

**PERIMETER GUIDANCE (PROPERTY AND LAND INVESTMENT SCHEMES)
INSTRUMENT 2006**

Powers exercised

- A. The Financial Services Authority makes this instrument in the exercise of its powers under section 157(1) (Guidance) of the Financial Services and Markets Act 2000.

Commencement

- B. This instrument comes into force on 6 March 2006.

Amendments to Perimeter guidance

- C. General guidance on FSA regulatory perimeter issues, amending the Perimeter Guidance manual, is made in the form set out in the Annex to this instrument. This general guidance does not form part of the FSA Handbook.

Citation

- D. This instrument may be cited as the Perimeter Guidance (Property and Land Investment Schemes) Instrument 2006.

By order of the Board
23 February 2006

Annex

Amendments to the Perimeter Guidance manual

In this Annex, underlining indicates new text. This is with the exception of the insertion of the new Chapter 11 which is all new text and is not underlined.

1.4.2 G Table: list of general guidance to be found in *PERG*

Chapter:	Applicable to:	About:
...		
<u>PERG 11:</u> Property investment clubs and land investment schemes	<u>Any person who needs to know whether his activities in relation to property investment clubs and land investment schemes will amount to regulated activities or whether the restriction in section 21 of the Act will apply to any financial promotions he may make.</u>	<ul style="list-style-type: none">• <u>the regulated activities that may arise in connection with the establishment and operation of property investment clubs and land investment schemes and any exclusions that may be relevant</u>• <u>the extent to which the financial promotion restriction in section 21 of the Act applies</u>

2.7.12 G ... CIS 16 (Applicaton and Notification). Guidance on whether certain types of scheme (property and land investment schemes) may amount to collective investment schemes is set out in PERG 11 (Property investment clubs and land investment schemes).

Insert the following new text to be added as Chapter 11

Chapter 11 Guidance on property investment clubs and land investment schemes

11.1 Background

Q1. What is the purpose of these questions and answers (“Q&As”) and who should be reading them?

These Q&As are principally aimed at those involved in the running of property investment clubs or schemes involving the sale of plots of land with arrangements for obtaining planning permission in respect of them or for the disposal of the land as a whole. They are intended to help such persons understand whether they will be carrying on a *regulated activity* and need

to be an *authorised person* or *exempt person* under section 19 of the Financial Services and Markets Act 2000. The Q&As may also be of assistance to investors in such schemes concerned about whether the scheme they are investing in should be run by an authorised or exempt person.

The Q&As that follow are set out in two sections:

- Guidance on property investment clubs (PERG 11.2)
- Guidance on land investment schemes (PERG 11.3)

11.2 Guidance on property investment clubs

Q2. What are property investment clubs?

In general, property investment clubs, (sometimes also known as buy-to-let schemes, buy-to-let syndicates or property investment syndicates) are schemes allowing members of the public to invest in property and which possess some or all of the following characteristics:

- a pooling of resources to allow investment in, or collective management of, real property;
- much or all of the property purchased being financed by money borrowed by the members of the scheme (a typical split being 15% equity and 85% debt), with the borrowing often being arranged by the property investment club itself for members;
- the offer of educational training on the property market;
- other help given to members by the property investment club, including help with the purchase, and the sale, of the property (sometimes involving forward purchase contracts);
- the properties concerned are often newly, or not yet, built; and
- discounts are often offered, or are purported to be offered, on the price of the property (usually from the developer in recognition of a bulk purchase by club members).

Q3. Does the FSA regulate property investment clubs?

The FSA regulates the operation and promotion of property investment clubs if, in substance, they amount to *collective investment schemes*.

If a scheme, in substance, is a collective investment scheme, it cannot escape the need for regulation by being dressed up as something else.

Q4. What is a collective investment scheme and will my property investment club be one?

Broadly speaking, a collective investment scheme is any arrangement:

- the purpose or effect of which is to enable those taking part (either by owning the property, or part of it, or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property;
- where persons taking part do not have day-to-day control over the management of the property; and
- where either the contributions and profits or income are pooled, or the property is managed as a whole by or on behalf of the operator of the scheme, or both.

Whether your property investment club is a collective investment scheme or not will depend on its individual structure and the facts surrounding it. If your club meets each of the above conditions and is not exempt, then its operation and promotion should come under FSA regulation. This is regardless of whether that was intended by the person operating or promoting the club.

Q5. Can a body corporate be used rather than a collective investment scheme?

Yes, if all your rights in a scheme derive from ownership of securities issued by a body corporate, the scheme will not be a collective investment scheme. This is unless the body corporate is an *open-ended investment company* or a limited liability partnership. PERG 9 has guidance on the meaning of open-ended investment company.

Q6. What is the purpose of the ‘day-to-day control’ test and the nature of day-to-day control?

The purpose of the ‘day-to-day control’ test is to try to draw an important distinction about the nature of the investment that each investor is making. If the substance is that each investor is investing in a property whose management will be under his control, the arrangements should not be regarded as a collective investment scheme. On the other hand, if the substance is that each investor is getting rights under a scheme that provides for someone else to manage the property, the arrangements would be regarded as a collective investment scheme.

Day-to-day control is not defined and so must be given its ordinary meaning. In our view, this means you have the power, from day-to-day, to decide how the property is managed. You can delegate actual management so long as you still have day-to-day control over it.

Q7. The participants in my property investment club do not get involved in every single management decision, but appoint agents to take decisions for them in accordance with criteria agreed between them. Have the participants lost day-to-day control?

We do not consider that day-to-day control means that each participant would themselves need to be involved in each and every decision taken, so long as they retain day-to-day control over the management. For example, delegating rent collection, cleaning and management services in relation to a property, by appointing agents to carry out these tasks would not necessarily mean that the participants lose day-to-day control, so long as the participants retain day-to-day control over the management of the agency contracts.

Q8. Must each participant individually have day-to-day control for my property investment club not to be a collective investment scheme?

Yes, though this does not prevent two or more individuals having day-to-day control together. (This may happen, for example, where business partners buy several flats in a block and manage them jointly.) But the more distant any individual participant is from controlling the management of the property himself, the less likely it is that the individual participants can be said to have control which is ‘day-to-day’.

Q9. I run a property investment club where the participants have a right to be consulted on management decisions or at least give directions. Do they have day-to-day control?

Not by virtue of those rights alone. Simply having the right to be consulted or give directions is not enough to give a participant day-to-day control.

Also, if all management decisions are taken by the operator (or a person appointed by him) using generic mandates (for example, a power of attorney) from participants, then it is unlikely to be the case that the participants have day-to-day control. It is more likely in this case that the scheme is effectively one where management is devolved entirely to the operator, with participants only retaining a notional control over the decision-making of the operator – in essence amounting to a right to be consulted or give directions, rather than day-to-day control.

Q10. I have promoted or set up a property investment club such that the documents that each participant signs explicitly say that they have day-to-day control over the management of the property - does that mean it is not a collective investment scheme?

No. In our view, regardless of what rights or powers the documentation purports to give its participants, it is important to look at what happens in fact. It is the substance rather than the form that counts. So, if the participants are stated to have day-to-day control, simply as an attempt to avoid the property investment club amounting to a collective investment scheme, but they do not, in fact, have such day-to-day control, then the club may still amount to a collective investment scheme. In that case, its operation and promotion would be regulated by the FSA.

Q11. I run a property investment club where all of the major participants have day-to-day control over the management of the property but, by choice, one or two of the smaller participants do not. Does this mean that the club could still be a collective investment scheme?

Yes, if the other elements are present. In order for the arrangements not to be a collective investment scheme, all individual participants, regardless of their contribution or stated preferences, must have day-to-day control. So, if one participant does not have day-to-day control then the whole scheme could amount to a collective investment scheme.

Q12. I run a scheme where each person owns individual properties or parts of properties in the property investment club. Each person owns property either directly, or indirectly (for example, through a limited company or a limited liability partnership

of which he is the owner or through a limited partnership). Is this scheme likely to be a collective investment scheme?

No, unless the properties belonging to each person, company, limited liability partnership or limited partnership are managed as a whole by or on behalf of the operator of the scheme. So, the mere fact that the operator is managing a number of properties and achieves economies of scale in his management charges or in things such as insurance cover would not mean that the properties are being managed as a whole. Neither would the fact that the operator may be able to offer reductions in sale price because of bulk discounts negotiated with developers. This is provided the operator is managing each property on an individual basis.

As an example, if a managing agent manages a block of flats on the basis that the only profit or income each individual flat owner obtains is what arises from the management of his property, there is no management as a whole. However, if the managing agent managed the flats in such a way that each individual flat owner received an income from total lettings, regardless of whether that person's flat was let or not, the properties are managed as a whole and the arrangements are likely to be a collective investment scheme.

Q13. Does it make a difference if people participate through a corporate vehicle?

No. But it should be noted that a limited liability partnership or limited partnership, through which a person indirectly owns the property concerned, may amount to a collective investment scheme itself. This is if the partnership has more than one investor participant and subject to the considerations set out in this guidance.

Q14. I run a property investment club where the participants own their own individual properties which are rented out but the rental income is pooled and I decide on which property should be rented at any time and to whom. Is this likely to be a collective investment scheme?

Yes. This is because:

- the property in respect of which the arrangements are made is the property belonging to each of the participants;
- you are managing that property as a whole; and
- the participants do not have day-to-day control over the management of that property.

Q15. If my property investment club is not a collective investment scheme because participants acquire shares in a body corporate, does that mean that I do not need to be authorised?

Not necessarily. Depending on the circumstances, you may be involved in making arrangements for the participants to buy, sell or subscribe for their shares which is itself a regulated activity and may only be carried on by an authorised or exempt person.

Q16. Does the FSA regulate the mortgages that are used to finance property investment clubs?

No. The FSA only regulates the provision of mortgages on property where the borrower intends to use at least 40% of it as a dwelling for him or a close relative. This is typically not the case with properties purchased through property investment clubs.

Q17. What are the consequences of a property investment club being regulated by the FSA?

If a property investment club were considered to be a collective investment scheme, and therefore its operation and promotion regulated by the FSA, then any person operating the scheme in the *United Kingdom* or advising investors on the merits of participating or arranging for them to do so, must be an authorised or exempt person. If such a person was not authorised or exempt, he would be liable to commit a criminal offence. It is only the activities of such persons that would be regulated by the FSA. The property investment club itself would not be regulated by the FSA as a product in the way that authorised unit trusts or authorised open-ended investment companies (which are collective investment schemes) are. Also, agreements entered into by an unauthorised person in the course of their operating, advising on or arranging for persons to participate in a collective investment scheme are potentially unenforceable against the other party and the other party may be entitled to compensation from the unauthorised person.

Q18. Are there restrictions on the promotion of my property investment club?

Yes, if it is a collective investment scheme or involves investors acquiring securities issued by a body corporate – otherwise not. If your property investment club is a collective investment scheme, you would not be able to promote it to the general public and, unless exempt, any promotional material would need to comply with FSA rules. PERG 8 has guidance about the restrictions on all kinds of *financial promotion*.

Q19. Does the FSA or Treasury intend to regulate all property investment clubs?

We understand that, as at 6 March 2006, there is no current intention to change existing regulatory boundaries.

11.3 Guidance on land investment schemes involving planning permission arrangements

Q20. I run a business arranging for the sale of individual plots of development land to investors who are also required to use my services in obtaining planning permission for or disposing of the land as a whole (or both). Might I need to be authorised?

Yes, this is likely to be the case. This will be because the role you have in obtaining planning permission or in negotiating and effecting the sale of the land (or both) may mean that you are operating a collective investment scheme (see Q4). The purpose or effect of the arrangements would appear to be to enable investors, as owners of parts of the land, to receive profits arising from your services in obtaining planning permission or arranging disposal in respect of the land as a whole. If the planning or disposal process is such that individual investors do not have day-to-day control over it, the arrangements are likely to amount to a collective investment scheme, and to operate it you would need to be authorised

or exempt. The restrictions on financial promotions referred to in Q18 would also need to be considered.

Q21. I run a business which arranges for individual plots of land to be sold to potential investors and, whilst I refer to the possibility of obtaining planning permission as a way of increasing the value of the land, I don't, nor does anyone connected to me, have a role in pursuing any such permission nor any other control over the land as a whole. Do I need to be authorised?

No. If all of the participants have control over the obtaining of planning permission relevant to their individual plots of land the arrangements will not be a collective investment scheme. Arranging for investment in plots of land by itself is not a regulated activity as plots of land are not of themselves *specified investments*.