

Guidance on corporate finance activities

The purpose of this schedule is to describe some common corporate finance scenarios and identify whether these are *regulated activities* or not and if so whether a *firm* needs FSA authorisation, a *DPB licence*, or are unregulated and so no authorisation or *licence* is needed.

Section A of the table refers to general situations, whilst Section B provides more detailed examples.

The analysis of many of the examples in Section B uses the sale of a body corporate exclusion (*Regulated Activities Order* (RAO) article 70) or the fact that only advice given to a person in his capacity as an investor is *investment* business advice for the purposes of the RAO (article 53).

Article 70 provides two alternative tests and a transaction must meet one of these to be excluded and so not be a *regulated activity*. The exclusion within article 70 applies to the *regulated activities* of dealing in *investments* as principal (article 14), dealing in *investments* as agent (article 21), arranging deals in *investments* (article 25) and advising on *investments* (article 53). Article 70 states that:

- a the transaction is one to acquire or dispose of shares in a body corporate (other than an open-ended investment company) or which is entered into for the purposes of such an acquisition or disposal; and
- b either:
 - i) the conditions set out in the paragraph below are met; or
 - ii) those conditions are not met, but the object of the transaction may nevertheless reasonably be regarded as being the acquisition of day to day control of the affairs of the body corporate.

The conditions in paragraph b) (i) are that:

- a the shares consist of or include 50% or more of the voting shares in the body corporate; or
- b the shares, together with any already held by the person acquiring them, consist of or include at least 50% of such shares; and

in either case, the vendor and acquirer is either a body corporate, a partnership, a single individual or a group of connected individuals.

It is not necessary for the vendor and the acquirer to be the same "type". These conditions must be met in both parts, i.e. a and b(i) or b(ii).

A group of connected individuals means:

- a in relation to the vendor, a single group of persons each of whom is:
 - i) a director or manager of the body corporate;
 - ii) a close relative of any such director or manager; or
 - iii) a person acting as trustee for any person falling within paragraphs i) or ii).
- b in relation to the acquirer, a single group of persons each of whom is:
 - i) a person who is or is to be a director or manager of the body corporate;
 - ii) a close relative of any such person; or
 - iii) a person acting as trustee for any person falling within paragraphs i) or ii).

The alternative test under article 70b (ii) relates to day to day control and can only be used where the *firm* is satisfied that it is acting for a person (which could be a group of disparate persons) who is seeking to acquire day to day control. Where a group of persons are acting together, it may be difficult to establish that they seek to possess a controlling interest (i.e. day to day control). A group of persons must be acting in concert to meet the test. The *firm* does not need to act for all of the potential shareholders, provided those it collectively represents are seeking to acquire control.

The test under 70b (ii) must therefore be considered carefully in the light of the situation faced by the *firm*. The table cannot always provide definitive guidance as to whether the article 70 exclusion can be applied, but does indicate where it may be considered.

No distinction is made in the table between shares that are or will be traded on a *public market* and those which are not, unless stated.

For an activity to be undertaken by a *licensed firm* the activity must be complementary to or arising out of another *professional service* to that *client*. If this condition is not met, *FSA* authorisation would be required.

(N/a in the table indicates that the particular form of *licence/authorisation* is not needed.)

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Situation	Client and activity	Can be done without authorisation or a licence	Can be done under a DPB licence	Requires FSA authorisation
Section A				
General				
1. Company formation.	Advising on and arranging the formation of a company	Yes. Provided no advice is given to a prospective purchaser of shares.	N/a	N/a
2. Valuations.	Providing a valuation of shares for a client.	Yes, provided no advice is given as to whether to sell or purchase the shares.		
3. Issuing shares.	Advice and assistance to a company to issue shares	Yes. Company secretarial services and advice on the issue of shares is not regulated. If the <i>firm</i> becomes involved in bringing the parties together, then this is the <i>regulated activity</i> of arranging. See example 4 and more detailed example 10 below.	N/a	N/a
4. Company sells 10% of its shares for a financial consideration.	a) Arranging the transaction for either party	No	Yes.	N/a
	b) Advising either party on the sale or purchase.	No	Yes, provided the shares being offered are not, nor will be traded on a <i>public market</i> when <i>FSA</i> authorisation is required when advising the purchaser. Advice can be given to the vendor.	Yes, where advice is given to the purchaser, even if the shares being offered are, or will be traded on a <i>public market</i>

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5. Advising and arranging for a reorganisation of shareholding amongst family members, for no valuable consideration.	Advising and arranging for either party.	Yes. Where there is no consideration involved, there is no <i>regulated activity</i> .	N/a	N/a
Section B				
Takeovers				
6. Company A makes a cash take-over bid for company B.	a) Advice to company A.	Yes. Sale of a body corporate exclusion will apply.	N/a.	N/a.
	b) Arranging the transaction for company A.	Yes. Sale of a body corporate exclusion will apply.	N/a.	N/a.
	c) Advice to shareholders of B.	Yes, if the sale of a body corporate exclusion is met.	Yes, if the sale of a body corporate exclusion does not apply.	N/a.
	d) Arranging the transaction for the shareholders of B.	Yes, if the sale of a body corporate exclusion is met.	Yes, if the sale of a body corporate exclusion does not apply.	N/a.
7. Company A makes a take-over bid for company B, but company A issues shares to fund the acquisition.	a) Advice to company A.	Yes. Sale of body corporate exclusion applies and advice on the issue of shares is not a <i>regulated activity</i> .	N/a.	N/a.
	b) Arranging the transaction for company A.	Yes. The sale of a body corporate exclusion applies to the issue of shares.	N/a.	N/a.

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	c) Advice to shareholders of B.	Yes, if the sale of a body corporate exclusion is met. The exclusion will also extend to the advice given on whether the vendor should accept cash or shares.	Yes, if the sale of a body corporate exclusion does not apply. If the shares being offered are or will be traded on a <i>public market</i> and the exclusion does not apply, then <i>FSA</i> authorisation is required.	<i>FSA</i> authorisation is needed if the sale of a body corporate exclusion does not apply and the shares being offered to B as consideration are or will be traded on a <i>public market</i> .
	d) Arranging the transaction for the shareholders of B.	Yes, if the sale of a body corporate exclusion is met.	Yes, if the sale of a body corporate exclusion does not apply.	N/a.
	e) Advice to company B.	Yes. The company is not an investor and therefore the advice is not a <i>regulated activity</i> .	N/a.	N/a.
8. Management buy-outs, buy in, etc.	a) Advice to the purchasing team. b) Arranging the transaction for the purchasing team. c) Advice to the vendors. d) Arranging the transaction for the vendors.	See the answers given under scenario 6, the purchasers would be treated as "company A", even if they were not a company.	See scenario 6.	See scenario 6.

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9. Management buy-outs using a new company (Newco) as a vehicle for the purchase.	a) Advice to the purchasing team.	<p>Yes - advice on the issue of shares in Newco is not a <i>regulated activity</i>.</p> <p>Advice on the acquisition of shares in Newco relates to the vehicle through which to make the buy-out and therefore exclusion 70 applies. Alternatively, exclusion 70 could apply in its own right.</p> <p>The transaction is likely to meet exclusion 70 b (ii) as the buy out team will be acting collectively.</p>	N/a.	N/a.
	b) Arranging for the team.	<p>Yes - arranging the issue of shares, as well as the acquisition of the shares by the team is likely to meet exclusion 70 on the same basis as in 9a above.</p>	N/a.	N/a.
	c) Advising Newco on the purchase of Target and arranging the purchase.	<p>Yes - exclusion 70 applies to both advising and arranging.</p>	N/a.	N/a.

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Rights Issue 10. Company makes a rights issue.	a) Advising the company.	Yes, advice on the issue of shares is not a <i>regulated activity</i> .	N/a.	N/a.
	b) Arranging for the issue of shares.	Company secretarial services can be undertaken but if the arranging goes further than that and brings the parties to the transaction together, this becomes a <i>regulated activity</i> .	Yes. However, if a financial promotion is issued, this may require approval or issue by an <i>FSA authorised firm</i> . (A <i>DPB licensed firm</i> cannot approve financial promotions or issue them unless an exclusion in the Financial Promotions Order applies.)	Yes, if a financial promotion is involved which does not meet any exclusion in the Financial Promotions Order and approval of the promotion is not sought from another <i>authorised firm</i> .
	c) Advising the shareholders to take up the rights issue.	No. As the advice to an investor is a <i>regulated activity</i> .	Yes, unless the shares are or will be traded on a <i>public market</i> .	Yes, if the shares are or will be traded on a <i>public market</i> .
11. Company wants to go public.	a) Advice to the company.	Yes. As the company is not an investor, it is not a <i>regulated activity</i> .	N/a.	N/a.
	b) Advice to the existing shareholders to sell.	No. As this is advice to an investor, this is a <i>regulated activity</i> .	Yes, as advice to sell can be given under a <i>licence</i> .	N/a.

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	c) Arranging for the flotation.	Company secretarial services can be undertaken but if the arranging goes further than that and brings the parties to the transaction together, this becomes a <i>regulated activity</i> .	May be able to do under a DPB <i>licence</i> , but may be blocked by the regulations of an exchange. If a financial promotion is involved, this may require issue or approval by an <i>FSA authorised firm</i> .	Yes, if a financial promotion is involved which does not meet any exclusions within the Financial Promotions Order and approval of the promotion is not sought from another authorised <i>firm</i> .
	d) Advising potential shareholders to subscribe.	No - advice to subscribe is a <i>regulated activity</i> .	No, advice to subscribe for a share that will be listed is a <i>regulated activity</i> , which requires <i>FSA</i> authorisation.	Yes.
1.1.1 Company re-structuring 12. The re-structuring involves setting up a group and therefore the creation of new companies.	a) Advice to the company.	Yes - advice on the issue of shares is not a <i>regulated activity</i> .	N/a.	N/a.
	b) Arranging for the company.	Yes – arranging for the parent to subscribe is a <i>regulated activity</i> , but falls under exclusion 70.	N/a.	N/a.

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13. The restructuring involves de-merging company A into a number of separate companies (B and C).	a) Advising company A.	Yes, advice on the issue of shares in B and C is not a <i>regulated activity</i> .	N/a.	N/a.
	b) Advice to the prospective shareholders in B and C, who are the current shareholders in A.	Yes, if the sale of a body corporate exclusion is met. If not, advice to acquire shares in B and C is a <i>regulated activity</i> .	Yes, unless the shares are or will be traded on a <i>public market</i> . If they can be and no exclusion applies, then <i>FSA</i> authorisation is required.	<i>FSA</i> authorisation is needed if the sale of a body corporate exclusion does not apply and the shares are or will be traded on a <i>public market</i> .
	c) Arranging for the issue of shares in companies B and C to the shareholders in company A.	Yes, this could fall under the sale of a body corporate exclusion. Company secretarial services can also be undertaken which would cover providing administrative assistance to the companies in issuing the shares. If not, arranging would be a <i>regulated activity</i> .	Yes, unless a financial promotion requires approval. A <i>licensed firm</i> could arrange for the issue of shares even if they are or will be traded on a <i>public market</i> , provided no advice has been given, see b above.	Yes, even if the shares are or will be traded on a <i>public market</i> , advice has been given to those acquiring the shares and exclusion 70 did not apply.
14. Two companies (A and B) merge into a third (C).	a) Advice to the shareholders of A and B.	Yes, if the sale of a body corporate exclusion is met.	Yes. If the sale of a body corporate exclusion does not apply.	N/a.
	b) Advice to C.	Yes, acquiring companies A and B would come under the sale of a body corporate exclusion.	N/a.	N/a.

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15. Company wishes to do a share buy back.	a) Advice to the company.	Yes, as not a <i>regulated activity</i> .	N/a.	N/a.
	b) Advice to the shareholders.	No, advice to an investor to sell is a <i>regulated activity</i> .	Yes.	N/a.
1.1.2 Trade investment 16. Company A makes a trade <i>investment</i> in company B (i.e. less than a controlling stake).	a) Advising company A.	No, advice to invest is a <i>regulated activity</i> .	Yes, but advice could not be given to an individual if company B was listed.	N/a.
	b) Advising shareholders of B.	No, advice to an investor to sell is a <i>regulated activity</i> .	Yes, advice on the sale of shares can be provided under a DPB <i>licence</i> .	N/a.