG and our draft proposals are set out in Annex 1.

4.26 As we have set out in Chapter 1, we propose to publish Final Guidance following the GC 17/4 consultation, including any retained Guidance from FG 12/10 and FG 15/1 that does not relate to personal recommendations in September.

Q8: Do you agree with our approach to the transposition in PERG of the FG 15/1 Guidance on personal recommendations? If not please explain why.

Consequential amendments

4.27 As a result of the amendment to the RAO, we propose to make changes to PERG so that it reflects the legislative changes. These are included in Appendix 1.

Q9: Do you agree with the proposed changes? If not, please set out your reasons.

5 Feedback from the Advice Unit and proposed Guidance

5.1 In this chapter we set out proposed Guidance informed by the experiences of the Advice Unit.

The Advice Unit

- 5.2** The Advice Unit was established in May 2016 and has opened for two tranches of applications from firms. To date, 17 firms have been accepted into the Unit.
- 5.3** The Advice Unit gives regulatory feedback to firms developing automated models (whether fully or partly automated) that seek to deliver lower cost advice, or lower cost discretionary investment management services, to consumers.³⁷
- 5.4** Between July 2016 and June 2017, the Advice Unit covered propositions that aimed to serve the following gaps in the current market for automated advice as identified by FAMR:
- investments
 - pensions (accumulation and decumulation)
 - protection
- 5.5** The Advice Unit now also accepts applications from firms in the mortgages, general insurance and debt sectors as well as from firms that want to provide Guidance instead of regulated advice.
- 5.6** Firms that meet the Advice Unit's eligibility criteria³⁸ can request regulatory feedback on their model, for example where a firm is unable to resolve a question through existing rules and Guidance. Further information regarding the Advice Unit is available on our web pages.³⁹
- 5.7** Having provided feedback to several firms, we have identified common areas of uncertainty with our rules and, accordingly, we believe it would be helpful for us to provide Guidance for all firms. These questions were asked in relation to automated propositions; however, elements of this Guidance might be helpful for advice or discretionary investment management firms more broadly.

37 Where we refer to 'advice' in this Chapter this may, in some circumstances, also cover models offering a discretionary investment management service.

38 www.fca.org.uk/firms/project-innovate-and-innovation-hub/advice-unit/eligibility-criteria-advice-unit

39 www.fca.org.uk/firms/innovate-innovation-hub/advice-unit



Draft Guidance explained

- 5.8** The proposed Guidance set out below is based on questions submitted to the Advice Unit so far.⁴⁰ Each question has been presented as a case study⁴¹ to give further context and we have answered on the basis of the specific facts set out in the case study. This means that our responses may not be relevant to firms which, for example, are providing advice on the types of investment which are not covered by the specific case study or are using different processes to give advice.
- 5.9** As noted earlier in this paper, our answers here set out the position with effect from 3 January 2018 and refer to the MiFID II requirements. We have also footnoted the relevant non-MiFID COBS rules (which will continue to apply to non-MiFID II investment products after 3 January 2018) where appropriate.

Proposed Guidance

1. Clients with uncertain investment needs

Case Study:

A firm is using an automated advice service to provide personal recommendations on financial instruments to clients. The firm wants to serve clients who do not have a clear 'purpose' for the basis of the investment (for example they have a very broad objective such as 'save for a rainy day', and therefore are unable to be specific about the purpose and time period of their investment). The firm thinks there may be some merit in referring to 'goals' rather than 'objectives' ('goals' being seen by the firm as less specific than 'objectives').

Question:

- **To what degree do the rules on suitability allow the firm to provide personal recommendations to clients where there is some uncertainty around the purpose and time period of the desired investment?**

Our response

In broad terms, a firm needs to obtain such information as is necessary to determine that a personal recommendation is suitable for the relevant client.⁴² A firm will need to have sufficient information about those factors that are relevant (e.g. that all the money invested will be needed in three years' time).

To assess suitability, a firm must obtain the necessary information regarding, among other things, the client's investment objectives.⁴³ Our rules are clear that information about a client's investment objectives

40 These are questions that were submitted before the expansion in scope of the firms that the Advice Unit provided with feedback and so all relate to investment advice and/or discretionary investment management services.

41 We have made some changes to the scenarios presented. This is to ensure that: a) anonymity of Advice Unit firms is maintained and/or b) to further enhance the clarity of the proposed draft guidance for the benefit of all firms.

42 From 3 January 2018, see COBS 9A.2.1R and Article 25(2) of MiFID. COBS 9.2.1R(1) makes similar provision in respect of investment products not subject to the MiFID II requirements.

43 From 3 January 2018, see COBS 9A.2.1R(1), COBS 9A.2.4EU and COBS 9.2.8EU (Article 25(2) of MiFID and Article 54(2) and (5) of the MiFID Org Regulation. COBS 9.2.1R(1) and COBS 9.2.2R make similar provision in respect of investment products not subject to the MiFID II requirements.

should include, where relevant, information about the length of time for which the client wishes to hold an investment and the purposes of the investment. It is difficult to envisage many cases where, for example, the client's approximate time period for investing would be irrelevant.

A firm which does not obtain sufficient information to enable it to recommend a product which is suitable for the client must not make a personal recommendation.⁴⁴ So, if the client's investment objectives are not sufficiently clear to enable the firm to give a suitable personal recommendation the firm should ensure it draws out the information necessary to enable it to provide a personal recommendation which is suitable.

The consumer's time period for the investment

Any recommendation that is made must be supported by the relevant information gathered from the client, including the desired investment period. The firm may be able to provide a personal recommendation with a broad (rather than a specific) time period in mind, or with a minimum time period in mind, as long as the recommendation provided is suitable for any time period within that range.

For example, if a client has indicated an investment period of three to five years, then the firm will need to ensure that the recommendation is suitable for a time frame of anywhere between three and five years. If this is not possible then the firm will need to gather more specific information regarding the time period to support the suitability of the recommendation.

Investment objectives and investment goals

To offer a personal recommendation to a client a firm must obtain such information as is necessary to have a reasonable basis for determining (giving due consideration to the nature and extent of the service) that the firm's recommendation meets the client's investment objectives, including the client's risk tolerance.⁴⁵

The client might express these objectives in broad terms, such as 'saving for a rainy day', 'building wealth' and 'outstripping inflation'. These terms will mean different things to different customers and may be considered ambiguous without further clarification.

In such circumstances, the firm's personal recommendation would need to be suitable for all possible interpretations of the objective in question. But if some possible interpretations of the broad objective could make the personal recommendation unsuitable, then the firm would need to gather further information to support its investment advice.

Moreover, the broad 'objectives' listed above would not, in our view, inform the firm about the (broad or narrow) time period for the investment, the customer's need to access money over that time or

44 From 3 January 2018, see COBS 9A.2.13EU and Article 54(8) of MiFID. COBS 9.2.6R makes similar provision in respect of investment products not subject to the MiFID II requirements.

45 From 3 January 2018, COBS 9A.2.4EU and Article 54(2) of MiFID. COBS 9.2.2R(1) makes similar provision in respect of investment products not subject to the MiFID II requirements.



the client's risk profile. It is difficult to envisage cases where the firm could ensure that its recommendation was suitable without gathering further information about these issues.

2. Assisting a client with the automated advice service

Case Study:

A firm providing an automated advice service intends to use staff that are not QCF level four qualified to assist (but not provide personal recommendations to) clients.

The firm wants those staff to be able to direct clients to the online automated process or help clients by answering questions on how to complete the process.⁴⁶

Question:

- **Could direction by the staff member towards an online automated advice process (which may result in a personal recommendation being made) ever be reasonably interpreted as being a personal recommendation?**

Our response

If a staff member does nothing more than direct a client towards an automated advice service this is unlikely to be a personal recommendation. However, if the staff member's interaction with the client goes beyond this, then the firm should consider whether this could be a personal recommendation by referring to existing guidance.⁴⁷

3. Firms' regulatory responsibility when providing a personal recommendation

Case Study:

A firm offers automated advised and non-advised services side by side. Clients can undertake the advised journey up to the point of receiving a recommendation but then choose not to proceed, for example if they do not want to pay the firm's adviser charge. Clients can then use the non-advised⁴⁸ service to purchase the same investment(s) that has been recommended to them without paying an adviser charge.

Questions:

- **Has the firm provided a personal recommendation, even though the client has opted not to proceed with the advised service, but has instead chosen to execute the recommended transaction through the non-advised service?**
- **Should the firm block the client from using its non-advised service after it has provided a personal recommendation?**

46 For example, the process could be offered in person, such as in a branch, where the staff member offers the consumer an electronic tablet device to complete the automated advice process or, alternatively, over the phone where direction is made to the firm's automated advice service via a website.

47 See for example Q19, Q20 and Q21 of PERG 13.3. Firms should be aware that although giving generic advice or purely factual information 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. For example, if the member of staff provides generic advice to a client or potential client (for instance, on the merits of investing in UCITS funds over listed shares) and the automated advice model identifies as suitable a particular UCITS fund for the client or potential client, the generic advice will form part of the personal recommendation. See recitals 15 and 16 of the MiFID Org Regulation.

48 This could be either the firm's non-advised service or a similar service offered by a competitor firm.

Our response

A recommendation to a client to buy a particular financial product which is presented as suitable or based on a consideration of the consumer's circumstances will be a personal recommendation whether the client goes on to buy that product or not.⁴⁹ Where a firm gives a personal recommendation it must comply with any applicable FCA rules.

In this particular circumstance, whether or not the firm chooses to block the client from completing its own non-advised process after receiving a personal recommendation is ultimately a commercial decision for the firm's senior management.⁵⁰ However the firm cannot use the non-advised option as a means of avoiding the adviser charging requirements in COBS 6.1A, as these apply where the firm makes a personal recommendation, not only where the client proceeds with the recommended transaction.

4. Timing of disclosure of advice charges

Case Study:

A firm has designed its automated advice process with a natural break. This break allows the exit from the process of clients for whom investing is not appropriate. The firm's initial assessment stage will identify a client's primary needs (for example, repayment of debt) to establish whether they are clients for whom the automated advice process is intended. No personal recommendation is given at the initial assessment stage.

The firm proposes to disclose its charging structure at the start of the second stage of the process, where the firm seeks the necessary information about the client (their investment objectives, financial situation and knowledge and experience) to enable it to give a suitable personal recommendation at the end of the process.

Question:

- **Does the firm's process meet our requirement to disclose its charging structure to the retail client 'in good time'?**⁵¹

Our response

Where the firm's process works as described, i.e. the initial stage purely acts as a filter (with no advice given) and the second stage of the process involves the collection of the necessary information about the client, and results in the provision of a personal recommendation, then disclosing the charging structure at the start of the second stage is likely to meet the requirements of the relevant rule.

49 Q19 of PERG 13.3 sets out the definition of 'investment advice' under MiFID.

50 Firms should also bear in mind that they may not solicit or accept any commission, remuneration or benefit of any kind in relation to a personal recommendation or any other related service and so a firm cannot avoid the inducements ban by providing a personal recommendation and then getting clients to transact through a non-advised channel. This is because the ban on soliciting or accepting inducements in COBS 6.1A.4R applies in relation to the personal recommendation or any other 'related service' (which includes arranging or executing a transaction which has been recommended by the firm – see COBS 6.1A.6R(1)).

51 COBS 6.1A.17R



5. Timing of suitability reports

Case Study:

A firm's automated advice service will be providing personal recommendations in relation to UK listed shares. The automated advice service will upload a suitability report to an electronic consumer area immediately after the consumer has received an online personal recommendation and before the transaction has been executed.

Question:

- **Will the firm's model comply with the new MiFID II requirement to provide the report after the personal recommendation has been provided but before the transaction is concluded?**

Our response:

If the firm uploads the suitability report (which must be provided in a 'durable medium'⁵²) to an electronic consumer area that is personal to that client immediately after the client has received the online personal recommendation, it then points the client to the availability of the suitability report and gives the client a reasonable opportunity to view the report before deciding whether to proceed with the transaction, this would likely comply.

6. Timing of disclosure of a Key Features Document/Key Investor Information Document

Case Study:

A firm's automated advice service will provide personal recommendations on units in UCITS schemes or non-PRIPs packaged products and upload, as appropriate, a key features document (KFD) or key investor information document (KIID) to the client area of its website for review and ongoing reference immediately after the client has received a personal recommendation. The firm is unsure if this is 'too late' in its process and wants to know whether it can make use of the exception to the general timing rules in COBS 14.2.16R.

Questions:

- **Does the firm's model comply with the timing requirements for disclosure of a KFD/KIID to clients?**
- **Can the firm make use of the exception to the timing rules in COBS 14.2.16R?**

Our response

The requirement in COBS 14.2.14R (2) and (3) is to disclose 'in good time' before the firm carries on the relevant business (in relation to KFDs) or 'in good time' before the client's proposed subscription for units in the scheme (in relation to KIIDs).

52 See the definition in the FCA Glossary (www.handbook.fca.org.uk/handbook/glossary/?starts-with=D) and Article 3 of the MiFID Org Regulation

In the above case, if the firm provides the necessary disclosures immediately after the personal recommendation is made, giving the client a reasonable opportunity to review the KFD or KIID before deciding whether to conclude the contract, this would comply with the timing rules in COBS 14.2.14R (2) and (3).

COBS 14.2.16R (1) contains an exception to the timing rules in COBS 14.2.14R (2). The exception is available where the contract has been concluded at a client's request using a means of distance communication that would not enable the KFD to be provided in good time before the client is bound by the contract. In such a case, the relevant document or requisite information must be provided to the client immediately after the distance contract concludes.

However, we consider that this exception is unlikely to be available for a wholly automated advice service since the means of distance communication (through a website) should enable the firm to provide the required documents in good time before the client is bound. In other words the technology being used should allow the firm to comply with the relevant timing rule and therefore the exception is not engaged.⁵³ The exception in COBS 14.2.16R (1) does not apply to contracts for units in the UCITS scheme.⁵⁴

7. Identification of clients who are unwilling to take any risk with their capital

Case Study:

As part of a firm's online discretionary investment management service the client is asked questions to establish tolerance for risk. The firm then places the client into various categories to help quantify and explain the risk. The firm is unsure whether the definitions of 'preferences regarding risk taking' and 'risk profile' should capture those clients who are unwilling to take any risk at all with their capital (i.e. for whom investing is unlikely to be suitable). So it is unsure whether it is required to have a 'zero risk tolerance' categorisation for clients.

Question:

- **Is a firm always required to identify clients who have zero risk tolerance?**

Our response

A discretionary investment manager must only take decisions to trade which are suitable for the client. To determine suitability, the firm will need to obtain the necessary information regarding, amongst other things, the client's financial situation, including their ability to bear losses and their investment objectives, including their risk tolerance.⁵⁵ In addition, the firm must obtain from the client such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for determining (giving due consideration to the nature and extent of the service) that the specific transaction to

53 COBS 14.2.14R

54 See COBS 14.2.16R(2)

55 From 3 January 2018, see COBS 9A.2.1R and Article 25(2) of MiFID. COBS 9.2.1R makes similar provision in relation to investment products not subject to MiFID II requirements.



be recommended or entered into in the course of providing a portfolio management service, satisfies, amongst other things, the client's investment objectives, including their risk tolerance.⁵⁶

As we have previously said:

- firms should ensure they have a robust process for assessing the risk a client is willing and able to take, including identifying those clients who are best suited to placing their money in cash deposits because they are unwilling or unable to accept the risk of loss of capital.⁵⁷
- we consider it would be poor practice for a firm not to filter out customers who were unwilling to risk capital loss.⁵⁸

However, we do not prescribe how firms establish the risk a customer is willing and able to take.

Q10: Do you agree with the proposed Guidance in this chapter?

56 From 3 January 2018, see COBS 9A.2.4EU and Article 54(2) of the MiFID Org Regulation. COBS 9.2.2R makes similar provision in relation to investment products not subject to MiFID II requirements.

57 FG 11/05: Establishing the risk a customer is willing and able to take and making a suitable investment selection (pg. 6)

58 FG 11/05: Establishing the risk a customer is willing and able to take and making a suitable investment selection (pg. 12)

6 Insistent clients

- 6.1** In this chapter, we set out proposals to introduce the expectations that we have previously set out in our factsheet on insistent clients (published 2016⁵⁹) as Handbook Guidance.
- 6.2** This factsheet used the example of pension transfers as this is an area where insistent clients are particularly relevant. However, we propose that our Handbook Guidance would apply wherever a personal recommendation is given, not just for the transfer and conversion of safeguarded benefits.

What is an 'insistent client'?

- 6.3** The Handbook does not currently define an insistent client or contain any provision specific to processing a transaction on behalf of an insistent client. We use this term to describe an individual who has received a personal recommendation and chooses to do something other than follow the adviser's personal recommendation.
- 6.4** We are aware that firms have differing views on how to deal with insistent clients and that some firms are unwilling to transact with an insistent client. We also know many pension providers are unwilling to accept a transfer where there has not been a positive recommendation to transfer. Our proposal is designed to increase confidence for advisers and providers when dealing with insistent clients.

Our expectations

- 6.5** We recognise that where a client has received a personal recommendation they may choose to take a different action to the one that was recommended. It is essential that clients in this position have had the consequences fully explained so they understand the implications of proceeding against the recommendation.
- 6.6** When proceeding with a request for an insistent client it is important that the firm that has given the personal recommendation makes it clear (a) what element of its advice is being acted against and (b) that any further advice given is subsequent to the specific action requested by the insistent client. The Guidance will make it clear to advisers that where they facilitate a request that conflicts with the personal recommendation they should ensure:
- The original advice given complies with the requirements for giving a personal recommendation.
 - They have communicated clearly what their recommendation is and the reasons for their recommendation.

59 www.fca.org.uk/firms/pension-reforms-insistent-clients



- They have clearly communicated the risks of the alternative course of action proposed by the client and why they have not recommended it.
- There is a clear distinction between the advice that is being acted against and any subsequent or concurrent advice. This might be achieved through distinct suitability reports.
- They keep a record of the process followed and the communication to and from the client that makes it clear that the action is against the personal recommendation at the client's request. Best practice would be for a record of the client's intention to proceed against advice to be in the client's own words.

Q11: Do you agree with our proposal to add Guidance on processing insistent client requests to the handbook? If not please comment on how the proposal should be varied.

Annex 1

Questions in this paper

- Q1:** Do you agree with the proposed approach to redress and the Financial Ombudsman Service? If not, please give reasons why.
- Q2:** Are there alternative approaches that we should consider?
- Q3:** Do you agree with the proposed approach to the FSCS? If not, please give reasons why.
- Q4:** Are there alternative approaches that we should consider?
- Q5:** Do you agree with our approach regarding qualifications? If not please give reasons why.
- Q6:** Is there anything further that we need to take into consideration regarding this proposal given the RAO amendment?
- Q7:** Do you agree with this approach? If not please set out your reasons why not.
- Q8:** Do you agree with our approach to the transposition in PERG of the FG 15/1 Guidance on personal recommendations? If not please explain why.
- Q9:** Do you agree with the proposed changes? If not, please set out your reasons.
- Q10:** Do you agree with the proposed Guidance in this chapter?
- Q11:** Do you agree with our proposal to add Guidance on processing insistent client requests to the handbook? If not please comment on how the proposal should be varied.

Annex 2

Cost benefit analysis

Introduction

1. FSMA requires that before making any rules, we publish a cost benefit analysis (CBA) of the proposed rules. Specifically, section 138I requires that the CBA of proposed rules is an analysis of the costs, together with an analysis of the benefits that will arise if the proposed rules are made and an estimate of those costs and benefits.
2. This analysis presents estimates of the significant impacts of our proposal. We provide monetary values for the impacts where we believe it is reasonably practicable to do so. For others, we provide a qualitative analysis. Our proposals are based on carefully weighing up these multiple factors and reaching a judgement about the appropriate level of consumer protection, taking into account all the other impacts we foresee.
3. This CBA assesses changes to our rulebook proposed in Chapter 3. The CBA does not assess the impact of our perimeter Guidance proposed in Chapter 4 because PERG is not Guidance on FCA rules and is therefore out of scope. It then briefly assesses the impact of Guidance proposed in Chapter 5.
4. Table 1 presents a summary of the CBA

Policy	Counterfactual	Impact
Changes to DISP application	Guidance is in scope of DISP where it forms part of a regulated activity, where it is an 'ancillary activity' carried on 'in connection with' a regulated activity or other specified activity, or where the guidance is an integral part of a core MiFID investment service or it is an ancillary service under MiFID.	Negligible quantitative costs or benefits
Changes to COMP application	Guidance is in scope of COMP where it is "in connection with" designated investment business or protected non-investment insurance business.	Negligible quantitative costs or benefits
Changes to TC	Provision of guidance is not in scope of TC requirements	No change from counterfactual
Inducement ban	Compliance with FG 14/1 – Supervising retail investment advice: inducements and conflicts of interest	No change from counterfactual
Guidance on Insistent Clients	Compliance with the Factsheet – Pension reforms and insistent clients	No change from counterfactual

Handbook changes arising from amendments to the Regulated Activities Order

5. The RAO amendment will be brought about by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2017. The overall effect of this Statutory Instrument is already addressed in an Impact Assessment which accompanies it.⁶⁰
6. This CBA therefore does not assess the overall effect of the RAO amendment but only the impact of the proposed approach we are taking for authorised firms that will be affected by the RAO amendment and their consumers.

Counterfactual

7. The RAO amendment will mean that the provision of guidance will cease to be a regulated activity for the majority of authorised firms. Therefore the counterfactual against which we assess our proposals for the purposes of this CBA are the requirements that apply to an authorised firm which provides information about an investment to a consumer.
8. The provision of information is not a regulated activity but under certain circumstances where information is provided by an authorised firm, in particular a number of requirements with their origin in EU legislation that must also apply to the provision of guidance. In light of this, and the similarities and overlaps between the provision of information and guidance, we believe that this is the most appropriate baseline against which to assess our proposals.
9. We have chosen to follow this counterfactual in most of the policies. Our proposed changes to redress requirements in DISP and COMP are the only amendments that involve additional requirements. This does not address any particular market failure, but provides regulatory consistency. We estimate that it will have negligible costs or benefits as we do not believe any firms will be affected by the Financial Ombudsman Service and FSCS provision in this area.
10. This CBA then briefly discusses TC requirements and inducements where we make no change from the counterfactual.

Changes to the redress scheme: DISP and Financial Ombudsman Service

11. This part of the CBA discusses changes proposed in paragraphs 3.11–3.16 above. We have set out in Chapter 3 that all guidance will be in scope of DISP complaint handling requirements and that all consumers who receive guidance may have recourse to the Financial Ombudsman Service.
12. In our counterfactual scenario, where an authorised firm provides information about an investment, the provision of information will also be in scope of DISP and the jurisdiction of the Financial Ombudsman Service where it forms part of a regulated activity, where it is an 'ancillary activity' carried on 'in connection with' a regulated activity or other specified activity, or where the guidance is an integral part of a core MiFID investment service or it is an ancillary service under MiFID.
13. Therefore our proposed approach involves more extensive application of DISP and Financial Ombudsman Service jurisdiction than the counterfactual.

60 www.legislation.gov.uk/ukxi/2017/500/impacts



14. However we believe that, guidance would generally meet the criteria to be in scope of DISP and Financial Ombudsman Service jurisdiction under our counterfactual scenario. We do not believe that it is likely that firms would be able to monetise standalone guidance so we expect that it would generally be offered in connection with regulated activities. This would generally mean that one or more of the conditions that would bring guidance into scope of DISP would be met.
15. Situations could occur where a consumer would have recourse to the Financial Ombudsman Service with respect of guidance that they have received from an authorised firm which would lead to a benefit for that consumer and a cost to the firm.
16. However we believe the costs and benefits of this change will be minimal. This is because we expect that it is unlikely that our approach will bring additional cases into scope of DISP. The Financial Ombudsman Service has told us that it could not recall any examples of cases where the proposed approach would have made a difference as in most cases it would be a complaint about an activity, or ancillary activity, it could consider in any event.
17. There may be some small, non-monetisable benefit from the clearer regulation. This is because firms will be able to give consumers a more straightforward explanation of their rights in the event of a dispute and consumers should find their rights more comprehensible. Also, in the event of a dispute relating to guidance, both parties will know exactly what their rights and responsibilities are from the outset and neither will have to wait for a determination by the Financial Ombudsman Service as to whether the guidance was provided under circumstances that meant that it was in their jurisdiction.

Changes to the redress scheme: COMP and FSCS

18. This part of the CBA discusses changes proposed in paragraphs 3.17 to 3.19 above.
19. Where an authorised firm provides information about an investment to a consumer, that consumer will be protected by the FSCS if the provision of information forms part of a regulated activity or it is 'in connection with' designated investment business or protected non-investment insurance business.
20. In our proposed approach, we require that the FSCS deems that where guidance is offered by a firm that has one or more permission to carry out designated investment business then that guidance will be deemed "in connection with" that designated investment business. Any consumer who received guidance from such a firm would therefore be protected by the FSCS. This goes somewhat further than our counterfactual.
21. As above, we believe that where an authorised firm that carries out designated investment business also offers guidance, this guidance will generally be offered with a view to selling investment products and the conditions will generally be met for consumers to be protected by the FSCS.
22. We think that there will be very few instances of FSCS claims arising from this change. This is because:
 - i. There are hypothetical scenarios under which a consumer may be protected by the FSCS under our proposed approach where they would not be under the counterfactual and so there may be a financial benefit to the consumer and also a

cost to firms if additional FSCS levies needed to be paid to meet a claim. However, as with the Financial Ombudsman Service, these would be unusual situations and we would not be able to reasonably estimate the likelihood of such a situation occurring along with a valid FSCS claim, nor the amount of loss involved.

- ii. We have consulted with the FSCS who are not aware of any past cases that would have been directly affected by such an approach, so we think that any financial costs and benefits should generally be minimal if they occur at all.

23. Therefore, we estimate that there will be no or minimal costs and minimal benefits of these changes.

24. As with our approach to Financial Ombudsman Service though there should be some small and non-monetisable benefit for both firms and consumers as firms would be able to set out a much clearer account of the level of protection that consumers will receive with respect of any guidance.

TC requirements for firms providing guidance at firms that make use of the RAO exemption

25. This part of the CBA discusses changes proposed in paragraphs 3.20-3.24 above.

26. Individual members of staff at firms who provide information about investments to consumers are in scope of the requirements of SYSC, in particular the high level competent employees. This is the same approach that we have taken for individuals who only provide guidance at firms that are able to make use of the RAO exemption.

27. Our proposal does not differ from the counterfactual against which we are assessing our approach. Therefore there are neither costs nor benefits.

TC requirements for firms providing guidance at other firms

28. This part of the CBA discusses changes proposed in paragraphs 3.20-3.24 above.

29. We have proposed that where an individual offers guidance at a firm that does not benefit from the RAO amendment then this will no longer bring the individual into scope of TC. Rather they will be subject to the requirements of SYSC as for individuals at firms that are able to make use of the RAO amendment.

30. A consistent regime for qualification requirements will apply across all types of firm that provide guidance. The qualification requirements will be based on the nature of the service provided rather than the nature of the firm providing the service. It would also be easier for staff to move between firms that make use of the RAO amendment and firms that will not benefit from the RAO amendment.

31. There are currently 30 firms that will not benefit from the RAO amendment. Of these, we believe that half only provide services to professional investors. As such employees at these firms are currently not in scope of TC Appendix 1 and so won't be affected by our proposed approach to qualifications for guidance.

32. Of the remainder, it is our expectation that client facing staff at these firms will also be involved in the provision of personal recommendations to clients. This means that they will be required to meet the TC requirements for providing personal recommendations.



33. As such, while our proposed approach will make the qualification requirements that apply to guidance consistent across all types of firms, we do not believe that it will result in specific qualitative or quantitative benefits in practice.

Clarifying our expectations on the application of the inducement ban

34. This part of the CBA discusses changes proposed in paragraphs 3.25-3.27 above.
35. Our clarification (through amendment of the RDR adviser charging rules) that the inducement rules apply to the wider business of providing advice on RIPs repeats existing expectations included with the findings of supervisory work and the Guidance contained in FG14/1.⁶¹
36. We do not believe that our proposal to clarify this expectation through our Handbook would require any further work for firms involved and as such there should be neither new costs nor new benefits.

Guidance arising from experiences of the FCA's Advice Unit

37. This part of the CBA discusses changes proposed in Chapter 5 above.
38. As we are not making new rules, our statutory CBA requirements do not apply. We consider that our proposed Guidance (Chapter 5) supports existing FCA rules and principles by adding clarity and not creating new policy. Our proposed Guidance is not binding on firms operating in the financial advice and/or discretionary investment management sector.
39. We do not consider that we should account for costs incurred by firms knowingly not complying with our existing requirements (e.g. the rules on Suitability), so we have not quantified or considered here the costs to firms of correcting practices that do not meet the existing rules and principles.
40. Where we have made reference to new policy, introduced by MiFID II, our CBA quantification has taken place through the relevant consultation process for the rule(s) in question.⁶²

Insistent clients

Our proposed Guidance on insistent clients is based on our existing Factsheet *Pension reforms and insistent clients*. What we have proposed does not add or remove anything beyond the information in the Factsheet. As such expectations for firms are not being changed. We therefore believe that there will be no benefits or costs for the purpose of CBA.

61 www.fca.org.uk/publications/finalised-guidance/fg14-1-supervising-retail-investment-advice-inducements-and

62 Our MiFID II publications can be found here: www.fca.org.uk/mifid-ii

Annex 3

Compatibility statement

Compliance with legal requirements

1. This Annex records the FCA's compliance with a number of legal requirements applicable to the proposals in this consultation, including an explanation of the FCA's reasons for concluding that our proposals in this consultation are compatible with certain requirements under the Financial Services and Markets Act 2000 (FSMA).
2. When consulting on new rules, the FCA is required by section 138I(2)(d) FSMA to include an explanation of why it believes making the proposed rules is compatible with (a) its general duty, under s. 1B(1) FSMA, so far as reasonably possible, to act in a way which is compatible with its strategic objective and advances one or more of its operational objectives, and (b) its general duty under s. 1B(5)(a) FSMA to have regard to the regulatory principles in s. 3B FSMA. The FCA is also required by s. 138K(2) FSMA to state its opinion on whether the proposed rules will have a significantly different impact on mutual societies as opposed to other authorised persons and, if so, details of the difference.
3. This Annex also sets out the FCA's view of how the proposed rules are compatible with the duty on the FCA to discharge its general functions (which include rule-making) in a way which promotes effective competition in the interests of consumers (s. 1B(4)). This duty applies in so far as promoting effective competition in the interests of consumers is compatible with advancing the FCA's consumer protection or integrity objectives.
4. In addition, this Annex explains how we have considered the recommendations made by the Treasury under s. 1JA FSMA about aspects of the economic policy of Her Majesty's Government to which we should have regard in connection with our general duties.
5. This Annex includes our assessment of the equality and diversity implications of these proposals.
6. Under the Legislative and Regulatory Reform Act 2006 (LRRRA) the FCA is subject to requirements to have regard to a number of high-level 'Principles' in the exercise of some of our regulatory functions and to have regard to a 'Regulators' Code' when determining general policies and principles and giving general Guidance (but not when exercising other legislative functions like making rules). This Annex sets out how we have complied with requirements under the LRRRA.

The FCA's objectives and regulatory principles: Compatibility statement

7. The proposals set out in this consultation are primarily intended to advance the FCA's operational objective of securing an appropriate degree of protection for consumers.



8. Below we explain how we have had regard to each of the eight matters listed in section 1C (2) (a) – (h) of the Financial Services and Markets Act (FSMA).
9. Although we are only required to set out an explanation with regards our proposed rules, where relevant we have also set out how we have also had regard to these principles when preparing the draft Guidance in this consultation.

The differing degrees of risk involved in different kinds of investment or other transaction

10. In line with the RAO amendment itself, our proposed rule changes apply equally to guidance with respect of any type of investment or other transaction. We consider this secures an appropriate degree of protection for consumers because while degrees of risk are involved in different kinds of investment or other transaction, consumers nevertheless need to be able to base their investment decisions on accurate and fair information provided by appropriately qualified individuals and have adequate recourse to redress where this is not the case.
11. The proposed Guidance set out in Chapter 5 is designed to support firms developing automated advice propositions on investments. As we have set out in Chapter 1, it is our intention that this will be consolidated into the Guidance we consulted on in GC 17/4. We believe that the Guidance in GC 17/4 on streamlined advice services will address this issue.

The differing degrees of experience and expertise that different consumers may have

12. We have set out in Chapter 3 that we believe that our approach will mean that guidance given by firms will generally be in scope of the Principles because we would generally expect such advice to be given in connection with, or for the purposes of, another regulated activity rather than as a standalone service. This will mean that, among other things, a firm will need to pay due regard to the interests of its customers (including potential customers) and treat them fairly and also that a firm will also need to pay due regard to the information needs of its clients (including potential clients) and communicate information to them in a way which is clear, fair and not misleading. This will help ensure that firms providing customers with guidance are treated fairly and that such customers are given adequate and clear information on which to base investment decisions.
13. We have invited input from stakeholders as to whether our expectation that the Principles will generally apply to firms giving guidance is correct and will consider our final approach in line with these comments.
14. We also believe that our approach to redress will mean that it will be more straightforward for consumers to understand what avenues of redress they may have access to, particularly for those who might have a relatively low level of expertise.
15. Although the draft Guidance on insistent clients as described in Chapter 6 does not introduce new expectations for firms, we believe that by including more prominent Guidance in our Handbook this will better enable firms to support consumers with greater levels of experience and expertise who may have their own views on what investment decisions might meet their needs.

16. Again, we believe that the Guidance in GC 17/4 will address this issue for firms developing automated advice services and that it is not a relevant consideration for the draft Guidance in Chapter 5 in isolation.

The needs that consumers may have for the timely provision of information and advice that is accurate and fit for purpose

17. We believe that our approach to qualifications as set out in chapter three will mean that individuals who provide guidance to consumers will have an adequate level of qualification and competence to provide guidance and other relevant information about investment products in an informed and accurate way.
18. As set out above, we also believe that our approach will mean that consumers will generally be protected through the requirements of PRIN which will further ensure that information provided to clients is accurate and fit for purpose. In particular we expect that guidance will generally be in scope of Principle 7 which requires that a firm must pay due regards to the information needs of its clients and that it communicates information to them in a way that is fair clear and not misleading.
19. Although they do not introduce new expectations, the Guidance we have set out on timing of disclosing of charging structures and of suitability reports in the fourth and fifth examples

The general principle that consumers should take responsibility for their decisions

20. We have considered this issue in particular in the context of the ability of recipients of guidance to refer complaints to the Financial Ombudsman Service and make claims on the FSCS. As explained in Chapter 3, our approach is designed to ensure that clients of firms that provide guidance are treated consistently and that there are not different levels of protection depending on the type of firm providing guidance.
21. Moreover it is appropriate that consumers can complain to the Financial Ombudsman Service and make claims on the FSCS where they suffer loss as a result of relying on guidance when making investment decisions.
22. Our draft Guidance on insistent clients in Chapter 6 reflects this principle by ensuring that consumers are can enter into certain transactions where a firm advises against them provided the risks are appropriately explained.

The general principle that those providing regulated financial services should be expected to provide consumers with a level of care that is appropriate, having regard to the degree of risk involved in relation to the investment or other transaction and the capabilities of the consumers in question

23. As a result of the RAO change, guidance will cease to be a regulated activity for most authorised firms. Our proposed rule changes in general do not affect those firms for which all regulated advice will remain a regulated activity.
24. The exception to this is our proposal that employees who only provide guidance no longer need to meet the specific training and competence requirements in the TC sourcebook even where the firm is not able to take advantage of the RAO amendment. As set out in Chapter 3, we believe the SYSC requirements which will apply will result in an appropriate level of qualification and expertise to ensure that staff can provide consumers with a level of care that is appropriate, are able to have regard to the risk involved in relation to the investment or other transaction and the capabilities of the consumers in question.



25. It will also mean that a consistent standard applies between the employees of those firms that do benefit from the RAO amendment and those that don't.

The differing expectation that consumers may have in relation to different kinds of investment or other transaction

26. Our general approach has been to ensure that consumers who receive guidance are treated consistently. Our approach, particularly with regards to recourse to the Financial Ombudsman Service will mean that the options for consumers receiving guidance in relation to particular types of investment will not depend simply upon the nature of the authorised firm with which they are dealing (for example, whether the firm is subject to MiFID or not).

Any information which the consumer financial education body has provided to the FCA in the exercise of the consumer financial education function

27. This matter is not relevant to these proposals as we have not been provided any relevant information by the consumer financial education body on this subject.

Any information which the scheme operator of the ombudsman scheme has provided to the FCA pursuant to section 232A

28. We have engaged with the Financial Ombudsman Service to develop our approach to DISP complaint handling and the jurisdiction of the Financial Ombudsman Service for firms that provide guidance. Our approach taken reflects the input of the Financial Ombudsman Service.
29. We consider these proposals are compatible with the FCA's strategic objective of ensuring that the relevant markets function well. Our proposals seek to reflect the narrowing of the scope of regulated activities that will be brought about as a result of the RAO amendment. But we recognise that this unregulated activity may be carried on in connection with or for the purposes of other regulated activities so our proposals seek to achieve a balance between effective consumer protection, that will boost consumer confidence in the advice market, while recognising that guidance will generally be unregulated for most authorised firms.

30. In preparing the proposals set out in this consultation, the FCA has had regard to the regulatory principles set out in s. 3B FSMA.

31. We have not been provided any relevant information by the scheme operator of the ombudsman scheme in relation to other elements of this consultation.

The need to use our resources in the most efficient and economic way

32. The approach on which we are consulting builds on existing rules and Guidance rather than creating new systems and processes.

The principle that a burden or restriction should be proportionate to the benefits

33. We believe we are putting forward a proportionate approach that sets an appropriate level of investor protection while minimising, as far as possible, burdens on firms and the impact on competition, including competitive entry.
34. As set out in Chapter 3, we believe that our approach to Financial Ombudsman Service and FSCS will not add any meaningful further burden to firms as it is our expectation that guidance would generally meet the criteria which brings any unregulated activity into scope of Financial Ombudsman Service and FSCS protection. The approach however will bring helpful clarity for firms and consumers.

35. In other areas we have taken the same approach as would generally apply to any authorised firm carrying out an unregulated activity rather than seeking to impose new burdens.

36. We believe that the proposed Guidance in Chapters 5 and 6 does not introduce any new burdens or restrictions for firms – they merely provide clarification of existing expectations.

The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term

37. Our approach has been guided by an overall objective behind FAMR of ensuring that a wider range of services will exist to support both those consumers who wish to receive a personal recommendation before investing and those who are willing to make their own investment decisions based on information provided by firms. If a greater range of consumers are able to invest then their money may be channelled more efficiently into the real economy.

The responsibilities of senior management

38. We do not believe that anything we have proposed will undermine the responsibilities of senior management. Firms' senior managers remain responsible for ensuring their processes meet relevant regulatory requirements.

39. We believe that the new Guidance that we are proposing will help set out more clearly what these responsibilities are to help senior management adhere to their responsibilities.

The desirability of recognising differences in the nature of, and objectives of, businesses carried on by different persons including mutual societies and other kinds of business organisation

40. We have sought to apply a consistent regime to the provision of guidance. This is so that the requirements depend on the service itself rather than the nature of the firm providing the service. However we recognise that firms offer a range of models for distribution of investment products to consumers and believe that the regime we have proposed will not hamper any type of firm from being able to provide guidance.

41. The new Guidance we have introduced in Chapter 5 has been developed through the experience of the Advice Unit with automated advice services in mind. The objective is to help set out more clearly how some of our regulatory expectations apply to this relatively new business model. Nevertheless as we have stated in Chapter 5, there may be read across for other business types as well.

The desirability of publishing information relating to persons subject to requirements imposed under FSMA, or requiring them to publish information

42. We do not believe that this principle is relevant in the context of these proposals.

The principle that we should exercise of our functions as transparently as possible

43. We are using this consultation paper to seek input into the approach we adopt. We invite feedback to help share the final rules and Guidance to be introduced.

44. In formulating these proposals, the FCA has had regard to the importance of taking action intended to minimise the extent to which it is possible for a business carried on (i) by an authorised person or a recognised investment exchange; or (ii) in contravention



of the general prohibition, to be used for a purpose connected with financial crime (as required by s. 1B(5)(b) FSMA).

Expected effect on mutual societies

45. The FCA does not expect the proposals in this paper to have a significantly different impact on mutual societies. We recognise that mutual societies may offer investment advice or may distribute investment products through other channels. For these activities, mutual societies would be expected to comply with our rules in the same way as other authorised firms.

Compatibility with the duty to promote effective competition in the interests of consumers

46. In preparing the proposals as set out in this consultation, we have had regard to the FCA's duty to promote effective competition in the interests of consumers.
47. Our approach to firms giving guidance have been developed to give a clear and effective regime for firms that which to offer services that support consumers making their own investment decisions so that there will be beneficial competition between firms offering different types of support for consumers who are making investment decisions.
48. Our approach with regards to qualifications and redress will mean that a consistent regime applies to all types of firm regardless of the nature of their authorisation. This will mean that one type of firm will not appear more attractive to customers – for example a customer might choose one firm where they have recourse to the Financial Ombudsman Service over another where they do not.
49. Similarly we have sought to avoid different types of firms having less prescriptive regulatory requirements for the provision of the same service. For example we have taken the same approach for qualifications for firms in scope of the RAO change as for those that are not in scope.
50. The Guidance in Chapter 5 has been designed to support the development of automated advice models. Growth in this sector will provide a new channel by which advice can be provided to consumers.

Equality and diversity

51. We are required under the Equality Act 2010 to 'have due regard' to the need to eliminate discrimination and to promote equality of opportunity in carrying out our policies, services and functions. As part of this, we conduct an equality impact assessment to ensure that the equality and diversity implications of any new policy proposals are considered.

52. The outcome of the assessment in this case is stated in paragraph 2.9 of the Consultation Paper.

Legislative and Regulatory Reform Act 2006 (LRRRA)

53. We have had regard to the principles in the LRRRA for the parts of the proposals that consist of general policies, principles or Guidance and consider that the proposals are consistent with the five LRRRA principles.
54. We have had regard to the Regulators' Code for the parts of the proposals that consist of general policies, principles or Guidance and consider that the new Guidance proposed will support authorised firms furthers the principle of ensuring clear information, Guidance and advice is available to help those we regulate meet their responsibility to comply, and that we should carry out our activities in a way that supports those we regulate to comply and grow.
55. We are holding this consultation to ensure that our approach to regulatory activities is transparent and to provide a means to engage with those we regulate and to hear their views.



Annex 4

Abbreviations in this document

AML	Anti-Money Laundering
CBA	Cost Benefit Analysis
CESR	The Committee of European Securities Regulators
COBS	Conduct of Business Sourcebook
CP	Consultation Paper
ESMA	The European Securities and Markets Authority
FAMR	Financial Advice Market Review
FCA	Financial Conduct Authority
FSCS	Financial Services Compensation Scheme
FSMA	Financial Services and Markets Act 2000
ISA	Individual Savings Account
IT	Information Technology
KFD	Key Features Document
KIID	Key Investor Information Document
MiFID I	Markets in Financial Instruments Directive (Directive 2004/39/EC)
MiFID II	Markets in Financial Instruments Directive (Directive 2014/65/EU)
MiFID Org Regulation	Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU regarding organisational requirements and operating conditions for investment firms
PERG	Perimeter Guidance Manual
PRIIPs	Packaged Retail and Insurance-Based Investment Products
PRIN	Principles for Business Sourcebook
QCF	Qualifications and Credit Framework

RAO	Regulated Activities Order
RDR	Retail Distribution Review
RIP	Retail Investment Product
SYSC	Senior Management Arrangements, Systems and Controls Sourcebook
TC	Training and Competence Sourcebook
UCITS	Undertakings for Collective Investment in Transferable Securities

We have developed the policy in this Consultation Paper 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.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

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Appendix 1

Draft Handbook text

**ADVISING ON INVESTMENTS (ARTICLE 53(1) OF THE REGULATED
ACTIVITIES ORDER) (CONSEQUENTIAL AMENDMENTS) INSTRUMENT 2017**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
 - (a) section 137A (The FCA’s general rules);
 - (b) section 137R (Financial promotion rules);
 - (c) section 137T (General supplementary powers);
 - (d) section 139A (Power of the FCA to give guidance);
 - (e) section 213 (The compensation scheme);
 - (f) section 214 (General);
 - (g) section 226 (Compulsory Jurisdiction rules);
 - (h) section 247 (Trust scheme rules);
 - (i) section 261I (Contractual scheme rules); and
 - (j) paragraph 13(4) of Schedule 17 (FCA’s rules);
 - (2) regulation 6(1) of the Open-Ended Investment Companies Regulations 2001 (SI 2001/1228); and
 - (3) the other rule and guidance-making powers and related provisions listed in Schedule 4 (Powers exercised) to the General Provisions of the FCA’s Handbook.
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 3 January 2018, immediately after the Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument 2017.

Amendments to the Handbook

- D. 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)
Glossary of definitions	Annex A
Training and Competence (TC)	Annex B
Conduct of Business sourcebook (COBS)	Annex C
Insurance Conduct of Business sourcebook (ICOBS)	Annex D
Supervision manual (SUP)	Annex E
Dispute Resolution: Complaints (DISP)	Annex F

Compensation (COMP)	Annex G
Collective Investment Schemes (COLL)	Annex H
The Perimeter Guidance manual (PERG)	Annex I
The Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD)	Annex J

Notes

- E. In this instrument, the notes (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

Citation

- E. This instrument may be cited as the Advising on Investments (Article 53(1) of the Regulated Activities Order) (Consequential Amendments) Instrument 2017.

By order of the Board

[*date*]

Annex A

Amendments to the Glossary of definitions

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

Insert the following definitions in the appropriate alphabetical positions.

business of advising the business of a firm in providing:

- (1) advice on P2P agreements;
- (2) in relation to advising on investments (except P2P agreements):
 - (a) personal recommendations;
 - (b) non-personal recommendation advice.

non-personal recommendation advice

- (1) advice given to a person which is the regulated activity specified in article 53(1) of the Regulated Activities Order and which is not a personal recommendation.
- (2) for the purposes of (1), article 53(1A) of the Regulated Activities Order is to be disregarded.

Amend the following definitions as shown.

advising on investments (except P2P agreements)

the regulated activity, specified in article 53(1) of the Regulated Activities Order (Advising on investments), which is in summary:

advising a person if the advice is:

- (1) given to ~~the~~ a person in their capacity as an investor or potential investor, or in their capacity as agent for an investor or a potential investor; and
- (2) advice on the merits of their doing any of the following (whether as principal or agent):
 - (a) buying, selling, subscribing for, exchanging, redeeming, holding or underwriting a particular investment which is a security, structured deposit or relevant investment (that is, any designated investment (other than a P2P

agreement), funeral plan contract, pure protection contract, general insurance contract, right to or interests in a funeral plan contract or structured deposit); 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*,

but excluding the provision of non-personal recommendation advice where the person providing that advice is appropriately authorised (see article 53(1A) to (1D) of the Regulated Activities Order).

advising on investments

- (1) (except in SUP 10A (Approved Persons), ~~and APER and CONRED 2~~) the *regulated activities*, specified in articles 53(1) to (1D) and article 53(2) of the Regulated Activities Order (Advising on investments), which are:

...

- (2) (in SUP 10A (Approved Persons) and APER) the *regulated activities* specified in articles 53(1) to (1D) and article 53(2) (Advising on investments) of the Regulated Activities Order. For these purposes, *advising on investments* includes any activities that would be included but for the exclusion in article 72AA (Managers of UCITS and AIFs) of the *Regulated Activities Order*.

- (3) (in CONRED 2) has the meaning in force on 1 April 2013.

advising on pension transfers and opt-outs

any of the following *regulated activities*:

- (a) *advising on investments (except P2P agreements) in respect of pension transfers and pension opt-outs* (article 53(1) to (1D));
- (b) ...

designated investment business

any of the following activities, specified in Part II of the *Regulated Activities Order* (Specified Activities), which is carried on by way of business:

...

- (m) *advising on investments (except P2P agreements)* (article 53(1) to (1D)), but only in relation to *designated investments* (other than *P2P agreements*); for the purposes of the *permission* regime, this includes:

- ...
- ...
- insurance mediation activity* any of the following *regulated activities* carried on in relation to a *contract of insurance* or rights to or interests in a life policy:
- ...
- (e) *advising on investments (except P2P agreements)* (article 53(1) to (1D));
- ...
- personal recommendation* (1) (except in *CONRED* and in relation to *advising on investments (except P2P agreements)*):
- a recommendation that is ~~*advice on investments*~~ *advice on P2P agreements, advice on conversion or transfer of pension benefits, or advice on a home finance transaction* and is presented as suitable for the person to whom it is made, or is based on a consideration of the circumstances of that person.
- A recommendation is not a personal recommendation if it is issued exclusively to the public.
- For the purposes of this definition, references in the *Handbook* to making *personal recommendations* on, or in relation to, *P2P agreements* should be understood as referring to making *personal recommendations* involving *advice on P2P agreements*.
- ~~[Note: article 9 of the *MiFID Org Regulation*]~~
- (2) (in *CONRED*) a recommendation that is *advice on investments* and:
- ...
- (3) (in relation to *advising on investments (except P2P agreements)*) a recommendation:
- (a) made to a person in their capacity as an investor or potential investor, or in their capacity as agent for an investor or a potential investor;
- (b) which constitutes a recommendation to them to do any of the following (whether as principal or agent):

- (i) buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular investment which is a security, a structured deposit or a relevant investment (that is, any designated investment (other than a P2P agreement), funeral plan contract, pure protection contract, general insurance contract, right to or interests in a funeral plan contract or structured deposit); or
 - (ii) exercise or not exercise any right conferred by such a relevant investment to buy, sell, subscribe for, exchange or redeem such an investment;
- (c) that is:
- (i) presented as suitable for the person to whom it is made; or
 - (ii) based on a consideration of the circumstances of that person; and
- (d) that is not issued exclusively to the public.

[Note: article 9 of the MiFID Org Regulation and article 53(1C) of the Regulated Activities Order]

Annex B

Amendments to the Training and Competence sourcebook (TC)

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

2 Competence

2.1 Assessing and maintaining competence

...

Supervisors

2.1.4 G *Firms* should ensure that those supervising *employees* carrying on an activity in *TC* Appendix 1 have the necessary coaching and assessment skills as well as technical knowledge and experience to act as a competent supervisor and assessor. In particular *firms* should consider whether it is appropriate to require those supervising *employees* not assessed as competent to attain an appropriate qualification as well except where the employee is giving ~~advice~~ personal recommendations on retail investment products or advising on *P2P* agreements, see *TC* 2.1.5R.

2.1.5 R Where an *employee* has not been assessed as competent to do so and:

- (1) gives ~~advice~~ personal recommendations on retail investment products to retail clients, the firm must ensure that the individual supervising and assessing that *employee* has attained an appropriate qualification; or
- (2) gives advice on *P2P* agreements to retail clients, the firm must ensure that the individual supervising and assessing that *employee* has attained an appropriate qualification for giving ~~advice~~ personal recommendations on retail investment products to retail clients.

...

Knowledge and competence requirements when advising on *P2P* agreements

...

2.1.5H R A firm must not, for the purposes of *TC* 2.1.1R, assess an *employee* as competent to carry on activity 9A in *TC* Appendix 1 until the *employee* has attained each module of an appropriate qualification for giving ~~advice~~ personal recommendations on retail investment products to retail clients.

...

Qualification requirements before starting activities

- 2.1.6 R A *firm* must ensure that an *employee* does not carry on an activity in *TC* Appendix 1 (other than an overseeing activity) for which there is a qualification requirement without first attaining the relevant regulatory module of:
- ...
- (2) (in respect of *advising on P2P agreements* (activity 9A in *TC* Appendix 1)) an appropriate qualification for giving ~~advic~~
personal recommendations on retail investment products to retail clients.
- 2.1.7 R A *firm* must ensure that an *employee* does not carry on any of the following activities without first attaining each module of an appropriate qualification:
- ...
- (1A) ~~advising~~ giving personal recommendations on and dealing in securities which are not *stakeholder pension schemes*, *personal pension schemes* or *broker funds*;
- (1B) ~~advising~~ giving personal recommendations on and dealing in derivatives;
- ...
- ...

Exemption from appropriate qualification requirements

- 2.1.9 R ...
- (2) The conditions are that a *firm* should be satisfied that an *employee*:
- (a) has at least three years' up-to-date relevant experience in the activity in question obtained while employed outside the *United Kingdom*;
- (b) has not previously been required to comply fully with the relevant qualification requirements in *TC* 2.1.1R; and
- (c) has passed the relevant regulatory module of an appropriate qualification;
- but (b) and (c) do not apply to an *employee* who is benefiting from the "30-day rule" exemption in *SUP* 10A.10.8R or the "14-day rule" exemption in *SYSC* 5.2.28AR, unless the *employee* benefits from that rule because he is ~~advising~~ giving personal

recommendations to retail clients on retail investment products, is providing advice on P2P agreements to retail clients or is a broker fund adviser.

- (3) The relevant activities are:
 - (a) ~~advising on investments (except P2P agreements) which are giving personal recommendations on retail investment products, if that advice is given to retail clients; or~~

...

...

App 1.1 Activities and Products/Sectors to which TC applies subject to TC Appendices 2 and 3

App
1.1.1R

Activity	Products/Sectors	Is there an appropriate qualification requirement
<i>Designated investment business carried on for a retail client</i>		
...		
Advising <u>or giving personal recommendations</u> (as relevant)	2. Securities <u>Giving personal recommendations on securities</u> which are not <i>stakeholder pension schemes, personal pension schemes or broker funds</i>	Yes
	3. Derivatives <u>Giving personal recommendations on derivatives</u>	Yes
	4. Retail investment products <u>Giving personal recommendations on retail investment products</u> which are not <i>broker funds</i>	Yes

	5.	<u>Giving personal recommendations on Friendly Society life policies</u> where the <i>employee</i> is not reasonably expected to receive a remuneration of greater than £1000 a year in respect of such sales	No
	6.	<u>Giving personal recommendations on Friendly Society tax-exempt policies</u> (other than <i>Holloway sickness policies</i> where the <i>Holloway policy special application conditions</i> are met)	Yes
	7.	Long-term care insurance contracts <u>Giving personal recommendations on long-term care insurance contracts</u>	Yes
	8.	Investments <u>Giving personal recommendations on investments</u> in the course of <i>corporate finance business</i>	Yes
	9.	<i>Advising on syndicate participation at Lloyd's</i>	Yes
	9A.	<i>Advising on P2P agreements</i>	Yes
...			
Advising <u>Giving personal</u>	12.	Securities <u>Giving personal</u>	Yes

<u>recommendations and dealing</u>		<i>recommendations on and dealing in securities which are not stakeholder pension schemes, personal pension schemes or broker funds</i>	
	13.	Derivatives <u>Giving personal recommendations on and dealing in derivatives</u>	Yes
...			
Non-investment <i>insurance business</i> carried on for a <i>consumer</i>			
Advising <u>Giving personal recommendations</u>	24.	Non-investment insurance contracts <u>Giving personal recommendations on non-investment insurance contracts</u>	No
...			
Notes :			
1.	In the Appendix the heading and types of business specified in the headings are to be read in conjunction with the paragraphs appearing beneath them.		
2.	Thus, for example, paragraph 24, consistent with the heading above it, refers only to advice on <u>personal recommendations given in relation to non-investment insurance contracts given to a consumer.</u>		
2A.	...		
...			

...

App 4.1 Appropriate Qualification tables

App
4.1.1E

Part 1: Activities

TC App 4.1 is relevant to TC 2.1.10E (selecting an appropriate qualification).

Part 1: Activities

Note: ...

Part 1A: The Retail Distribution Review activities (RDR activities)

Activity Number	RDR Activity		
2	Advising <u>Giving personal recommendations on securities</u> which are not <i>stakeholder pension schemes, personal pension schemes or broker funds</i>		
3	Advising <u>Giving personal recommendations</u> on <i>derivatives</i>		
4 and 6	(4) Advising <u>Giving personal recommendations</u> on <i>retail investment products</i> which are not <i>broker funds</i> and (6) advising giving personal recommendations on <i>friendly society tax-exempt policies</i> (other than Holloway sickness policies <u>Holloway sickness policies</u> where the Holloway policy special application conditions <u>Holloway policy special application conditions</u> are met)		
12	Advising <u>Giving personal recommendations</u> on and dealing in <i>securities</i> which are not <i>stakeholder pension schemes, personal pension schemes or broker funds</i>		
13	Advising <u>Giving personal recommendations</u> on and dealing in <i>derivatives</i>		

Extent to which the qualification meets the qualification requirement in relation to RDR activities

4.1.1AE ...

Part 1B: The non-Retail Distribution Review activities (non-RDR activities)

Activity Number	Non-RDR Activity (non-overseeing activity)		
7	Advising <u>Giving personal recommendations</u> on <i>long-term care insurance contracts</i>		
8	Advising <u>Giving personal recommendations</u> on <i>investments</i> in the course of <i>corporate finance business</i>		
...			

Annex C

Amendments to the Conduct of Business sourcebook (COBS)

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

1 Application

1.1 General application

...

1 Application (see COBS 1.1.2R)

Annex

1

Part 1: What?

Modifications to the general application of COBS according to activities

...			
6	Use of third party processors in life insurance mediation activities		
6.1	R	If a <i>firm</i> (or its <i>appointed representative</i> or, where applicable, its <i>tied agent</i>) outsources <i>insurance mediation activities</i> to a <i>third party processor</i> :	
		...	
		(2)	any <i>COBS rule</i> requiring the <i>third party processor's</i> identity to be disclosed to <i>clients</i> must be applied as a requirement to disclose the <i>firm's</i> identity;
		unless the <i>third party processor</i> is advising on investments <u>giving personal recommendations</u> in relation to <u>advising on investments</u> (except <u>P2P agreements</u>).	
...			

...

2 Conduct of business obligations

2.1 Acting honestly, fairly and professionally

The client's best interests rule

2.1.1 R (1) A *firm* must act honestly, fairly and professionally in accordance with

the best interests of its *client* (the *client's best interests rule*).

(2) This *rule* applies ~~in relation to *designated investment business* carried on:~~

- (a) in relation to *designated investment business* carried on for a *retail client*; and
- (b) in relation to *MiFID*, *equivalent third country* or *optional exemption business*, for any ~~other~~ *client*.

...

2.3 Inducements relating to business other than MiFID, equivalent third country or optional exemption business

...

2.3.11 G ...

Providing credit and other benefits to firms that ~~advise~~ give personal recommendations on retail investment products or P2P agreements

...

2.3A Inducements relating to MiFID, equivalent third country or optional exemption business

...

Inducements relating to the provision of independent advice, restricted advice and portfolio management services to retail clients in the United Kingdom

2.3A.1 R (1) ... 5

(2) The *firm* must not accept any fees, commission, monetary or non-monetary benefits which are paid or provided by:

- (a) any third party; or
- (b) a *person* acting on behalf of a third party,

in relation to the provision of the relevant service to the *client*.

(2A) Where the *firm* provides *independent advice* or *restricted advice*, the rule in (2) applies in connection with:

- (a) the *firm's business of advising*; or
- (b) any other related service, where 'related service' has the same meaning as in COBS 6.1A.6R.

...

...

4. Communicating with clients, including financial promotions

4.1 Application

Who? What?

4.1.1 R This chapter applies to a *firm*:

(1) communicating with a *client* in relation to its *designated investment business* (other than *MiFID, equivalent third country or optional exemption business*);

...

(3) when a *MiFID investment firm* or a *credit institution* is communicating in connection with selling, or advising *clients* in relation to, *structured deposits* as specified by *COBS 1.1.1AAR*;

(4) communicating with a *client* in relation to its *MiFID, equivalent third country or optional exemption business*.

...

4.2 Fair, clear and not misleading communications

The fair, clear and not misleading rule

4.2.1 R (1) A *firm* must ensure that a communication or a *financial promotion* is fair, clear and not misleading.

(2) This *rule* applies in relation to:

(a) a communication by the *firm* to a *customer* in relation to *designated investment business* which is not *MiFID, equivalent third country or optional exemption business*, other than a *third party prospectus*;

(aa) a communication to an *eligible counterparty* that is in relation to *MiFID or equivalent third country business*, other than a *third party prospectus*;

(ab) a communication by the *firm* to a *customer* in relation to *MiFID, equivalent third country or optional exemption business*, other than a *third party prospectus*;

...

...

6 Information about the firm, its services and remuneration

...

6.1A Adviser charging and remuneration

Application – Who? What?

...

- 6.1A.1 G *Guidance on the regulated activity of advising in relation to a new or existing investment can be found in PERG 8.24 to ~~PERG 8.29~~ PERG 8.30B. Although the guidance in PERG 8.29.7G relates to advising on investments (except P2P agreements) under article 53(1) of the Regulated Activities Order, exactly the same answers apply to a personal recommendation because the examples given relate to the relationship between a firm and a particular client and advice given to that specific client. 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 describes what is meant by a personal recommendation in the context of article 53(1) to (1D) of the Regulated Activities Order; it will also be relevant to a firm which makes a personal recommendation in relation to a retail investment product. The ~~guidance~~ guidance in PERG 8.24 to ~~PERG 8.29~~ PERG 8.30B does not apply to the regulated activity of advising on P2P agreements.*

...

Requirement to be paid through adviser charges

- 6.1A.4 R Except as specified in COBS 6.1A.4AR, COBS 6.1A.4ABR, COBS 6.1A.4ACG, COBS 6.1A.4BR and COBS 6.1A.5AR(1), a firm must:
- (1) ...; and
 - (2) not solicit or accept (and ensure that none of its associates solicits or accepts) any other commissions, remuneration or benefit of any kind in relation to the personal recommendation connection with the firm's business of advising or any other related service, regardless of whether it intends to refund the payments or pass the benefits on to the retail client; and
 - (3) ...

...

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.1 G *Guidance on the regulated activity of advising in relation to a new or existing investment can be found in PERG 8.24 to ~~PERG 8.29~~ PERG 8.30B. Although the guidance in PERG 8.29.7G relates to advising on investments (except P2P agreements) under article 53(1) of the Regulated Activities Order, exactly the same answers apply to a personal recommendation because the examples given relate to the relationship between a firm and a particular client and advice given to that specific client. 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 describes what is meant by a personal recommendation in the context of article 53(1) to (1D) of the Regulated Activities Order; it will also be relevant to a firm making a personal recommendation 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.*
- A

...

Requirement not to offer commissions

- 6.1B.5 R (1) Except as specified in COBS 6.1B.5AR, a firm must not offer or pay (and must ensure that none of its associates offers or pays) any commissions, remuneration or benefit of any kind to another firm, or to any other third party for the benefit of that firm, in ~~relation to a personal recommendation~~ connection with that firm's business of advising (or any related services), except those that facilitate the payment of adviser charges from a retail client's investments in accordance with this section.
- (2) ...

...

Requirements on firms facilitating the payment of adviser charges

...

- 6.1B.1 G COBS 6.1B.9R(3) does not prevent a firm, if this is in the retail client's best interests, from entering into an agreement with another firm which is providing a personal recommendation to a retail client, or with a retail client of such a firm, to provide it with credit separately in accordance with the rules and guidance on providing credit and other benefits to firms that advise provide personal recommendations on retail investment products or P2P agreements (see COBS 2.3.12E, COBS 2.3.12AG, COBS 2.3A.27E and COBS 2.3A.28G).
- 1

...

16 Reporting information to clients

...

16.6 Communications to clients – life insurance, long term care insurance and income withdrawals

...

Income withdrawals

16.6.8 At intervals no longer than 12 *months* from the date of an election by a *retail client* to make *income withdrawals* or one-off, ad-hoc or regular *uncrystallised funds pension lump sum payments* ~~payments~~ payments, the relevant *operator* of a *personal pension scheme* or *stakeholder pension scheme* must:

- (1) ...; and
- (2) inform the *retail client* how to obtain a personal recommendation relating to advice on investments (except P2P agreements) in respect of his ~~income withdrawals~~ income withdrawals, and that it would be in his best interests to do so.

22 Restrictions on the distribution of certain regulatory capital instruments

...

Further requirements for non-advised, non-MiFID sales

22.2.3 R (1) The requirements in (2) and (3) must be met if:

- (a) ...
- (b) the *retail client* is not otherwise receiving ~~advice~~ a personal recommendation on the *mutual society share* from the *firm* or another *person*.

...

...

Annex D

Amendments to the Insurance Conduct of Business sourcebook (ICOBS)

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

4 Information about the firm, its services and remuneration

4.1 General requirements for insurance intermediaries

...

Scope of service

4.1.6 R ...

- (2) A *firm* that does not ~~advise~~ advise on the basis of a fair analysis of the market must inform its *customer* that he has the right to request the name of each *insurance undertaking* with which the *firm* may and does conduct business. A *firm* must comply with such a request.

[**Note:** article 12(1) of the *Insurance Mediation Directive*]

...

Annex E

Amendments to the Supervision manual (SUP)

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

10A FCA Approved Persons

...

10A Frequently asked questions

**Annex
1G**

...

31 ...

...

How does the customer function relate to the training and competence requirements?			
Activity	Products/sectors in TC Appendix 1	FCA controlled function	SUP
Advising only <u>or giving</u> <u>personal recommendations</u> (as relevant)	2-9A	<i>customer function</i> (CF 30)	10A.10.4 R
Undertaking an activity	10-11		
Advising <u>Giving</u> <u>personal recommendations</u> and dealing	12-13		
...			

...

12 Appointed Representatives

...

12.2 Introduction

...

Business for which an appointed representative is exempt

- 12.2.7 G (1) The *Appointed Representatives Regulations* are made by the Treasury under sections 39(1), (1C) and (1E) of the *Act*. These regulations describe, among other things, the business for which an *appointed representative* may be exempt or to which sections 20(1) and (1A) and 23(1A) of the *Act* may not apply, which is business which comprises any of:

...

- (i) *advising on investments (except P2P agreements)* (article 53(1) to (1D) of the *Regulated Activities Order*) (that is in summary, advising on any *designated investment* (other than a *P2P agreement*), *structured deposit*, *funeral plan contract*, *pure protection contract*, *general insurance contract* or right to or interest in a funeral plan);

...

...

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

The permission that the firm needs

- 12.4.1A G The effect of sections 20 (Authorised persons acting without permission) and 39(4) (Exemption of appointed representatives) of the *Act* is that the *regulated activities* covered by an *appointed representative's* appointment need to:
- (1) fall within the scope of the *principal's permission*; or
 - (2) be excluded from being *regulated activities* when carried on by the *principal*, for example because:
 - (a) they fall within article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party); ~~or~~
 - (b) ~~because~~ they constitute *CBTL business* and the *principal* is a *CBTL firm*; or
 - (c) the *principal* is appropriately authorised (see article 53(1A) of the *Regulated Activities Order*).

...

App 3 Guidance on passporting issues

...

App 3.9 Mapping of MiFID, CRD, AIFMD, UCITS Directive, MCD and Insurance Mediation Directive to the Regulated Activities Order

...

Services set out in Annex I to MiFID

App
3.9.5G

Table 2: <i>MiFID investment services and activities</i>		Part II RAO <u>Investments Activities</u>	Part III RAO Investments
...			
	Ancillary services		
...			
5.	Investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments	Article 53(1), 64 (<u>see Note 4</u>)	Article 76-81, 82B, 83-85, 89
...			
...			
<p><u>Note 4: A firm which provides investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments does not need permission under article 53(1) of the Regulated Activities Order if it is appropriately authorised (see article 53(1) to (1D) of the Regulated Activities Order).</u></p>			

...

Annex F

Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

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

2 Jurisdiction of the Financial Ombudsman Service

...

2.3 To which activities does the Compulsory Jurisdiction apply?

Activities by firms

- 2.3.1 R The *Ombudsman* can consider a *complaint* under the *Compulsory Jurisdiction* if it relates to an act or omission by a *firm* in carrying on one or more of the following activities:

...

(7) giving non-personal recommendation advice;

or any ancillary activities, including advice, carried on by the *firm* in connection with them.

...

Annex G

Amendments to the Compensation sourcebook (COMP)

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

5 Protected claims

...

5.5 Protected investment business

...

Advising without a personal recommendation

5.5.4 R The FSCS must treat a claim relating to advice in relation to a designated investment that falls outside article 53(1) of the Regulated Activities Order by virtue of article 53(1A) of that Order as being ‘in connection with protected investment business’ for the purposes of COMP 5.2.1R(3) where the relevant person giving the advice, at the time the act or omission giving rise to the claim took place:

- (1) had, or required, permission to carry on; or
- (2) (in the case of an appointed representative) was exempt from the general prohibition in respect of,

an activity that was designated investment business.

...

5.7 Protected non-investment insurance mediation

...

Advising without a personal recommendation

5.7.5 R The FSCS must treat a claim relating to advice on a relevant general insurance contract or a pure protection contract (which is not a long-term insurance contract or a reinsurance contract) that falls outside article 53(1) of the Regulated Activities Order by virtue of article 53(1A) of that Order as being ‘in connection with protected non-investment insurance business’ for the purposes of COMP 5.2.1R(5) where the relevant person giving the advice, at the time the act or omission giving rise to the claim took place:

- (1) had, or required, permission to carry on; or
- (2) (in the case of an appointed representative) was exempt from the general prohibition in respect of,

an activity that was *non-investment insurance business*.

Annex H

Amendments to the Collective Investment Schemes sourcebook (COLL)

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

6 Operating duties and responsibilities

...

6.9 Independence, names and UCITS business restrictions

Restrictions of business for UCITS management companies

6.9.9 R A *UCITS management company* must not engage in any activities other than:

...

(5) ~~*advising on investments where:*~~ investment advice concerning *financial instruments* where the *firm* has permission for the activity in (4); and

(a) ~~;~~ ~~and~~

(b) ~~each of the instruments are *financial instruments*~~

...

Annex I

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

...

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*.

...

7 Periodical publications, news services and broadcasts: applications for certification

...

7.3 Does the activity require authorisation?

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) ~~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*.

...

7.4 Does the article 54 exclusion apply?

...

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*. (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.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

- 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 If a person wishes to give advice without being authorised, the definition of advising on investments (except P2P agreements) in PERG 8.24.1G is the one to consider. It is not relevant whether or not the advice is a personal recommendation.
- 8.24.1C G (1) If a firm that is not appropriately authorised (see PERG 8.24.1AG for what this means) wants to give non-personalised advice (see (5)), it will need permission for advising on investments (except P2P agreements).
- (2) Its permission should of course also include advising on investments (except P2P agreements) if it wants to give any other kind of advice coming within advising on investments (except P2P agreements).
- (3) If a firm in (1) only wants to give non-personalised advice, it may apply for an appropriate limitation.
- (4) For a firm that is appropriately authorised:
- (a) it may give non-personalised advice without the need to include that activity 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).
- (5) In this paragraph non-personalised advice means advice that:
- (a) is covered by PERG 8.24.1G; but
- (b) is not a personal recommendation.
- 8.24.1D 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.
- ...
- 8.24.3 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)* in *PERG 8.24.1G*.
- (3) *PERG 8.30B* explains what a *personal recommendation* is.
- (4) In addition, under article 52A of the *Regulated Activities Order*, ~~providing~~ 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 to continue or cease to be a member of a particular Lloyd's syndicate, is a regulated activity.

...

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 that actions carried out by a firm that are preparatory to carrying on a regulated activity are an integral part of that activity. Therefore if a firm 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 a 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) 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.

...

- 8.28.5 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 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.
- 8.28.8 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 manager, in his capacity as such, 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 *buying, 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 <i>sell</i> 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* with a view to facilitating the selection by that *person* of 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 to 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 judgement 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.
 - (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 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 that the *firm* is doing. A description of a product's investment objectives 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 that 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 in 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 advising on the merits of buying a particular *investment* by applying its skill and judgment to determine what product a *person* with a particular risk appetite should invest in.
 - (5) It is the combination of self-generated rankings, combined with 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)*).

- 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) In these scenarios the result is that it is 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 table explain which part of the table is 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”, published by the Committee Of European Securities Regulators (now *ESMA*) (Ref.: CESR/10-293).

Examples

- 8.30B.5 G *PERG 8 Annex 1* sets out some examples of what is and is not a *personal recommendation*.

Relevance of the guidance elsewhere in this chapter

- 8.30B.6 G (1) *PERG 8.25* to *PERG 8.30A* deal with the general meaning of *advising on investments (except P2P agreements)* in *PERG 8.24.1G*. 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*.

- 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;
 - (d) be advice (that is, not just information), as described in *PERG* 8.28;
 - (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, with certain exceptions, make no difference to whether or not the communication comes within *PERG* 8.30B.2G(1) and (2), as described in *PERG* 8.30;
 - (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).

Recommendation presented as suitable

- 8.30B.8 G An *investment* 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 *PERG* 8.30B.2G(3)(a).
- 8.30B.9 G (1) However, it is not necessary for a *firm* to tell a customer explicitly that a recommendation it is making is suitable for the customer in order for it to be a *personal recommendation*. If the *firm* implicitly presents an *investment* to the customer as suitable, that can still be a *personal recommendation*.
- (2) For example, several *investments* might be presented, with one of them highlighted for the customer by a phrase such as “people like you tend to buy this product”.
- 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.

The same recommendation is sent to several customers

8.30B.16 G If a *firm* makes a recommendation to multiple customers, that does not automatically mean that it is not a *personal recommendation*.

8.30B.17 G In order to assess whether a communication sent 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) The way the *firm* selects the customers to whom the message is relevant.
- (2) 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*.
- (3) 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.

- (4) The key factor here is how the recommendation would appear to a reasonable investor.

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 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, journal, magazine, publication, internet communication addressed 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 not a *personal recommendation* on the grounds that it is made to the public.

(2) Therefore, for instance, while advice through 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*.

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 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 need 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. 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 does not want 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 argument that an investment objective such as riskiness cannot be part of the customer's personal circumstances. Such an objective can form part of the customer's personal circumstances.
- (2) *PERG* 8.30B.28G is not based on the argument that there is no *personal recommendation* where the advice is about whether a product meets the customer's objectives rather than 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, 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 input from the customer is more extensive than just inputting their risk appetite, and the way that the customer's various inputs interact on the website is much more complicated, the output from the website may be a *personal recommendation*.
- (2) 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).
- (3) 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. Thus 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.
- (c) Either explicitly or implicitly the output is presented as meeting the customer's requirements and wishes.
- 8.30B.34 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

Notes:

- (1) The column in the tables of examples headed ‘Whether recommendation is personalised’ is about whether the conditions in *PERG* 8.30B.2G(3) and (4) (Basic definition of personal recommendation) are met.
- (2) The column in the table of examples headed ‘Regulated advice or not’ is about whether:
 - (a) the conditions in *PERG* 8.30B.2G(1) and (2) (Basic definition of personal recommendation) are met; and
 - (b) a *person* is *advising on investments (except P2P agreements)* under the definition in *PERG* 8.24.1G (definition of advice that does not refer to a *personal recommendation*).
- (3) As explained in *PERG* 8.30B.6G, the fact that the table says that a particular example involves regulated advice does not mean that it involves a *personal recommendation*.
- (4) The column headed ‘Whether recommendation is personalised’ is marked ‘N/A’ whenever the column headed ‘Regulated advice or not’ says that there is no regulated advice. This is because in those circumstances there is no *personal recommendation* and so the question of whether or not the conditions in *PERG* 8.30B.2G(3) and (4) are met does not arise.

(A) Website without filtering with generic information		
Example	Whether recommendation is personalised	Regulated advice or not
<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>	N/A	Not regulated advice because simply giving information without making any comment or value judgement on its relevance to decisions which an investor may make does not involve advising on investments (see <i>PERG 8.28.2G</i>).

(B) Website without filtering but which classifies the available products		
Example	Whether recommendation is personalised	Regulated advice or not
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>(1) <i>Firm B</i> ranks its products 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 disclosure material). For example a list of funds' riskiness based on the <i>firm's</i> analysis and metrics.</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 their personal circumstances. The customer reads both sets of information</p>	<p>Likely to be regulated advice.</p> <p>Please see the reasons in <i>PERG 8.30A.14G</i>.</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 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>(list of products and explanatory material) and makes any investment decision on that basis.</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 suitable for long- or short-term investment. <p>For example, each fund may have three boxes next to it on the website. One has a riskiness rating. One box 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>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>N/A</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, 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 advice and only 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>Likely to be regulated advice, for the same reason as in example (B1).</p> <p>The term 'good value' is itself implicit advice on the merits of buying. It is also a strong example of a classification factor based on judgment and skill rather than simple objective facts.</p>

(C) Website with pop-up boxes		
Example	Whether recommendation is personalised	Regulated advice or not
<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>N/A</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		
Example	Whether recommendation is personalised	Regulated advice or not
<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>N/A</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>
<p>(2) The filtering is based on riskiness as described in example (B1).</p>	<p>Not a <i>personal recommendation</i>, for the reasons in <i>PERG</i> 8.30B.28G.</p>	<p>Likely to be regulated advice, for the same reason as in example (B1).</p>

<p>(3) The filtering is based on a number of factors as described in example (B2).</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (D2).</p> <p>The fact that there are several filtering factors does not mean that the approach in <i>PERG 8.30B.33G</i> (multiple customer inputs means that there is a <i>personal recommendation</i>) applies. If the way that the various inputs in this example (D3) interact on the website is still straightforward, <i>PERG 8.30B.33G</i> does not apply.</p>	<p>Likely to be regulated advice, for the same reason as example (B1).</p>
<p>(3) The filtered results are ranked as described in example (B3).</p>	<p>N/A</p>	<p>Likely not to be regulated advice, for the reasons in example (B3)</p>
<p>(4) The filtered results are ranked in accordance with the ratings of a third party as described in example (B4).</p>	<p>N/A</p>	<p>Likely not to be regulated advice, for the reasons in example (B4)</p>
<p>(5) The filtered results are ranked in the way described in example (B5).</p>	<p>Not a <i>personal recommendation</i>, for the same reason as in example (D2).</p>	<p>Likely to be regulated advice, for the same reason as example (B5).</p>
<p>(6) Materials including narrative on investment risk alongside a risk profiling tool are used to help educate a customer make a decision on their investment.</p>	<p>N/A</p>	<p>Not likely to be regulated advice. The reason is the same as example (A).</p>

(E) Guided sales and limited advice		
Example	Whether recommendation is personalised	Regulated advice or not
<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; ● 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 longer 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>This is a <i>personal recommendation</i>, for the reasons in <i>PERG</i> 8.30B.33G.</p>	<p>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>
<p>(2) <i>Firm F</i> provides advice on a limited straightforward issue at the request of the customer, such as which ISA 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. It is included to make a point about example (E1). The answer to example E1 is not based on the approach</p>	<p>Likely to be regulated advice, as all the elements in <i>PERG</i> 8.24.2G are met.</p>

	<p>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.</p>
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(F) Miscellaneous		
Example	Whether recommendation is personalised	Regulated advice or not
<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 ISA with the <i>firm</i> and who have not used their entire ISA 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 ISA wrapper.</p>	N/A	<p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information is factual (the amount of the unused ISA allowance) and the tax benefits of ISAs.</p> <p>The same answer would apply whether the <i>firm</i> has a single ISA product or several. As long as the information is presented neutrally, the communication does not implicitly recommend that the customer buy the <i>firm's</i> ISA.</p>

<p>(2) A <i>firm</i> sends a communication to all of its customers who hold a self-invested personal pension 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>	N/A	<p>Not likely to be regulated advice, as long as this information is presented neutrally.</p> <p>The information is factual (the benefits of pensions).</p> <p>A factor that would normally point towards this being regulated advice is that the communication is made in the context of a possible purchase of a particular <i>investment</i> (a new payment into the customer's existing pension fund). However, in this example:</p> <ul style="list-style-type: none"> ● The <i>firm</i> has contacted the customer on its own initiative. The customer is not looking for advice. ● The information is presented neutrally. ● What the <i>firm</i> says is tentative. 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.
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		<ul style="list-style-type: none"> ● The information is about the benefits of pensions generally not the benefit of this particular pension scheme. ● It is clear to the customer that there are a large number of other factors to consider. <p>This general context means that there is not an implicit recommendation.</p>
<p>(3) A customer is speaking with a <i>firm</i>. The customer tells the <i>firm</i> that they have a number of small pension pots with a range of providers that they would like to consolidate.</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 them to consider their pension holistically but that they should take advice from a financial adviser before doing so as the adviser will be able to consider whether any existing pensions have valuable benefits that could be lost if transferred.</p>	<p>N/A</p>	<p>Consolidating pension pots involves <i>buying</i> and <i>selling investments</i>.</p> <p>This is similar to example (F2) as the information is factual (the benefits of consolidating pensions) and the information is given in the context of a possible sale. 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 example (F2) as long as it is clear to the customer that they are not getting advice to consolidate.</p>

<p>(4) 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 – for example 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>	N/A	<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 not specific enough to amount to a recommendation to sell particular <i>investments</i> in the customer's existing portfolio.</p>
<p>(5) 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 are not suitable for their needs. It explains:</p> <ul style="list-style-type: none"> ● The products the customer holds are poorly diversified. ● The products have underperformed compared to their benchmarks. ● The <i>firm</i> believes that the products are not suitable for what they understand the customer's investment purpose to be (for example 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>If this does involve regulated advice 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 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>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 regulated advice.</p>

<p>(6) <i>Firm F</i> is a pension 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 sale literature specifically explains this.</p>	N/A	This will generally not be regulated advice, for the same reason as in <i>PERG</i> 8.30A.12G.
<p>(7) A customer contacts a <i>firm</i> to purchase a specific investment fund on an execution-only basis. Over the course of the 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>	N/A	<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> 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>(8) A customer over the age of 55 contacts a <i>firm</i> and would like to take out an annuity. However they only have a very small pension fund which will only generate an annuity income of a few pounds a month.</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> signposts sources of information that set out options available including an option to take advice. The <i>firm</i> leaves it to the customer to decide whether or not to take out the annuity.</p>	N/A	<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>Drawing attention to the amount of income under the annuity is not likely to be regulated advice not to buy the annuity, as long as this information is presented neutrally.</p>

<p>(9) A <i>firm</i> is approached by one of its customers. The customer wishes to draw down part of their pension 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 pension product also does not offer the facility to set up an income.</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 then they will need to transfer to a different pension 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.</p>	N/A	<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>(10) 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 site 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>	N/A	<p>This will generally not be regulated advice:</p> <ul style="list-style-type: none"> ● 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. <p>The calculator is in effect a method of organising information that the customer already has.</p>

<p>(11) 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 a side bar.</p> <p>The website also 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>	<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>.</p> <p>The communication is not addressed to a <i>person</i> as such but rather to the public in general. Thus it is not presented as suitable for a particular person and is not based on a consideration of the circumstances of a particular <i>person</i>.</p> <p>Furthermore, 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>	<p>The best buys list is likely to be regulated advice, for the same reason as in example (B5).</p> <p>However, 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> 8.29.5G).</p>
<p>(12) A <i>firm</i> wishes to send a ‘markets update 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>This is not a <i>personal recommendation</i>, for the same reasons as in example (F11).</p>	<p>The markets outlook part is not likely to be regulated advice taken on its own.</p> <p>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>(13) A <i>firm</i> hands over the communication in example (F12) 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> and thus it forms part of that <i>personal recommendation</i>.</p>	<p>Likely to be regulated advice, as all the elements in <i>PERG</i> 8.24.2G are met.</p>
<p>(14) 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> <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>	<p>N/A</p>	<p><i>Firm F</i> will generally not be giving regulated advice, for the same reason as in example (B3).</p> <p><i>Firm G</i> will generally not be giving regulated advice, for the reasons in <i>PERG</i> 8.30A.13G.</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.

...

Annex J

Amendments to the Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD)

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

...				
Notes:				
	...			
	(17)	<p>For regulated activities other than designated investment business, <u>MiFID, equivalent third country or optional exemption business</u>, a firm must take reasonable steps to communicate information in a way that is clear, fair and not misleading (e.g. ICOB 2.2.3R and MCOB 3A.2.1R(1)). In doing so, it may be reasonable for a distributor to rely on information produced by a provider unless the distributor is, or ought to be, aware of grounds to question its compliance. For designated investment business, <u>MiFID, equivalent third country or optional exemption business</u>, a firm must ensure that any communication to a client is fair, clear and not misleading regardless of whether it has been produced by a provider (COBS 4.2.1R). The standard for designated investment business is an absolute standard, which does not permit reliance unless an exemption applies. (Paragraph 1.23(1))</p>		

**CONDUCT OF BUSINESS SOURCEBOOK (INSISTENT CLIENTS) INSTRUMENT
2017**

Powers exercised

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

Commencement

- B. This instrument comes into force in on [*1 January 2018*].

Amendments to the Handbook

- C. The Conduct of Business sourcebook (COBS) is amended in accordance with the Annex to this instrument.

Citation

- D. This instrument may be cited as the Conduct of Business Sourcebook (Insistent Clients) Instrument 2017.

By order of the Board
[*date*]

Annex

Amendments to the Conduct of Business sourcebook (COBS)

After COBS 9.5 (Record keeping and retention periods for suitability records), insert the following new section, 9.5A. The text is not underlined.

9.5A Additional guidance for firms with insistent clients

Purpose

9.5A.1 G The *guidance* in this section is relevant where a *client* of a *firm* becomes an insistent *client*.

Who is an insistent client?

9.5A.2 G In this section, a *client* should be considered an insistent *client* where:

- (1) the *firm* has given the *client* a *personal recommendation*;
- (2) the *client* decides to enter into a transaction which is different from that recommended by the *firm* in the *personal recommendation*; and
- (3) the *client* wishes the *firm* to facilitate that transaction.

Information to be communicated to an insistent client

9.5A.3 G

- (1) Where a *firm* proceeds to execute a transaction for an insistent *client* which is not in accordance with the *personal recommendation* given by the *firm*, the *firm* should communicate to the insistent *client*, in a way which is clear, fair and not misleading, and having regard to the information needs of the insistent *client* so that the *client* is able to understand, the information set out in (2).
- (2) The information which the *firm* should communicate to an insistent *client* is:
 - (a) that the transaction will not be in accordance with the *firm's personal recommendation*;
 - (b) the reasons why the transaction will not be in accordance with the *firm's personal recommendation*;
 - (c) the risks of the transaction proposed by the insistent *client*; and
 - (d) the reasons why the *firm* did not recommend that transaction to the *client*.

Further personal recommendations given to an insistent client

- 9.5A.4 G Where a *firm* gives a further *personal recommendation* in relation to the transaction proposed by the insistent *client*, the *firm* should make clear to the insistent *client* that this *personal recommendation* is distinct from, but does not affect the conclusions of, the initial *personal recommendation*.

Record keeping

- 9.5A.5 G (1) In addition to complying with applicable record keeping requirements, a *firm* dealing with an insistent *client* should retain a record of:
- (a) the advice and transaction process followed, including the communications with the insistent *client*; and
 - (b) an acknowledgment from insistent *client* that:
 - (i) the transaction is not in accordance with the *firm's* *personal recommendation*; and
 - (ii) the transaction is being carried out at the request of the insistent *client*.
- (2) Where possible, the insistent *client's* acknowledgment under (1)(b) should be in the *client's* own words.
- 9.5.A.6 G A *firm* with an insistent *client* should also refer to the record keeping requirements in *COBS* 9.5 (Record keeping and retention periods for suitability records) and *SYSC* 9.1 (General rules on record-keeping).

