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Changes to  
the definition  
of investment  
advice under  
RAO



# Changes to the definition of investment advice under RAO

## Introduction

Following a consultation in September 2016, the government has determined to amend the definition of financial advice under Article 53(1) of the *Financial Services and Markets Act (Regulated Activities) Order 2001* (RAO) to bring it in line with the narrower definition set out in MiFID.

From 3 January 2018, only firms which make a personal recommendation will be regulated for giving investment advice. This means that most regulated firms will be exempt from the requirement to hold a permission to advise on investments under Article 53(1) RAO unless the firm is providing a personal recommendation. Firms should note that this is also the intended implementation date for MiFID II and MiFIR.

## Advising on investments under Article 53(1) RAO

The general prohibition under s.19 FSMA states that a person must not carry on a regulated activity in the UK, or purport to do so, unless that person is authorised or is an exempt person or an exclusion or exemption applies.

The regulated activity of advising on investments is set out in Article 53(1) RAO and PERG 2 of the FCA Handbook provides guidance on what amounts to the regulated activity of advising, together with the relevant exclusions and exemptions.

There are currently a number of general exclusions to Article 53(1) RAO, which also apply to several other regulated activities, such as overseas persons (Article 72 RAO), groups and joint enterprises (Article 69 RAO) or managers of UCITS or AIFs (Article 72AA RAO), for example.

There is also one specific exclusion, namely Article 54 RAO, which relates to advice given in publications, news and information services and

broadcasts. This exclusion will apply only if the principal purpose of the relevant publication, service or broadcast is not to provide regulated investment advice or to enable anyone to deal in securities or similar investments. The exclusion is likely to apply to newspapers, periodicals, websites or television or radio broadcasts on consumer affairs with some financial coverage.

## MiFID investment advice

Under MiFID, investment advice is an investment service and activity in its own right and is limited to advice on particular MiFID financial instruments. Article 4(1)(4) of MiFID defines investment advice as the provision of 'personal recommendations' i.e. advice which is not publicly available. This means that a firm that provides generic investment advice on MiFID financial instruments does not fall within scope of MiFID.

This narrower definition formed the basis of the government's September 2016 consultation, with the result that, following feedback supporting the proposal, the government has decided to amend the definition to reflect that in MiFID.

## FCA clarification for firms

Following HM Treasury's decision to amend the definition, the FCA has provided a summary on its website as to what the change will mean for different types of firms after 3 January 2018, as follows:

### *Regulated firms*

1. *Regulated firm with 'advising on investments' (Article 53(1) RAO) and/or 'agreeing to advise on investments (Article 53(2) RAO) permission(s) and another permission* – these firms will be able to provide advice on financial products and services without being authorised under Article 53(1) and/or Article 53(2) RAO. However, if they intend to provide personal recommendations they



should maintain their Article 53 (1) and/or (2) permissions.

2. *Regulated firm **without** 'advising on investments' (Article 53(1) RAO) and/or 'agreeing to advise on investments (Article 53(2) RAO) permission(s) **but with** another permission* – these firms will be able to provide advice on financial products and services without being authorised under Article 53(1) and/or Article 53(2) RAO. However, they will need to be appropriately authorised if they provide personal recommendations.
3. *Regulated firm **with** 'advising on investments' (Article 53(1) RAO) and/or 'agreeing to advise on investments (Article 53(2) RAO) permission(s) **but without** another permission* – there is no change for these firms. The current scope of Article 53(1) will still apply and for these firms, the scope of regulated advice for which permission is required is the same.

#### *Unregulated firms*

There is no change for these firms. Neither these firms nor any individuals will be able to provide any form of regulated advice.

#### Next Steps

The FCA states that there is no need for firms to take any action at present. Firms will not have to re-apply for existing permissions for advising on investments or agreeing to do so.

The FCA will be consulting on changes to the Handbook later this year with the intention being that the changes will come into effect on the same date as the amended Article 53(1) i.e. 3 January 2018.

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