

PERIMETER GUIDANCE (PERSONAL PENSION 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 (“the Act”).

Commencement

- B. Annex A of this instrument comes into force on 6 October 2006.
- C. Annex B of this instrument comes into force on 6 April 2007.

Amendments to the Perimeter Guidance manual (PERG)

- D. PERG is amended in accordance with Annex A and B. The general guidance in PERG does not form part of the Handbook.

Citation

- E. This instrument may be cited as the Perimeter Guidance (Personal Pension Schemes) Instrument 2006.

By order of the Board

28 September 2006

ANNEX A

Amendments to the Perimeter Guidance manual

In this Annex, underlining indicates new text and striking through indicates deleted text, with the exception of Chapter 12 which represents new text.

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

Chapter:	Applicable to:	About:
...		
<u>PERG 12:</u> <u>Running or advising on personal pension schemes</u>	<u>any person who needs to know whether his activities in relation to establishing, running, advising on or marketing personal pension schemes will amount to regulated activities</u>	<u>the regulated activities that arise in connection with establishing, running, advising on or marketing personal pension schemes and any exclusions that may be relevant</u>

2.5.5 G For *persons* who are *investment firms*, the activities ...

- (1) ...
- (6) groups and joint enterprises (see *PERG 2.9.9G*); ~~and~~
- (7) sale of a *body corporate* (see *PERG 2.9.11G*); ~~and~~
- (8) business angel-led enterprise capital funds (see *PERG 2.9.20G* to *PERG 2.9.22G*).

...

2.8.4C G The exclusions referred to in *PERG 2.8.4G*(1), (2), (5) and (6)(b), (c) and (d) will not be available to *persons* who, in carrying on the activity of *dealing in investments as principal*, are *investment firms* (see *PERG 2.5.4G* (Investment services and activities)).

Dealing in investments as agent

2.8.5 G The *regulated activity* of *dealing in investments as agent* applies to ...

...

(3) ...

(i) that involves a *contract of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*);

(j) on behalf of the participants of a business angel-led enterprise capital fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*.

...

2.8.5A G The exclusions referred to in *PERG 2.8.5G* (1), (2) and (3)(b), (c), (d) and (j) will not be available to *persons* who, in carrying on the activity of *dealing in investments as agent*, are *investment firms* (see *PERG 2.5.4G* (*Investment services and activities*)).

Arranging deals in investments and arranging regulated mortgage contracts

2.8.6 G The exclusions in relation to the *regulated activities* of *arranging* are ...

...

(13) ...

(k) that involve a *contract of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*);

(l) for or with a view to transactions to be entered into by or on behalf of the participants of a business angel-led enterprise capital fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*.

...

2.8.6A G The exclusions referred to in *PERG 2.8.6G*(4) and (13)(c), (d), (e) and (l) will not be available to *persons* who, in carrying on an *arranging* activity, are *investment firms* (see *PERG 2.5.4G* (*Investment services and activities*)).

Managing investments

- 2.8.7 G The activities of *persons* appointed under a power of attorney are excluded under article 38 of the *Regulated Activities Order*, from the *regulated activity of managing investments*, if specified conditions are satisfied. The exclusion only applies where a *person* is not carrying on *insurance mediation* or *reinsurance mediation* and is subject to further limitations discussed below. In addition, the following exclusions (outlined in *PERG 2.9*) apply in specified circumstances where a *person* manages assets:
- (1) ...
 - (4) as an *incoming ECA provider* (see *PERG 2.9.18G*); or
 - (5) belonging to the participants of a business angel-led enterprise capital fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*.

The exclusion in article 38 of the *Regulated Activities Order* and the exclusions referred to in *PERG 2.8.7G* (2), (3) and (5) will not be available to *persons* who, in carrying on the activity of *managing investments*, are *investment firms* (see *PERG 2.5.4G* (Investment services and activities)).

Safeguarding and administering investments

- 2.8.8 G The exclusions from the *regulated activity of safeguarding and administering investments* are as follows.
- (1) ...
 - (4) ...
 - (f) as an *incoming ECA provider* (see *PERG 2.9.18G*); ~~and~~
 - (g) that are *contracts of insurance* and, in so doing, provides information to *policyholders* or potential *policyholders* on an incidental basis in the course of his carrying on a business or profession not otherwise consisting of *regulated activities* (see *PERG 2.9.19G*(2)); and
 - (h) belonging to the participants in a business angel-led enterprise capital fund, but only where such safeguarding and administration is carried on by a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*.

...

Advising on investments

2.8.12 G ...

(2) The following exclusions apply in specified circumstances where a person is ~~advising on~~ advising on investments:

(a) ...

(f) that are *contracts of insurance* covering large risks situated outside the *EEA* (see *PERG 2.9.19G*);

(g) to be made by or on behalf of the participants of a business angel-led enterprise capital fund, when the advice is given to the participants in that fund and that person is a *body corporate* as specified in article 72E(7) of the *Regulated Activities Order*.

...

2.9.8 G ... in relation to rights under a *contract of insurance* or units in a *collective investment scheme* (or rights to, or interests in, either). The exclusions are also disappplied for persons who, in carrying on the relevant regulated activity, are investment firms (see *PERG 2.5.4G (Investment services and activities)*).

...

2.9.10 G ... *Guidance* on exclusions relevant to *insurance mediation activities* is in *PERG 5 (Insurance mediation activities)*. The exclusions are also disappplied for persons who, in carrying on the relevant regulated activity, are investment firms (see *PERG 2.5.4G (Investment services and activities)*).

...

2.9.12 G ... The exclusions in *PERG 2.9.11G(2), (3) and (4)* are disappplied where they concern a *contract of insurance*. *Guidance* on exclusions relevant to *insurance mediation activities* is in *PERG 5 (Guidance on insurance mediation activities)*. The exclusions are also disappplied for persons who, in carrying on the relevant regulated activity, are investment firms (see *PERG 2.5.4G (Investment services and activities)*).

...

2.9.22 The exclusions for business angel-led enterprise capital funds are also disappplied for persons who, in carrying on the relevant regulated activity, are investment firms (see *PERG 2.5.4G (Investment services and activities)*).

...

10 Guidance on activities related to pension schemes

10.1 Background

Q1. ...

The Q&As complement the general *guidance* on regulated activities in Chapter 2 of our Perimeter Guidance Manual ('PERG'), the general guidance on insurance mediation activities in Chapter 5 of PERG (PERG 5) and the relevant legislation. In addition, Chapter 12 of PERG (PERG 12) has further guidance about the regulated activities relating to the operation and sale of personal pension schemes that come into force on 6 April 2007.

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

...

- issues for pension scheme service providers other than trustees (PERG 10.4); and
- the application of EU Directives (PERG 10.4A); and
- issues for employers ...

...

10.3 Pension Scheme Trustees

Q30. ~~[Deleted] As a professional trustee of a pension scheme, am I affected by the implementation of the Insurance Mediation Directive (IMD)?~~

~~No. A pension scheme trustee may perform tasks on behalf of the other trustees (such as signing proposal forms or giving dealing instructions to insurers or brokers or notifying claims on the death of a scheme member). But he will not be providing an insurance mediation service to them. This is because, under the policy, he will share equal rights and equal responsibility with his co-trustees and so may be regarded as acting solely in the capacity of policyholder rather than intermediary. Also, the pension scheme trustee will not be providing an insurance mediation service on behalf of the members as the members will not be policyholders.~~

10.4A The application of EU Directives

Q41A. Are pension scheme trustees and administration service providers likely to be subject to authorisation under the Investment Services Directive or subject to the Capital Adequacy Directive?

This is possible, but in many instances it is likely that pension scheme

trustees and service providers will either not be providing an investment service for the purposes of, or otherwise be exempt under article 2.2 of, the *Investment Services Directive*. The following table expands on this in broad terms.

As for the *Capital Adequacy Directive*, this will only apply to persons who are *ISD investment firms* or *BCD credit institutions*.

<u>Activity</u>	<u>Potential ISD investment service?</u>	<u>Potential application of ISD or of an ISD article 2.2 exemption?</u>
<u>Dealing in scheme assets as trustee</u>	<u>Dealing in investments for own account</u>	<p><u>ISD will not apply provided the trustees are either not acting by way of business or otherwise are not holding themselves out as persons who provide a dealing service to third parties. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis</u></p> <p><u>Where the pension scheme is a collective investment undertaking, the trustee should be exempt under article 2.2(h) as depositary of the scheme</u></p>
<u>Issuing rights under a stakeholder pension scheme to members</u>	<u>None – the rights are not ISD investments</u>	<u>ISD does not apply</u>
<u>Pension scheme service provider:</u> <u>a. dealing in scheme assets as agent for the trustees</u> <u>b. arranging deals in scheme assets</u>	<u>a. Executing orders other than for own account</u> <u>b. Receiving and transmitting orders</u>	<p><u>ISD will potentially apply where the investments are ISD financial instruments (such as shares, debt securities or units)</u></p> <p><u>However, many pension schemes will be employee participation schemes, the administration of which is exempt under article 2.2(d)</u></p> <p><u>Where the service provider is providing services exclusively for the benefit of a corporate trustee who is a member of its group, the exemption in article 2.2(b)</u></p>

		<p><u>should apply</u></p> <p><u>Where the activity is receiving and transmitting orders, the intermediaries exemption in article 2.2(g) may apply</u></p> <p><u>Where the pension scheme is a collective investment undertaking, the scheme administrator may be exempt under article 2.2(h) as manager of the scheme</u></p>
<u>Managing the assets of the scheme</u>	<u>Investment management</u>	<p><u>ISD will not apply to trustees provided they are either not acting by way of business or otherwise are not holding themselves out as, or additionally remunerated for, providing investment management services. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis</u></p> <p><u>Also, where the pension scheme is a collective investment undertaking, the scheme administrator may, and the trustee will, be exempt under article 2.2(h) in respect of anything they do in the capacity of manager or depositary of the scheme respectively</u></p>
<u>Safeguarding and administering the scheme assets</u>	<u>None</u>	<u>Safekeeping and administration of investments is an ISD non-core service</u>
<u>Establishing, operating or winding up a stakeholder pension scheme</u>	<u>None</u>	<u>ISD does not apply</u>
<u>Advising trustees or members or prospective members</u>	<u>Investment advice</u>	<u>Investment advice is an ISD non-core service</u>

Q41B. Will the implementation of the Markets in Financial Instruments Directive be likely to affect the current position of pension scheme trustees and administration service providers under the Investment Services Directive and the Capital Adequacy Directive?

This is unlikely to be the case. The position under the Markets in Financial Instruments Directive should not be materially different to the position under the Investment Services Directive (or, as a result, the Capital Adequacy Directive) as regards the usual activities of pension scheme trustees and administration service providers. The one possible exception to this concerns investment advice which will become an investment service for the first time under the Markets in Financial Instruments Directive. This will not apply to advice given to scheme members about their rights under the scheme as those rights will not be financial instruments for the purposes of the Directive. But the Directive will apply to advice in the form of a recommendation to scheme trustees or members about their buying or selling a particular financial instrument for the purposes of the scheme. Financial instruments will include shares, debt securities and units in a collective investment scheme but not life policies or deposits. This will be subject to the possible availability of an exemption in article 2.1 of the Directive.

Draft guidance on the changes in regulatory scope that will be caused by the implementation of the Markets in Financial Instruments Directive and its effect on the application of the Capital Adequacy Directive was issued as Annex 5 to Consultation Paper 06/9 (Organisation systems and controls) and will, in due course, form Chapter 13 to PERG.

Q41C. As a professional trustee of a pension scheme, am I affected by the implementation of the Insurance Mediation Directive?

No. A pension scheme trustee may perform tasks on behalf of the other trustees (such as signing proposal forms or giving dealing instructions to insurers or brokers or notifying claims on the death of a scheme member). But he will not be providing an insurance mediation service to them. This is because, under the policy, he will share equal rights and equal responsibility with his co-trustees and so may be regarded as acting solely in the capacity of policyholder rather than intermediary. Also, the pension scheme trustee will not be providing an insurance mediation service on behalf of the members as the members will not be policyholders.

Q41D. As a pension scheme administration service provider, am I affected by the implementation of the Insurance Mediation Directive?

You may be. Detailed guidance about the potential effect of the *Insurance Mediation Directive* on the normal activities of administration service providers is in Q31 to Q41 and the table in Annex 3.

...

...

New text to be added as Chapter 12

12 Guidance for persons running or advising on personal pension schemes

12.1 Background

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

These Q&As are aimed at, and should be read by, *persons* involved in the running of a *personal pension scheme* and those who give advice about or provide services to such schemes. They are intended to help such persons understand whether they will be carrying on a *regulated activity* and need *authorisation* or exemption under section 19 of the Financial Services and Markets Act 2000 following the changes to pension legislation that are proposed to take effect on 6 April 2007. Under the proposed changes, establishing, operating or winding up a personal pension scheme will become a *regulated activity* and rights under a personal pension scheme will become a *specified investment*. The Q&As complement the general *guidance* on regulated activities which is in Chapter 2 of our Perimeter Guidance manual ('PERG') and the general guidance about pensions-related activities which is in Chapter 10 of PERG.

The Q&As are set out under five sections:

- the scope of the proposed new regulated activity of *establishing, operating or winding up a personal pension scheme* (PERG 12.2);
- the implications of the proposed new specified investment of rights under a *personal pension scheme* (PERG 12.3);
- the application of EU Directives (PERG 12.4)
- *financial promotion* issues (PERG 12.5); and
- practical transitional considerations (PERG 12.6).

12.2 Establishing, operating or winding up a personal pension scheme

Q2. What is a personal pension scheme for the purposes of this regulated activity?

The term is defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*) as any scheme other than an *occupational pension scheme* (OPS) or a *stakeholder pension scheme* that is to provide benefits for people:

- (1) on retirement; or
- (2) on reaching a particular age; or
- (3) on termination of service in an employment.

Although the definition does not expressly say so, it is, in the FSA's view, clear from the context in which the term is applied, that such a scheme will be one that is intended to be registered with The Pensions Regulator and to be eligible for tax relief relating to pension schemes.

This will include *self-invested personal pension schemes* ('SIPPs') as well as personal pensions provided to consumers by product companies such as insurers, unit trust managers or deposit takers (including free-standing voluntary contribution schemes).

To determine whether a pension scheme is a personal pension scheme it is first necessary to determine whether it is an OPS. An OPS is defined in the Regulated Activities Order by reference to an OPS as defined in section 1 of the Pensions Schemes Act 1993 but without including paragraph (b) of that section. This means that a pension scheme is an OPS if, broadly speaking, it is a pension scheme:

- that is established:
 - for the purpose of providing benefits to, or in respect of, people with service in employments of a description; or
 - for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

by persons who are, or who include, employees of that kind or their employers, or persons representing the interests of either, at the time the scheme is established; or

- that is prescribed or is of a prescribed description (such as a scheme that is prescribed under the Pension Schemes (Categories) Regulations 2005 (SI 2005/2401)).

The effect of omitting paragraph (b) from the Pensions Schemes Act definition of an OPS is that a pension scheme that would otherwise be an OPS but for the fact that its main administration takes place in another *EEA State* will be an OPS for the purposes of the Regulated Activities Order and this guidance.

Q3. What is involved in establishing a personal pension scheme?

The establisher of a *personal pension scheme* is the *person* responsible for putting in place the arrangements founding the scheme. With a trust-based scheme, this will usually be the person

who executes the trust as provider. In a scheme established by deed poll, it will be the person who enters into the deed poll. There will usually only be one person who establishes the scheme. Any professional firms that they may employ to act as their agent (such as solicitors) would not be establishing the scheme. The establisher may also be the operator but need not be. An employer will not be establishing a personal pension scheme (such as a *group personal pension scheme*) purely as a result of them having chosen such a scheme to offer to their employees.

The activity of establishing a personal pension scheme ceases once the scheme is established. This means that persons who have established schemes prior to 6 April 2007 will not require authorisation for establishing a personal pension scheme unless they intend to establish a new scheme after that date.

Q4. What is involved in operating a personal pension scheme?

The 'operator' is the *person* responsible to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In trust-based schemes, the trustees may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person to be responsible to the members for carrying out all the operator's functions as scheme administrator or as trustee, or both as the case may be. But a person to whom activities may be outsourced by the operator will not, thereby, become an operator of the scheme (see further guidance in Q6).

The fact that a member of a SIPP has the right to direct which investments are to be held for his benefit does not mean that he is to be regarded as operating the scheme as a result of exercising that right.

Q5. What is involved in winding up a personal pension scheme?

The *person* who winds-up a *personal pension scheme* will be the person who is responsible for putting in place the arrangements for bringing the scheme to an end in a way that complies with the relevant provisions of the instrument that established the scheme and any relevant rules under pensions or tax legislation. This will, more often than not, be the operator of the scheme.

Q6. What is my position as an operator of a personal pension scheme if I delegate day-to-day functions such as administration of the scheme or the management or custody of the scheme assets to another person?

As explained in Q4, the operator of a *personal pension scheme* is the person who is responsible to the members of the scheme for ensuring that the scheme is operated in accordance with relevant pensions and tax legislation, the scheme's constitution and the *regulatory system*. Provided he remains responsible to the members for such matters, he will remain the operator even though he may delegate or out-source the day-to-day carrying out of his functions as operator to another person. That other person will not become an operator of the scheme purely as a result of carrying out such functions on behalf of the operator. However, he may be carrying on other regulated activities in performing his delegated or out-sourced tasks (such as *arranging* or *managing investments*) in which case he will be subject to regulation for those activities.

Chapter 10.4 of PERG has general guidance about the circumstances in which persons who administer pension schemes on behalf of the operator or trustees may be carrying on a regulated activity including an *insurance mediation activity*.

Q7. As the operator of a personal pension scheme, is my position affected by whether the underlying property of the scheme is comprised of physical assets such as commercial property rather than investments such as shares or life policies?

No. It is the establishment, operation and winding up of the scheme that is regulated under the new activity – regardless of the type of assets the scheme will hold.

Q8. Will I need to be authorised for managing the assets of a personal pension scheme which is invested solely in physical assets such as commercial property on behalf of the operator?

No. Such assets will not become *designated investments*. However, the operator of the scheme will remain responsible for the management and administration of the assets as these are part of the regulated activity of operating the scheme.

Q9. Will I satisfy the 'by-way-of-business' test that is necessary for authorisation to be required?

The application of the by-way-of-business test to any particular *person* will always depend on that person's individual circumstances. A number of factors need to be taken into account in determining whether the test is met. These include:

- the degree of continuity;
- the existence of a commercial element;
- the scale of the activity;

- the proportion which the activity bears to other activities carried on by the same person but which are not regulated; and
- the nature of the particular *regulated activity* that is carried on.

In very broad terms, it is likely that any corporate body (including corporate trustees) that operates a *personal pension scheme* would be carrying on that activity by way of business. Chapter 10.5 of PERG has specific guidance about the limited circumstances in which employers may be likely to satisfy the by-way-of-business test when advising on or arranging pension benefits for their employees.

Q10. Can there be more than one person who operates a personal pension scheme?

Yes. For example, the *person* establishing a scheme may appoint a trustee and an administrator to operate the scheme jointly (see Q4). In this case, both the trustee and the administrator will need to be *authorised*. Or there could be two or more trustees who are jointly responsible for operating the scheme, in which case each will need to be *authorised* if they are doing so by way of business.

Q11. I am a trustee operating a self-invested personal pension scheme ('SIPP'). Can I continue to rely on the various exclusions available to trustees for other regulated activities such as dealing in investments, managing investments and safeguarding and administering investments?

Yes, you may continue to rely on existing exclusions for those activities. No changes are being made to those exclusions. Guidance on the exclusions is given in Chapter 10 (Q23) of PERG.

Q12. Do the same principles apply to establishing, operating or winding up a stakeholder pension scheme?

Yes. In principle, the answers given to other questions apply equally to *stakeholder pension schemes*. Establishing, operating and winding up a stakeholder pension scheme are already regulated activities. Guidance on these activities is given in Chapter 10 (Q24 to Q28) of PERG.

Q13. Does the regulated activity of establishing, operating or winding-up a personal pension scheme have any effect on occupational pension schemes?

No. But the establishment, operation and winding up of *occupational pension schemes* that are *stakeholder pension schemes* are regulated activities in their own right.

Q14. I intend to operate a personal pension scheme under which members will acquire benefits derived from the management of a pool of assets. Will the scheme become a collective investment scheme?

No. *Personal pension schemes* (along with *stakeholder pension schemes*) are specifically exempted from being *collective investment schemes*. However, where a personal pension scheme invests in a pooled investment vehicle of some kind, that vehicle may itself be a collective investment scheme unless another exemption applies to it.

12.3 Rights under a personal pension scheme

Q15. I am a financial intermediary dealing with pensions. Am I affected by the fact that rights under a personal pension scheme are a specified investment?

Yes. The *specified investment* of rights under a *personal pension scheme* is a *security*. This means that the following regulated activities apply in relation to such rights:

- *dealing*;
- *arranging*;
- *managing investments*;
- *safeguarding and administering investments*; and
- *advising on investments*.

Q16. What are the rights under a personal pension scheme that are specified investments and securities?

These are all the rights that membership of the scheme confers on a member. This may vary (for example, where the scheme is a SIPP) but is likely to include some or all of the following rights:

- to make payments to the scheme;
- to withdraw sums from the scheme in certain circumstances;
- to transfer value to another pension scheme;
- to receive benefits arising from the capital value of or income derived from particular assets or from the performance of a unitised fund;
- to place certain types of property (for example, commercial property) in the scheme;
- to instruct the operator which assets to buy or sell for the purposes of the scheme;
- to instruct the operator to switch funds from one managed or unitised fund to another;

- to appoint a *person* to manage the assets or to give instructions to the operator about which assets to buy or sell on behalf of the member; and
- to instruct the operator to borrow money to purchase assets (for example, to take out a mortgage on a commercial property).

Q17. Regulated activities such as dealing and arranging deals in, and advising on, investments relate to transactions involving the buying or selling of certain specified investments including securities. When will rights under a personal pension scheme be bought or sold so as to trigger these regulated activities?

The terms ‘bought’ and ‘sold’ are given a wide meaning and include any acquisition or disposal for valuable consideration. The term disposal is also given a wide meaning and, in relation to an investment comprising rights under a contract, includes surrendering, assigning or converting such rights. Taking these facts into account, the circumstances in which rights under a *personal pension scheme* may be bought or sold include:

- when the member first joins the scheme and acquires all the rights that the scheme provides to its members (since he has bought those rights);
- when the member makes regular or occasional additional payments to the scheme (since he has bought further rights being rights to an increased entitlement to benefits);
- when income withdrawals are made or benefits are transferred to another scheme or benefits are released to permit the purchase of an annuity (since the rights giving entitlement to benefits represented by the sums moved out of the scheme are surrendered and so sold);
- where the member or his agent instructs the operator to buy assets of any kind either from existing cash holdings or from the proceeds of selling existing assets (since, in switching the assets, the member is converting his rights from an entitlement to benefits from the performance of certain assets to an entitlement to benefits from the performance of other assets – the former rights are sold and the latter are bought); and
- where the member exercises his right to switch between managed or unitised funds (since, in switching funds, the member is converting his rights from an entitlement to benefits from the performance of one fund to an entitlement to benefits from the performance of another fund – again, the former rights are sold and the latter are bought).

The operator of a personal pension scheme will also be selling rights when he grants rights to a member.

Q18. The members of the personal pension scheme that I operate acquire rights to or interests in specified investments such as units or life policies. Such rights or interests are usually specified investments in their own right and arranging or advising on them is a regulated activity. Does the fact that rights under the personal pension scheme are themselves a specified investment affect this?

In certain circumstances this may be the case, but, in practice, the effect will be largely academic. Where the rights or interests would form part of the rights under a *personal pension scheme*, they will fall under that category of specified investment and will not be a specified investment in their own right. But where, for example, advice is being given on the merits of

acquiring rights to or interests in specified investments for the purpose of their being held under a personal pension scheme but not any one particular scheme, the rights or interests will remain specified investments in their own right. This is because there are no rights under a personal pension scheme at that stage.

This will only affect the rights that the member obtains. It does not alter the nature of any asset that is held by or on behalf of the operator for the purpose of providing benefits to the scheme member. So, any person who arranges for the scheme operator (or trustee as the case may be) to acquire assets is likely to be carrying on the regulated activity of *arranging* where those assets are *securities* or *relevant investments* but not where they involve other property such as real estate. This contrasts with a person who is arranging for scheme members to acquire rights under the scheme which will be a regulated activity regardless of the nature of the underlying property.

Q19. For advice to be regulated, it needs to relate to the merits of buying or selling a particular investment. When do rights under a personal pension scheme become ‘particular’ rights and so particular investments?

It is the rights under a *personal pension scheme* that must be a particular investment. This means that the rights must arise under a particular personal pension scheme. So, provided the rights on which advice is given relate to rights conferred, or to be conferred, by a particular scheme, they will be particular rights and advice on the merits of buying or selling them is likely to be regulated. This is the case, whatever the nature of the rights or of the underlying assets or prospective underlying assets. Conversely, if there is no particular personal pension scheme, there cannot be any particular rights.

As for advice to a prospective member on the merits of buying particular assets at a stage where there are no particular rights under a personal pension scheme, such advice is likely to be regulated where the assets are *securities* or *relevant investments* (as being advice on the merits of buying rights to or interests in those investments). But such advice will not be regulated where the assets are not investments of that kind (such as commercial property).

A person may be asked to advise a client on the merits of his acquiring a commercial property for holding it under a SIPP in circumstances where the client has an existing SIPP of which the adviser may or may not be aware. Provided the adviser has not been asked to, and it is reasonable for him to believe that he would not be expected to, advise his client on the merits of his holding the property under the particular SIPP, the advice may remain generic as respects rights under a personal pension scheme and so would not be subject to regulation.

Q20. Can you provide examples of when the regulated activities of advising on and arranging deals in investments are likely to arise in typical situations involving rights under a personal pension scheme?

Yes. The following table indicates whether certain typical scenarios are likely to involve regulated advising or arranging activities.

Scenario – advice given to a member or prospective member of a personal pension	Is the advice likely to be regulated (subject to any exclusion applying)?	Is arranging the transaction to which the advice relates likely to be regulated
---	---	---

scheme on the merits of ...		(subject to any exclusion applying)?
his joining a <i>personal pension scheme</i> (PPS) either generally or of a particular kind (such as a <i>self-invested personal pension scheme</i> (SIPP))	No – this would be generic advice	N/A
his joining a particular PPS that is already established	Yes – the rights are particular rights as the PPS already exists and offers specific rights	Yes – rights are being bought
establishing a PPS (typically a SIPP) intended solely for the prospective member’s benefit	Yes – because the advice will concern establishing a particular scheme which will offer the investor particular rights (such as the right to make payments and direct investment)	Yes – rights are being bought
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, physical property of a particular description (such as commercial property) or particular physical property	No – there are no particular rights under a PPS at that stage, so the advice is generic as respects the acquiring of such rights	No
acquiring, for the purpose of holding under a PPS (typically a SIPP), but not any particular PPS, <i>securities</i> or <i>relevant investments</i> of a particular description or particular investments of that kind	<p>Yes, where the advice relates to acquiring particular investments of that kind – whilst the rights under the PPS may remain generic, the advice relates to acquiring rights to or interests in particular securities or relevant investments. Those rights or interests are themselves a particular investment</p> <p>No, where the advice only relates to acquiring a</p>	Yes – rights to or interests in specified investments are being bought

	particular type of investment – both the rights under the PPS and the investment remain generic	
acquiring a particular property for the purpose of holding it in a particular SIPP but where the advice to be given is limited to the tax or legal consequences of doing so	No. Although the advice relates to the merits of buying particular rights, provided the advice may reasonably be regarded as a necessary part of the service of providing tax or legal advice it should be excluded from the scope of regulation (see Q21)	No, provided the arranging is undertaken as a necessary part of providing tax or legal services. This may be more likely to arise in practice where, for example, a legal adviser goes on to arrange the conveyancing of the property as a necessary part of legal services. There may be limited circumstances in which it would be necessary for a tax adviser to go on to arrange for the client to acquire the rights under the PPS having given tax advice on the merits of doing so.
making additional payments into a particular PPS, either for investment in line with pre-existing arrangements or in accordance with instructions to be given to the operator, or of not making such additional payments	Yes – the advice relates to the merits of acquiring further particular rights	Yes – rights are to be bought
appointing a fund manager to manage the PPS assets on behalf of the member(s) or changing an existing fund manager	No – the advice is about the merits of exercising rights but not for the purpose of buying or selling particular investments – and no rights are being bought or sold	No, where the assets do not include <i>securities</i> or <i>relevant investments</i> Possibly, where the assets do include investments of that kind (because the arrangements are made with a view to the fund

		manager buying and selling, and possibly safeguarding and administering, investments)
changing the investment objectives with which the fund manager appointed to manage the PPS assets on behalf of the member(s) is instructed to comply	No – the advice is about the merits of exercising rights but not for the purpose of buying or selling particular specified investments – and no rights are being bought or sold	No
<p>placing particular assets or assets of a particular description, into a particular PPS, or of instructing the operator to purchase such assets, either:</p> <ul style="list-style-type: none"> • by means of funds to be made available by selling existing assets or of existing cash holdings within the PPS; or • from new funds to be provided by the member 	<p>Yes – the advice relates to either:</p> <ul style="list-style-type: none"> • disposing of particular rights and acquiring new particular rights; or • acquiring new particular rights 	Yes – rights are being bought or sold or both
instructing the operator to dispose of particular assets or assets of a particular description, to raise funds for purchasing other assets of any kind or to form a cash holding	Yes – the advice relates to disposing of particular rights as well as acquiring new particular rights	Yes – rights are being bought and sold
instructing the operator to realise an investment in a managed or unitised fund and re-invest the sums in another such fund	Yes – the advice relates to disposing of particular rights and acquiring new particular rights	Yes – rights are being bought and sold
withdrawing cash sums (income withdrawal)	Yes – the advice relates to disposing of particular	Yes – rights are being sold

	rights	
transferring existing assets of any kind or their cash value to another PPS	Yes – the advice relates to disposing of particular rights There may also be regulated advice on the merits of acquiring rights under the new PPS	Yes – rights are being sold and rights in the new PPS are being bought
instructing the operator/trustee to obtain a mortgage to purchase a particular commercial property to be held under the PPS	Yes – the advice relates to acquiring new rights under the PPS in the form of the borrowed money or the property to be acquired with it But the advice given to the member on the mortgage itself is not regulated as the mortgage would not be a <i>regulated mortgage contract</i> (because, under tax rules, a member of a PPS cannot hold property under the scheme if he intends to make personal use of it).	Yes – rights are being bought Arranging for a personal pension scheme trustee to take out a mortgage will not be regulated as it will not be a <i>regulated mortgage contract</i>

Q21. What exclusions may be available for advising on investments in connection with acquiring or disposing of rights under a personal pension scheme?

The usual exclusions for *advising on investments* will potentially be available. In particular, article 67 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the *Regulated Activities Order*):

- may permit firms such as solicitors or licensed conveyancers to advise on the implications of transferring title to real property to the operator of a particular *personal pension scheme*;
- may permit tax advisers or solicitors to advise their clients on the tax or legal consequences of holding property of any description, or of acquiring or exercising rights, under a particular personal pension scheme; and
- may permit firms such as surveyors or estate agents to advise on the merits of acquiring commercial property which is intended to be held under a particular personal pension scheme.

This is, in each case, so long as it may reasonably be regarded as necessary for them to provide the advice in order to provide their professional services and they are not remunerated for *advising on investments* separately from any remuneration they receive for providing their professional services.

If the rights relate to a contract of insurance, the adviser can still make use of the exclusion so long as he is not carrying on an activity that requires him to be regulated under the *Insurance Mediation Directive*. And that is only likely to be the case if the advice relates to the merits of his client directly acquiring rights under a contract of insurance (for example, because he is also a trustee of the scheme). Advice about acquiring a beneficial interest in a contract of insurance held under trust will not be subject to regulation under the Directive.

Q22. What exclusions may be available for arranging deals in investments in connection with acquiring or disposing of rights under a personal pension scheme?

The usual exclusions for *arranging* will potentially be available. The following exclusions may be particularly relevant.

Article 29 of the *Regulated Activities Order* will apply where the arranging is done with or through an *authorised person* and, broadly speaking, the arranger:

- is an *unauthorised person*;
- does not advise on the merits of the member or prospective member entering into the transaction; and
- is not rewarded other than by their client (the member).

This exclusion should mean that many firms providing professional services to members of the scheme (such as estate agents, surveyors, property developers and experts on valuing or appraising the particular type of asset that is to be acquired for the personal pension scheme) would be able to arrange for the property to be held under the scheme without needing *authorisation* or exemption. This is because the operator of the scheme will be an *authorised person* and the firm is likely to be paid by its client and not by the scheme operator.

Article 29 does not apply where the arrangements relate to a contract of insurance. But this will only affect the availability of the exclusion as it applies to personal pension schemes where either:

- the member is himself directly acquiring rights under the contract of insurance (for example, because the member is also a trustee of the scheme); or
- the rights which the member is acquiring (or disposing of) relate directly to rights under a contract of insurance that is or is to be held by or on behalf of the operator for the purpose of providing benefits to that member.

Article 33 of the *Regulated Activities Order* will allow *persons* such as estate agents, surveyors or property developers (whether or not they are *authorised*) to refer clients to an *authorised* or

exempt person for independent advice on the merits of their placing a commercial property in a particular personal pension scheme. Article 33 may also apply where a person arranges for an independent fund manager to be appointed to manage the assets of a personal pension scheme or for members or potential members to obtain independent advice in relation to their rights under the scheme. As with article 29, the article 33 exclusion does not apply where the introductions relate to a contract of insurance.

Article 67 of the *Regulated Activities Order* may permit firms such as solicitors and licensed conveyancers to arrange for the title to property to be transferred to the operator of the personal pension scheme. The exclusion could also apply to firms such as surveyors or estate agents arranging the transfer of title to commercial property. This is so long as it is necessary for them to arrange the transaction in order to provide their professional services and they are not separately remunerated for doing it.

Q23. I am an exempt professional firm. Will I be able to advise on, and arrange deals in, rights under personal pension schemes without needing FSA authorisation?

Rights under a personal pension scheme will be securities. This means that, subject to your being able to satisfy the general requirements of Part XX of the FSMA:

- you will be limited in your ability to give advice without authorisation; but
- you will be able to arrange deals in such rights without authorisation.

The limitation on your being able to give advice, as an exempt professional firm, to a member of a personal pension scheme will be, in broad terms, that:

- the advice must not consist of a recommendation to acquire or dispose of rights (unless it endorses a corresponding recommendation that has been given to the member by a suitably authorised or exempt person); and
- if, in addition, the advice relates to a contract of insurance, you must be a firm that is included in the FSA Register of Exempt Professional Firms.

12.4 Application of EU Directives

Q24. Do the changes in the scope of regulated activities concerning pension schemes that take effect on 6 April 2007 have any implications for pension scheme trustees or service providers under the Investment Services Directive (or, in future, the Markets in Financial Instruments Directive) or the Insurance Mediation Directive?

In general terms, if a pension scheme trustee or service provider does not need to be authorised under the *Investment Services Directive* prior to 6 April 2007 he should not need to be authorised for carrying on the same activities after that date. This is because rights under a personal pension scheme are not a financial instrument under the Directive and establishing, operating or winding up a personal pension scheme is not an investment service under the Directive. This will also be the case under the Markets in Financial Instruments Directive when it replaces the Investment Services Directive later in 2007. But this is subject to the fact that investment advice will become an investment service for the first time. Guidance on the application of the Investment Services Directive to the activities of pension scheme trustees and service providers generally is

in Chapter 10.4A of PERG. Draft guidance on the changes in regulatory scope that will be caused by the implementation of the Markets in Financial Instruments Directive was issued as Annex 5 to Consultation Paper 06/9 (Organisation systems and controls) and will form Chapter 13 to PERG.

Similarly, a pension scheme trustee or service provider who is not subject to regulation under the *Insurance Mediation Directive* prior to 6 April 2007 will not become subject to regulation purely as result of the changes in regulatory scope that take effect on 6 April 2007. Detailed guidance on the application of that Directive to pension scheme trustees and service providers is in Chapters 10.4 and 10.4A of PERG.

12.5 Financial promotion issues

Q25. Will the financial promotion restriction in section 21 of the Financial Services and Markets Act 2000 apply to promotions that invite or induce persons to become members of a personal pension scheme?

Yes, because they will be inviting or inducing persons to buy an investment in the form of the rights under the scheme that they would acquire by becoming a member.

Q26. Will the financial promotion restriction apply to a promotion of commercial property that is held out as being suitable for holding under a SIPP (but not any particular SIPP)?

Yes, if the promotion is an inducement to acquire the right to receive benefits derived from the performance of that property when it is held under a *personal pension scheme*. However, provided the promotion does not identify any particular scheme or scheme provider or person who can arrange or advise on the placing of the property into the scheme, the promotion should be exempt as a generic promotion under article 17 of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (the *Financial Promotion Order*).

Q27. Will any of the other exemptions in the Financial Promotion Order apply to promotions of a personal pension scheme?

Yes. All the usual exemptions that apply to the promotion of *securities* generally will apply. This includes the exemption for promotions made by an employer to their employees about a *group personal pension scheme* to which they are to contribute (article 72 of the *Financial Promotion Order*).

Q28. Can I find out more about the financial promotion restriction?

Yes. Chapter 8 of PERG has detailed guidance about the scope of the financial promotion restriction and the exemptions that are available.

12.6 Practical transitional considerations

Q29. I am currently operating a SIPP but am not an authorised person. Do I have to become authorised by 6 April 2007 or will there be any transitional arrangements to allow for the possibility that I do not obtain authorisation by that date?

Transitional arrangements have been put in place. The broad effect of these arrangements is that you will be able to benefit from interim authorisation as respects any of the new regulated activities that relate to personal pension schemes pending the final determination of your application. This is provided:

- you were carrying on the regulated activities, for which you are seeking permission, on or before 1 October 2006; and
- your application for authorisation was submitted on or before 23 March 2007.

Q30. I am already authorised. Do I need to seek a variation of permission to carry on any of the new regulated activities?

This depends on what activities are covered by your existing *permission*. If, immediately prior to 6 April 2007, your permission covers any regulated activity that relates to stakeholder pension schemes, you will automatically be granted permission to carry on each such regulated activity in relation to personal pension schemes. This is provided you have not exercised your right to notify the FSA by 23 March 2007 that you do not wish your permission to be extended in this way.

If your existing permission does not cover a regulated activity relating to stakeholder pension schemes, you will need to apply for a variation of permission if you wish to carry on any of the new regulated activities. As with applications for authorisation (see Q29), you will benefit from interim permission provided:

- you were carrying on the regulated activities, for which you are seeking to vary your permission, on or before 1 October 2006; and
- your application to vary your permission was submitted on or before 23 March 2007.

Q31. Can I avoid the need to be authorised by becoming an appointed representative of an authorised person?

You cannot be an *appointed representative* for *establishing, operating or winding up a personal pension scheme*. But you can be an appointed representative for activities such as advising on or arranging deals in rights under a *personal pension scheme*.

If you are an appointed representative prior to 6 April 2007 and you intend to carry on any of the new regulated activities, you will need to consider whether your existing agreement with your principal will cover those activities or whether it will need to be amended to do so. You may be an appointed representative of a life office for the purpose of advising on or arranging deals in its investment products and also undertake unregulated activities in relation to personal pension schemes offered by third parties. If those unregulated activities include activities that will become regulated from 6 April 2007, you will need either to become the appointed representative of another appropriately authorised firm or to seek authorisation yourself. This is because an appointed representative of a life office can only undertake regulated activities that arise directly from the life office's insurance business.

Remember also that a person cannot generally be authorised and exempt as an appointed representative at the same time. However, this rule is waived if you obtain interim authorisation to carry on the new regulated activities and wish, pending determination of your application for authorisation, to continue to conduct existing regulated activities as an appointed representative.

ANNEX B

Amendments to the Perimeter Guidance manual

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

Rights under a ~~stakeholder~~ pension scheme

2.6.19 G ~~A stakeholder pension scheme is defined in section 1 of the Welfare Reform and Pensions Act 1999. Regulations made under that section set out detailed rules under which such schemes will operate (see the Stakeholder Pension Scheme Regulations 2000). Schemes must be registered with The Pensions Regulator and approved by the Board of HM Revenue and Customs. Rights under such schemes are specified investments for the purposes of the Regulated Activities Order. There are no exclusions in the Order.~~

Two types of investment are specified here:

- (1) rights under a stakeholder pension scheme; and
- (2) rights under a personal pension scheme.

2.6.19A G A stakeholder pension scheme is defined in section 1 of the Welfare Reform and Pensions Act 1999. Regulations made under that section set out detailed rules under which such schemes will operate (see the Stakeholder Pension Scheme Regulations 2000). Schemes must be registered with The Pensions Regulator.

2.6.19B G A personal pension scheme is, broadly speaking, a pension scheme which is not an occupational pension scheme or a stakeholder pension scheme. That is, a scheme or arrangement that is comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people:

- (1) on retirement; or
- (2) on having reached a particular age; or
- (3) on termination of service in an employment.

2.6.19C G Rights under stakeholder pension schemes and personal pension schemes are specified investments for the purposes of the Regulated Activities Order.

There are no exclusions in the Order.

...

Establishing etc ~~stakeholder~~ pension schemes

2.7.14 G The *regulated activities* carried on in relation to ~~stakeholder pension schemes~~ pension schemes are the ~~establishment~~ establishing, operating or winding up of a stakeholder pension scheme and establishing, operating or winding up a personal pension scheme. ~~Managers of such schemes will require authorisation as they will be operating the schemes.~~ The identity of the operator of such a pension scheme depends on the facts. However, the scheme administrator will usually be the operator of the scheme either on its own or jointly with the scheme trustees. More detailed guidance on the scope of this activity is in PERG 12 (Q4).

...

2.7.21 Gcarrying on any of the activities that are regulated in relation to *collective investment schemes*, ~~and stakeholder pension schemes~~ or personal pension schemes. A person will need to make sure that...

...

Establishing etc ~~stakeholder~~ pension schemes

2.8.11 G The only exclusion from the range of activities specified as being regulated in relation to *stakeholder pension schemes* and personal pension schemes relates to *incoming ECA providers* (see PERG 2.9.18G).

...

2.10.14 G The *regulated activities* that may be carried on in this way are restricted by an Order made by the Treasury under section 327(6) of the *Act* (Exemption from the general prohibition) (the *Non-Exempt Activities Order*). Accordingly, under that section, a person may not by way of business carry on any of the following activities without *authorisation*:

(1) ...

(5) establishing, operating or winding up a stakeholder pension scheme or a personal pension scheme;

...

PERG 2 Annex 2G

2 Table

Table 1: Regulated Activities [See note 1 to Table 1]

Regulated activity

**Specified investment in relation to which
the regulated activity (in the corresponding
section of column one) may be carried on**

...

(p) establishing, operating or winding up a stakeholder pension scheme (article 52(a))

(p-a) establishing, operating or winding up a personal pension scheme (article 52(b))

(pa) providing basic advice ...

Note 1

In addition to the ...

- *establishing, operating or winding up a stakeholder pension scheme or establishing operating or winding up a personal pension scheme (article 52)*

...

Note 4

For the purpose of the

- *stakeholder pension scheme (article 82(1));*
- *personal pension scheme (article 82(2));*
- *life policy (explained in note 5); and*
- *rights to or interests in investments in so far as they relate to a unit, a stakeholder pension scheme, a personal pension scheme or a life policy.*

...

5 Table

Table 3: Securities, contractually based investments and relevant investments [see notes 1 and 2 to Table 3]

Security

.....

...

stakeholder pension scheme (article 82(1));

personal pension scheme (article 82(2));

...

8.25.1 G For the purposes of article 53 of the *Regulated Activities Order*, a *security or relevant investment* is any one of the following:

...

(7) *stakeholder pension schemes* or *personal pension schemes*;

...

8.36.4 G ...

(9) Rights under a stakeholder pension scheme or a personal pension scheme.

...

10.1 Q1. ...

The Q&As are primarily concerned with identifying the regulated activities (such as dealing or arranging deals in investments, managing investments or advising on investments) that may be carried on by persons (including trustees) who are involved with *occupational pension schemes* and ~~personal pension schemes~~ *personal pension schemes*. They are also concerned, but only in relation to *personal pension schemes* and *stakeholder pension schemes*, with identifying when the regulated activity of operating such a scheme will be carried on (see Q26).

The Q&As complement the general *guidance* on regulated activities in Chapter 2 of our Perimeter Guidance Manual ('PERG'), the general guidance on insurance mediation activities in Chapter 5 of PERG (PERG 5) and the relevant legislation. In addition, Chapter 12 of PERG (PERG 12) has further guidance about the regulated activities relating to the operation and sale of personal pension schemes that ~~came~~ came into force on 6 April 2007.

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

...

Q3. ...

- *establishing, operating or winding up a stakeholder pension scheme;*
- *establishing, operating or winding up a personal pension scheme.*

...

Q4. ...

Securities, such as shares, debt securities, warrants, or unit trusts, or rights under a personal pension scheme or a stakeholder pension scheme and contractually based investments such as ...

...

Q23. ...

No, provided it is not establishing, operating or winding up the scheme and is able to satisfy various exclusions that apply to other regulated activities. But note that, under government proposals for reforming the way in which personal pension schemes are permitted to be established and registered, it may need to be authorised by 6 April 2007 for operating a personal pension scheme—see HM Treasury’s Consultation Document entitled “Proposed changes to the eligibility rules for establishing a pension scheme—A consultation document, September 2005”. This is available on HM Treasury’s website at: www.hm-treasury.gov.uk/consultations_and_legislation/pension_scheme/consult_pensionscheme_index.cfm. The document sets out several options and indicates that the Treasury’s preferred option is to introduce a new regulated activity of establishing, operating or winding up a personal pension scheme other than a stakeholder pension scheme (where those activities are already regulated). The new regulated activity would come into force on 6 April 2007. At the same time, rights under a personal pension scheme would become an investment for the purposes of existing *regulated activities* such as *dealing, arranging, managing investments and advising on investments*. The FSA proposes to consult on further perimeter *guidance* about the changes to regulatory scope in this area during the course of 2006. Guidance on the regulated activities of establishing, operating and winding up a personal pension scheme is in Q24 to Q28 and in PERG 12 (Q3 to Q5).

So, your company’s position until April 2007 will depend on a combination of the activities that it carries on and the availability of certain exclusions. These exclusions may also apply to trustees of pension schemes other than SIPPs, including trustees of stakeholder pension schemes, with the exception of that for *managing investments* (which will not apply to a trustee of an OPS).

...

(6) There are no exclusions from the regulated activities of *establishing*.

operating or winding up a stakeholder pension scheme or establishing, operating or winding up a personal pension scheme. Guidance to help you determine whether or not your company will be carrying on any of these activities is in Q24 to Q28 and in PERG 12 (Q3 to Q5).

Q24. My company acts as corporate trustee of a for both trust-based stakeholder and personal pension schemes. Does it need to be authorised?

This depends on the responsibilities that your company assumes as trustee. Establishing, operating or winding up a stakeholder pension scheme or a personal pension scheme are regulated activities in their own right. These are functions that ~~are~~ may often be carried out by the trustees of a trust-based ~~stakeholder pension~~ scheme other than where the trustees are mere bare trustees. This is apart from establishing a scheme which is a function that may often be carried out by a third party such as a product provider. See Q25 to Q28 and PERG 12 (Q3 to Q5) for further guidance on these activities.

Q25. What does establishing a stakeholder or personal pension scheme involve?

The establisher of a stakeholder or personal pension scheme is the *person* responsible for putting in place the arrangements founding the scheme ~~and registering it with HM Revenue & Customs~~. With a trust-based scheme, this will usually be the person who executes the trust as principal provider. In a scheme ...

Q26. What does operating a stakeholder or personal pension scheme involve?

The 'operator' is the *person* responsible, ~~under the scheme's constitution, for ensuring continuing compliance with the management and administration requirements in respect of the assets and income of, and the benefits payable under, the scheme as imposed under relevant pensions and tax legislation. For example, with~~ to the members for managing and administering the assets and income of, and the benefits payable under, the scheme in accordance with relevant pensions and tax legislation, the scheme's constitution and the regulatory system. In this respect, the responsibilities that are placed under Part 4 of the Finance Act 2004 on a pension scheme administrator (as defined in section 270(1) of that Act) will mean that he is likely to be the operator of the scheme. In a trust-based schemes, the trustees ~~will often be the operator by virtue of the responsibilities they assume under the trust deed.~~ In may act as scheme administrator or there may be a separate person who acts in that capacity. Where there are separate trustees, it may be the case that they are operating the scheme jointly with the scheme administrator by virtue of the responsibilities they assume under the trust deed for the management and administration of the scheme assets. However, in situations where the trustees' role is merely to act as a bare trustee holding the scheme assets, it

~~may be the case that there is a third party who has responsibility for the management and administration of the scheme and its assets and who will be the scheme's~~ it is the scheme administrator who is likely to be the sole operator of the scheme. The scheme may be established by an *authorised person* who acts as a provider of investment products or services to the scheme. This does not make that person the operator of the scheme if, as a matter of fact, he has appointed another person ~~(such as a trustee)~~ to be responsible to the members for carrying out all of the operator's functions as scheme administrator or as trustee, or both as the case may be in his place.

Q27. What is my position as the operator of a stakeholder or personal pension scheme if I delegate day-to-day functions such as administration of the scheme or management of the scheme assets to another person?

...

Q28. What does winding-up a stakeholder or personal pension scheme involve?

The *person* who winds-up such a stakeholder pension scheme ~~pension scheme~~ will be the person ...

...

10.4

Q31. ...

(4) Arranging the appointment of a custodian on behalf ... will then safeguard and administer in accordance with pre-existing arrangements.

(5) Arranging for persons to join or to leave a stakeholder pension scheme or a personal pension scheme or to exercise certain rights under such a scheme. This is because the rights themselves will be a form of investment and so you will be arranging. This is explained in more detail in PERG 12 (Q15 to Q20).

(6) Acting as the scheme administrator (as defined in section 270(1) of the Finance Act 2004) for a stakeholder pension scheme or a personal pension scheme. This is because you are likely to be operating the scheme (see Q26).

(7) Advising the trustees on the merits of buying or selling particular securities or relevant investments or advising a member on the merits of joining or leaving, or of exercising certain rights under, a stakeholder pension scheme or a personal pension scheme. This is because you will be advising on investments (see Q38 and Q39).

Services that typically will not involve any regulated activities ...

...

Q39. ...

It ~~may~~ is likely to be if the advice concerns a ~~personal pension scheme~~ personal pension scheme but probably not if it concerns an OPS that is not a stakeholder pension scheme. The same factors apply to advice given to a member as apply to advice given to trustees (see Q38). But a particular factor ~~is likely to~~ will be whether the member is himself *buying* or *selling* a *security* or *relevant investment* (a “regulated investment”).

~~With a trust-based pension scheme, the trustees will usually hold the legal title to the scheme’s investments with the members having a beneficial interest in those investments. These beneficial interests may themselves be regulated investments (under article 89 of the *Regulated Activities Order*) that can be bought or sold by the member.~~

~~So, for example, the interests which a member may acquire in *units* or *life policies* held under a SIPP will amount to a regulated investment held by the investor, even though the legal title to the investments is held by the trustees on the member’s behalf. Advice to the member on the merits of acquiring or disposing of those interests will then be regulated advice. But advice on the merits of acquiring or disposing of interests in other assets such as real property or cash will not be regulated advice.~~

It is usually the case that, where regulated investments are held under trust, the person for whose benefit the investments are held will acquire a beneficial interest in the investments. Such interests are regulated investments in their own right under article 89 of the *Regulated Activities Order*. Where an OPS that is not a *stakeholder pension scheme* is concerned, however, the interests obtained by members are specifically excluded from being regulated investments (see article 89(2) of the *Regulated Activities Order*). This means that a member of an a money purchase OPS does not acquire a regulated investment simply through having a beneficial interest in investments held under the trust for the purpose of providing his benefits. Similarly, an interest in investments that result from a member having made additional voluntary contributions and which are held under the trust for his benefit will not be a regulated investment. So, advice to the member on the merits of his making additional voluntary contributions under his OPS will not be regulated advice.

The position with *stakeholder pension schemes* and personal pension schemes (including free-standing additional voluntary contributions schemes) is different. The rights under such a scheme (whether it is trust-based or contractual) are a specific type of regulated investment. So, advice on the merits of joining or leaving, or of exercising certain rights under, such a stakeholder pension scheme will be regulated advice. This is the case with a stakeholder pension scheme even if the scheme is also an OPS. More detailed guidance on the meaning of rights under a personal pension scheme

and the circumstances in which advice about such rights is regulated is in PERG 12 (Q15 to Q20). That guidance will apply equally to rights under a stakeholder pension scheme.

~~The rights or interests that a person acquires under free-standing additional voluntary contribution arrangements will be regulated investments if and to the extent that the underlying investments are *securities* or *contractually based investments*. Where this is the case, advice on the merits of making free-standing additional voluntary contributions will be regulated advice.~~

~~If operating a personal pension scheme becomes a regulated activity in line with the government's proposals (see Q23), the rights that a member obtains under any such scheme (including a SIPP) will become regulated investments in their own right and so advice on the merits of *buying* or *selling* such rights would be regulated.~~

Q40. I provide administration services to the providers of pension products such as insurers, unit trust managers or banks. Is my position any different to that of a person who provides administration services to pension scheme trustees?

Potentially, yes. This is because:

...

- although you are likely to be carrying on *dealing* or *arranging* activities if you handle such things as arranging new policies or units, additional payments, surrenders, switches or assignments, some of the exclusions may not apply to you, for example:

...

Q41A. ...

Activity	Potential ISD investment service?	Potential application of ISD or of an ISD article 2.2 exemption?
Dealing in scheme assets as trustee	...	
Issuing rights under a stakeholder <u>or personal</u> pension scheme to members	None – the rights are not ISD investments	ISD does not apply

...		
Establishing, operating or winding up a stakeholder <u>or</u> <u>personal</u> pension scheme	None	ISD does not apply
...		

Q43. ...

You are unlikely to be carrying on a *regulated activity* in the case of an OPS ... staff with the opportunity to participate in a ~~group~~ *personal pension scheme* or a *stakeholder pension scheme*, you are likely to be *arranging*. You may also be *advising on investments* if you provide your employees with advice on the merits of their joining the scheme (see Q39).

Q44. As an employer, I ~~am~~ may offering my staff a stakeholder pension scheme or a personal pension scheme. If I do so, wWill I satisfy the by-way-of-business test?

...

Annex 3

Table summarising regulatory position of pension scheme trustees and service providers

Potential regulated activity	When will such regulated activities be carried on?
...	...
<i>Establishing, operating or winding-up a stakeholder pension scheme</i> <u>or</u> <i>establishing, operating or winding-up a personal pension scheme</i> (article 52 of the Regulated Activities Order)	The trustee of a trust-based stakeholder <u>or</u> <u>personal</u> pension scheme will often <u>may</u> be its operator. This is where the trustee is <u>not merely</u> a bare trustee and <u>is</u> responsible under the instruments establishing the scheme for complying with the management and administration requirements in respect of the assets and income of, and the benefits payable under, the scheme as imposed under relevant pensions and tax legislation. <u>Persons who are not scheme trustees are only</u>

	<u>likely to be carrying on these activities if they are the scheme administrator</u> (see Q26).
...	...

Annex 4

Table summarising regulatory position of employers and affinity groups

Activity carried on by employer or affinity group	Potential implications in terms of regulated activities and the need for authorisation
...	...
Acting as trustee of a trust-based stakeholder pension scheme	This is <u>likely to</u> will be a regulated activity <u>as</u> if the trustee is <u>likely to be</u> operating the stakeholder pension scheme. But the employer or affinity group will only need to be authorised or exempt if, as trustee, they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).
Arranging for employees to participate in an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme	Arranging for employees to participate in an occupational pension scheme (other than one that is also a stakeholder pension scheme) is not a regulated activity as the employees are not acquiring investments. Arranging for employees to participate in <u>any form of a group personal pension scheme or in a stakeholder pension scheme</u> is likely to involve <i>arranging</i> as is arranging for employees to participate in a stakeholder pension scheme . But the employer or affinity group will only need to be authorised or exempt if they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).
Advising employees on the merits of participating in an occupational pension scheme or a group personal pension scheme or a stakeholder pension scheme, including advising employees against joining a personal pension scheme or advising them to transfer from a personal	Advice on the merits of participating in an occupational pension scheme (other than one that is also a stakeholder pension scheme) is not a regulated activity as the employees are not acquiring investments. Advice on the merits of participating in a <u>particular</u> group personal pension scheme or a stakeholder pension scheme will be a regulated activity <u>because the rights that a person would acquire by becoming a member of the scheme are a form of investment</u> (see Q39). Advice against joining or to transfer from a <u>particular</u> personal pension scheme will be a

pension scheme	<p>regulated activity <u>for the same reasons</u> if the advice relates to a particular security or relevant investment that is or is to be held under the scheme or if the scheme is a stakeholder pension scheme. If the advice relates to personal pension schemes generally but not one in particular it will not be a regulated activity (see Q39 and Q40).</p> <p>But the employer or affinity group will only need to be authorised or exempt if they are acting by way of business which, in most instances, should not be the case (see Q6, Q44 and Q45).</p>
...	...

Annex 5

Table summarising regulatory position concerning financial promotions by trustees, employers and affinity groups

Person communicating	Subject or purpose of communication	Need for approval or exemption available
...
Employer, affinity group or trustee	To persuade employees or members to join a stakeholder pension scheme or a <i>group personal pension scheme</i> .	<p>Approval or exemption needed as rights under a stakeholder pension scheme will be, and rights under a group personal pension scheme are likely to be or to include, <u>themselves</u> investments.</p> <p>Promotions about stakeholder pension schemes ...</p>
Employer or affinity group	To persuade employees or members to make free-standing additional voluntary contributions (FSAVCs) or to take out any other type of personal pension scheme <i>personal pension scheme</i> (other than a stakeholder pension scheme or a	Approval or exemption is likely to <u>will</u> be needed as rights under FSAVCs and other personal pension schemes are likely to be or to include <u>themselves</u> investments.

	group personal pension scheme).	
...

12 Guidance for persons running or advising on personal pension schemes

12.1 Background

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

These Q&As are aimed at, and should be read by, *persons* involved in the running of a *personal pension scheme* and those who give advice about or provide services to such schemes. They are intended to help such persons understand whether they will be carrying on a *regulated activity* and need *authorisation* or exemption under section 19 of the Financial Services and Markets Act 2000 following the changes to pension legislation that ~~took~~ are proposed to take effect on 6 April 2007. ~~Under the proposed changes, establishing, operating or winding up a personal pension scheme will become a regulated activity and rights under a personal pension scheme will become a specified investment.~~ The Q&As complement the general *guidance* on regulated activities which is in Chapter 2 of our Perimeter Guidance manual ('PERG') and the general guidance about pensions-related activities which is in Chapter 10 of PERG.

The Q&As are set out under ~~four~~ five sections:

- ~~the scope of the proposed new regulated activity of~~ *establishing, operating or winding up a personal pension scheme* (PERG 12.2);
- ~~the implications of the proposed new specified investment of rights under a personal pension scheme~~ (PERG 12.3);
- the application of EU Directives (PERG 12.4); and
- *financial promotion* issues (PERG 12.5); ~~and~~
- ~~practical transitional considerations~~ (PERG 12.6).

...

Q11. I am a trustee operating a self-invested personal pension scheme ('SIPP'). Can I ~~continue to~~ rely on the various exclusions available to trustees for other regulated activities such as dealing in investments, managing investments and safeguarding and administering investments?

Yes, provided you are able to satisfy the conditions applicable to the ~~you may continue to rely on existing exclusions for those activities.~~ No changes ~~are being~~ were made to those any of the

exclusions as a result of the changes in regulatory scope that took effect on 6 April 2007. Guidance on the exclusions is given in Chapter 10 (Q23) of PERG.

...

Q24. Do the changes in the scope of regulated activities concerning pension schemes that ~~take~~ took effect on 6 April 2007 have any implications for pension scheme trustees or service providers under the Investment Services Directive (or, in future, the Markets in Financial Instruments Directive) or the Insurance Mediation Directive?

In general terms, if a pension scheme trustee or service provider ~~does~~ did not need to be authorised under the *Investment Services Directive* prior to 6 April 2007 he should not need to be authorised ...

Similarly, a pension scheme trustee or service provider who was is not subject to regulation under the *Insurance Mediation Directive* prior to 6 April 2007 will not become subject to regulation purely as result of the changes in regulatory scope that ~~take~~ took effect on 6 April 2007. Detailed guidance ...

12.6 Practical transitional considerations

~~Q29. I am currently operating a SIPP but am not an authorised person. Do I have to become authorised by 6 April 2007 or will there be any transitional arrangements to allow for the possibility that I do not obtain authorisation by that date?~~

~~Transitional arrangements have been put in place. The broad effect of these arrangements is that you will be able to benefit from interim authorisation as respects any of the new regulated activities that relate to personal pension schemes pending the final determination of your application. This is provided:~~

- ~~• you were carrying on the regulated activities for which you are seeking permission on or before 1 October 2006; and~~
- ~~• your application for authorisation was submitted on or before 23 March 2007.~~

~~Q30. I am already authorised. Do I need to seek a variation of permission to carry on any of the new regulated activities?~~

~~This depends on what activities are covered by your existing *permission*. If, immediately prior to 6 April 2007, your permission covers any regulated activity that relates to stakeholder pension schemes, you will automatically be granted permission to carry on each such regulated activity in relation to personal pension schemes. This is provided you have not exercised your right to notify the FSA by 23 March 2007 that you do not wish your permission to be extended in this way.~~

~~If your existing permission does not cover a regulated activity relating to stakeholder pension schemes, you will need to apply for a variation of permission if you wish to carry on any of the new regulated activities. As with applications for authorisation (see Q29) you will benefit from interim permission provided:~~

- you were carrying on the regulated activities, for which you are seeking to vary your permission, on or before 1 October 2006; and
- your application to vary your permission was submitted on or before 23 March 2007.

Q31. Can I avoid the need to be authorised by becoming an appointed representative of an authorised person?

You cannot be an *appointed representative* for *establishing, operating or winding up a personal pension scheme*. But you can be an appointed representative for activities such as advising on or arranging deals in rights under a *personal pension scheme*.

If you are an appointed representative prior to 6 April 2007 and you intend to carry on any of the new regulated activities, you will need to consider whether your existing agreement with your principal will cover those activities or whether it will need to be amended to do so. You may be an appointed representative of a life office for the purpose of advising on or arranging deals in its investment products and also undertake unregulated activities in relation to personal pension schemes offered by third parties. If those unregulated activities include activities that will become regulated from 6 April 2007, you will need either to become the appointed representative of another appropriately authorised firm or to seek authorisation yourself. This is because an appointed representative of a life office can only undertake regulated activities that arise directly from the life office's insurance business.

Remember also that a person cannot generally be authorised and exempt as an appointed representative at the same time. However, this rule is waived if you obtain interim authorisation to carry on the new regulated activities and wish, pending determination of your application for authorisation, to continue to conduct existing regulated activities as an appointed representative.