Chapter 8

Financial promotion and related activities

8.30B   Personal recommendations

Purpose of this section

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

Basic definition of personal recommendation

8.30B.2 G   A *personal recommendation* means a recommendation that:

(1) is made to a *person* in their capacity as:

   (a) an investor or potential investor; or

   (b) agent for an investor or a potential investor;

(2) is for the *person* in (1) to do any of the following (whether as principal or agent):

   (a) buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular *investment* which is a *security*, a *structured deposit* or a *relevant investment*; or

   (b) exercise or not exercise any right conferred by such an *investment* to *buy, sell,* subscribe for, exchange or redeem such an *investment*;

(3) is:

   (a) presented as suitable for the *person* to whom it is made; or

   (b) based on a consideration of the circumstances of that *person*; and

(4) is not issued exclusively to the public.

Link to MiFID

8.30B.3 G   (1) The definition of *personal recommendation* in the *Regulated Activities Order* is based on the definition of the *MiFID investment service or activity* of making a personal recommendation.

(2) *Personal recommendation* should therefore be interpreted for the purpose of the *regulated activity* of *advising on investments (except P2P agreements)* consistently with *MiFID*.

(3) However the types of *investments* to which the recommendation relates (as listed in ■ PERG 8.30B.2G(2)) are not limited to ones covered by *MiFID*.

8.30B.4 |G| This section draws on the document "Question & Answers: Understanding the definition of advice under MiFID" (CESR/10-293), published by the Committee Of European Securities Regulators (now *ESMA*).

Examples

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

(2) The notes at the start of the tables explain which parts of the tables are relevant to the issues in this section.

Relevance of the guidance elsewhere in this chapter

8.30B.6 |G| (1) ■ PERG 8.25 to ■ PERG 8.30A deal with the meaning of *advising on investments (except P2P agreements)* in ■ PERG 8.24.1G, where it is not relevant whether there is a *personal recommendation*. That material also applies to whether the conditions in ■ PERG 8.30B.2G(1) and (2) are met, as explained in (2) and (3).

(2) If something is regulated advice under ■ PERG 8.25 to ■ PERG 8.30A it meets the conditions in ■ PERG 8.30B.2G(1) and (2). However it is not a *personal recommendation* unless it also meets the conditions in ■ PERG 8.30B.2G(3) and (4).

(3) If something is not regulated advice under ■ PERG 8.25 to ■ PERG 8.30A it is not a *personal recommendation* as it does not meet the conditions in ■ PERG 8.30B.2G(1) and (2).

8.30B.7 |G| Therefore:

(1) for a communication to be a *personal recommendation* it must:

(a) relate to an *investment* which is a *security*, a *structured deposit* or a *relevant investment*, as described in ■ PERG 8.25;

(b) be about a particular *investment*, as described in ■ PERG 8.26;

(c) be given to *persons* in their capacity as investors or potential investors, as described in ■ PERG 8.27 (although the material in ■ PERG 8.27.5G about advice given in a periodical or website is not relevant);

(d) be advice (that is, not just information), as described in ■ PERG 8.28; and

(e) relate to the merits of *buying*, holding or *selling* the *investment*, as described in ■ PERG 8.29;

(2) the medium used to give advice should make no difference to whether or not the communication comes within ■ PERG 8.30B.2G(1) and (2), as described in ■ PERG 8.30 (but advice given in periodicals, broadcasts and other news or information services will generally not

be a *personal recommendation* for the reasons described in
■ PERG 8.30B.22G to ■ PERG 8.30B.24G);

(3) the points in ■ PERG 8.30A about whether pre-purchase questioning or filtering involves regulated advice are also relevant to whether the requirements in ■ PERG 8.30B.2G(1) and (2) are met; and

(4) a communication is not a *personal recommendation* unless it also meets the conditions in ■ PERG 8.30B.2G(3) and (4).

Presenting a recommendation as suitable

8.30B.8 |G| An *investment* might be presented as suitable for a customer in an explicit way using words such as, for example, "this product would be the best option for you". This meets the condition in ■ PERG 8.30B.2G(3)(a).

8.30B.9 |G|

(1) However, it is not necessary for a *firm* to tell a customer explicitly that a recommendation it is making is suitable for the customer in order for it to be a *personal recommendation*. If the *firm* implicitly presents an *investment* to the customer as suitable, that can still be a *personal recommendation*.

(2) The following are examples of implicit recommendations of this type:

(a) a *firm* may present several *investments*, with one of them highlighted for the customer by a phrase such as "people like you tend to buy this product"; and

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

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

Recommendation based on a consideration of circumstances

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

(1) factual information (for example, their address, income or marital status); or

(2) more subjective information about their wants and needs (for example, their overall risk appetite, short- and long-term investment objectives and their desire for protection from particular risks).

8.30B.12 |G| Whether or not a *firm* will be viewed as providing a recommendation based on a consideration of a *person's* circumstances is likely to depend on factors

such as the nature of the information it collects and the way that it presents its questions.

8.30B.13 G

(1) For example, if:

  (a) a *firm* has collected information from a customer on their investment objectives or financial situation; and

  (b) the customer returns to the *firm* through the same channel for a follow-on service;

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

(2) The following factors could also show that it would be reasonable for the customer to expect that the *firm* is using previously given information:

  (a) the contact point with the *firm* is the same; and

  (b) the nature of the service is similar to that given in the past.

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

(1) a customer gives a *firm* information when purchasing a mortgage; and

(2) the customer later makes use of an execution-only service provided by the *firm* through its online channel to buy *securities*;

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

8.30B.15 G

(1) If :

  (a) a *firm* makes a recommendation to a customer; and

  (b) the *firm* presents it as being based on the customer's personal circumstances; but

  (c) the *firm* in fact fails to use information about that customer's circumstances when making that recommendation;

  that recommendation is a *personal recommendation*.

(2) So for example, if:

  (a) a *firm* has accumulated relevant information on a customer's circumstances (either during a single interview or during the course of an ongoing relationship); and

  (b) it would be reasonable for the customer to expect that this information is being taken into account (see ■ PERG 8.30B.13G to ■ PERG 8.30B.14G);

  any recommendation will be treated as being based on a consideration of the customer's circumstances.

Where the same recommendation is sent to several customers

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

8.30B.17 G To assess whether a communication made to several customers is a *personal recommendation*, the following factors are relevant:

(1) the target audience (■ PERG 8.30B.18G);

(2) the content of the message (■ PERG 8.30B.19G); and

(3) the language used (■ PERG 8.30B.20G).

8.30B.18 G Target audience:

(1) For example, when the internal procedures of a *firm* specify that an *investment* may only be sold to a sample of customers selected on the basis of certain factors, such as customers under a certain age or who hold no similar products, the selection of the target audience will not automatically mean that the *firm* is providing *personal recommendations*.

(2) However, highlighting the particular personal circumstances that led the individual to be contacted, for example, is very likely to mean that the *investment* is being presented as suitable for the particular investor.

(3) The key factor here is how the recommendation would appear to a reasonable investor and in particular whether it would appear to a reasonable investor contacted in this way that:

(a) the communication from the *firm* was sent to that investor because the *investment* is suitable for that investor; or

(b) the investor was selected because of their circumstances.

8.30B.19 G Content of the message:

(1) If the message contains a solicitation, a recommendation, an opinion or a judgment about the advisability of a transaction, this could mean that it is a *personal recommendation*.

(2) This factor is also relevant to whether the message meets the requirements in ■ PERG 8.30B.2G(1) and (2) (whether there is a recommendation).

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

Disclaimers

8.30B.21 G A disclaimer may help a *firm* to avoid inadvertently presenting *investments* as suitable for particular customers or as being based on a consideration of

the customer's circumstances. However it will not always be sufficient. For example a disclaimer is unlikely to be effective if:

(1) a *firm* states that the *investment* would suit a particular customer's needs; or

(2) it is reasonable for the customer to expect that the recommendation is based on a consideration of their circumstances.

Recommendation to the public

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

8.30B.23 |G| Advice about *investments* in a newspaper, a journal, a magazine, a website accessible to the general public or in a radio or television broadcast should not amount to a *personal recommendation*.

8.30B.24 |G|
(1) However, use of the internet does not automatically mean that a communication is made to the public and that as a result it is outside the definition of a *personal recommendation*.

(2) Therefore, for instance, while advice on a generally accessible website is unlikely to be a *personal recommendation*, an email communication provided to a specific *person*, or to several *persons*, may amount to a *personal recommendation*.

(3) ■ PERG 8.30B.16G to ■ PERG 8.30B.20G (Where the same recommendation is sent to several customers) deal with when a communication, including an email, sent to multiple customers can be a *personal recommendation*.

(4) See ■ PERG 8.30B.33G(5) for an example of when the output of a website may still be a *personal recommendation* even though the website is accessible to the general public.

Decision trees and filtering

8.30B.25 |G|
(1) A *firm* may sell products through its website and that website may allow the customer to filter products based upon factors presented by the website and selected by the customer.

(2) Someone deciding whether a filtering process meets the requirements in ■ PERG 8.30B.2G(1) and (2) should look at ■ PERG 8.30A (Pre-purchase questioning (including decision trees)).

(3) However, if a filtering process is treated as giving regulated advice under ■ PERG 8.30A it must also meet the requirements in ■ PERG 8.30B.2G(3) and (4) if it is to be a *personal recommendation*.

8.30B.26 |G|
(1) This section ■ PERG 8.30B deals with two basic forms of filtering process.

(2) The first type involves identifying *investments* based on factual matters, as described in ■ PERG 8.30A.10G.

(3) The second type involves factors incorporating opinion, judgment or recommendations, as described in ■ PERG 8.30A.11G.

8.30B.27 |G| A filtering process based on factual matters will generally not involve a *personal recommendation* because it does not meet the requirements in ■ PERG 8.30B.2G(1) and (2) (see ■ PERG 8.30A.6G (as applied by ■ PERG 8.30B.6G)).

8.30B.28 |G| In the *FCA's* view, a filtering process based on a single subjective factor such as riskiness may meet the requirements in ■ PERG 8.30B.2G(1) and (2) but still not be a *personal recommendation* because it does not meet the requirements in ■ PERG 8.30B.2G(3) and (4). It need not meet those requirements for the following reasons taken together.

(1) The filter is simple because:

(a) the number of inputs by the customer is small;

(b) the translation from the customer's input to the list of displayed products does not involve any opinion or complicated processing;

(c) if the customer chooses high-risk products there is a pre-existing list of products that are displayed for that customer;

(d) if the customer chooses low-risk products there is a pre-existing list of products that are displayed for that customer; and

(e) the same results will be displayed for any other customer that chooses that category of risk.

(2) This sort of filtering is just a form of indexation of pre-existing information.

(3) It would be perfectly possible to arrange the *investments* the *firm* sells into categories based on riskiness in hard copy form, and to make that hard copy available to the public. However it cannot be said that a hard copy arranged and published in that way is based on the personal circumstances of the *person* reading it.

(4) The website output from the process does not become a *personal recommendation* just because it is on a website or just because the website screens out information the customer asks not to see.

(5) All the filtering does is to eliminate *investments* that do not fall within the specified category.

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

(1) ■ PERG 8.30B.28G is not based on the view that an investment factor such as riskiness cannot be part of the customer's personal circumstances. The customer's attitude to risk can form part of the customer's personal circumstances.

(2) ■ PERG 8.30B.28G is not based on the view that there is no *personal recommendation* where the advice is about whether a product meets

the customer's objectives rather than the product being good or bad. A *personal recommendation* may relate to the customer's objectives.

(3) ■ PERG 8.30B.28G is not based solely on the fact that the website only takes into account a narrow range of factors. The fact that a *firm* has not considered all the customer's circumstances does not necessarily mean that there is no *personal recommendation*.

8.30B.30 G (1) The conclusion in ■ PERG 8.30B.28G is given some support by the *ESMA* guidance referred to in ■ PERG 8.30B.4G.

(2) That guidance states that where the filtering process is limited to assisting the customer to make their own choice of product with particular features which the customer regards as important, then it is unlikely that the process will involve a *personal recommendation*.

8.30B.31 G (1) Whether or not a *personal recommendation* is given depends in part on whether the customer is led to think that one is being given.

(2) Therefore it is important that the customer understands that:

(a) the *firm* is not advising on whether the products are suitable for the customer; and

(b) instead the *firm* is assisting the customer to make their own choice of product with particular features which the customer regards as important.

(3) If buying the *investments* identified in the website's output is positioned as the appropriate action for the customer to take, the overall service might be viewed as a *personal recommendation*.

(4) The customer should understand that, because the website takes into account a narrow range of the customer's personal circumstances and preferences and because the customer rather than the *firm* has established what those circumstances and preferences are, the result may be that the customer ends up with products that are unsuitable for them.

8.30B.32 G (1) As described in ■ PERG 8.30B.21G, including a disclaimer is not enough on its own to prevent a *personal recommendation*.

(2) For example, if the *firm* says that the filtered *investments* displayed by the website would suit the customer's needs, the inclusion of a disclaimer saying that this is not advice or a *personal recommendation* would be unlikely to change the nature of the communication.

(3) A legalistic disclaimer is unlikely to be enough to prevent a *firm* from giving a *personal recommendation*. Instead, the material should prominently and clearly explain the limited nature of the service that the *firm* provides and the risk that the customer will end up with unsuitable *investments*.

8.30B.33 [G]

(1) If the filtering is based on more than one factor chosen by the consumer that does not mean that the *firm* is making a *personal recommendation*.

(2) However the output from the website may be a *personal recommendation* if the way that the customer's inputs interact on the website is more complicated than with a simple filtering system under which:

  (a) the *firm* assigns a limited number of characteristics (such as levels of riskiness) to each product;

  (b) the customer chooses the characteristics they want; and

  (c) the system displays all the products that meet all the characteristics chosen by the customer and does not show the other products.

(3) As explained in ■ PERG 8.30A.15G (as applied by ■ PERG 8.30B.6G), this type of filtering meets the requirements in ■ PERG 8.30B.2G(1) and (2).

(4) This type of filtering also meets the requirements in■ PERG 8.30B.2G(3) and (4) because:

  (a) the factors in ■ PERG 8.30A.15G mean that the website is going beyond simply indexing pre-existing information as described in ■ PERG 8.30B.28G (so the approach in ■ PERG 8.30B.28G does not apply);

  (b) if the customer has to input a large range of personal information the *firm* cannot argue that it has not taken into account the customer's personal circumstances and preferences when in fact it actually has; and

  (c) either explicitly or implicitly the output is presented as meeting the customer's requirements and wishes.

(5) A recommendation issued exclusively to the public is not a *personal recommendation*. But the output of the website in this paragraph ■ PERG 8.30B.33G is not excluded from being a *personal recommendation* for this reason: the output of the website in this example is tailored to the individual and is only made available to them.

8.30B.34 [G]

(1) The approach described in ■ PERG 8.30B.28G only applies if it is clear to the customer that the *firm* is presenting to the customer all the products it sells coming within the category selected by the customer (see ■ PERG 8.28.4G (information presented on a selected basis)).

(2) For example, if the customer filters the products based on how risky they are, the *firm* should present to the customer all the products it sells falling within the risk category the customer chooses.

8.30B.35 [G]

(1) An example of ■ PERG 8.30B.33G is a *firm* that presents a suggested portfolio of investments to the customer.

(2) For example, if the customer filters the products based on how risky they are, and the *firm* presents a number of investment products and a suggestion of what percentage of the customer's investment should

be invested in each, it is likely that the *firm* will be making a *personal recommendation*.

8.30B.36   G   The examples in ■ PERG 8 Annex 1 include examples of a *firm* selling products on a website which allows the customer to filter products based on input from the customer.

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