

Chapter 4

Guidance on regulated activities connected with mortgages

4.1 Application and purpose

Application

- 4.1.1 **G** This chapter applies to any *person* who needs to know whether the activities he conducts in relation to mortgages are subject to *FCA* regulation.

Purpose of guidance

- 4.1.2 **G** Certain activities relating to mortgages are regulated by the *FCA*. The purpose of this *guidance* is to help *persons* decide whether they need *authorisation* and, if they do, to determine the scope of the *Part 4A permission* for which they will need to apply.

Effect of guidance

- 4.1.3 **G** This *guidance* is issued under section 139A of *Act* (*Guidance*). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* in the circumstances contemplated by it, then the *FCA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates.

- 4.1.4 **G** Rights conferred on third parties cannot be affected by *guidance* given by the *FCA*. This *guidance* represents the *FCA's* view, and does not bind the courts, for example, in relation to an action for damages brought by a private *person* for breach of a *rule* (see section 138D of the *Act* (*Action for damages*)), or in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (*Enforceability of agreements*)). A *person* may need to seek his own legal advice.

- 4.1.5 **G** Anyone reading this *guidance* should refer to the *Act* and to the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*.

Guidance on other activities

- 4.1.6 **G** A *person* may be intending to carry on activities related to other forms of investment in connection with mortgages, such as advising on and arranging an endowment policy or *ISA* to repay an interest-only mortgage. Such a *person* should also consult the *guidance* in ■ PERG 2 (*Authorisation and*

regulated activities), ■ PERG 5 (Guidance on insurance distribution activities) and ■ PERG 8 (Financial promotion and related activities). In addition, ■ PERG 14 (Guidance on home reversion and home purchase activities) has *guidance on regulated activities relating to home reversion plans, home purchase plans and regulated sale and rent back agreements.*

4.2 Introduction

Requirement for authorisation or exemption

- 4.2.1 **G** In most cases, any *person* who carries on a *regulated activity* in the *United Kingdom* by way of business must either be an *authorised person* or an *exempt person*. Otherwise, the *person* commits a criminal offence and certain agreements may be unenforceable. ■ PERG 2.2 (Introduction) contains further *guidance* on these consequences.

Professional firms

- 4.2.2 **G** Certain *professional firms* are allowed to carry on some *regulated activities* without *authorisation* so long as they comply with specified conditions (see ■ PERG 4.14 (Mortgage activities carried on by professional firms)).

Questions to be considered to decide if authorisation is required

- 4.2.3 **G** A *person* who is concerned to know whether his proposed activities may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form, in the flowchart in ■ PERG 4.18):
- (1) will I be carrying on my activities by way of business (see ■ PERG 4.3.3 G (The business test))?
 - (2) if so, will my activities relate to *regulated mortgage contracts* (see ■ PERG 4.4 (What is a regulated mortgage contract))?
 - (3) if so, will I be carrying on any of the *regulated mortgage activities* (see ■ PERG 4.5 (Arranging regulated mortgage contracts) to ■ PERG 4.9 (Agreeing to carry on a regulated activity))?
 - (4) if so, there is the necessary link with the *United Kingdom* (see ■ PERG 4.11 (Link between activities and the United Kingdom))?
 - (4A) is the only available exclusion the one for *CBTL firms* (see ■ PERG 4.10B (Regulation of buy to let lending))?
 - (5) if so, will any or all of my activities be excluded (see ■ PERG 4.5 (Arranging regulated mortgage contracts) to ■ PERG 4.10 (Exclusions applying to more than one regulated activity))?

- (5A) if so, is the exclusion on which I am relying disapplied because the business is subject to the *Mortgage Credit Directive* (see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive))?
- (6) if the answer to 4A is “no” and it is not the case that all of my activities are excluded, am I a *professional firm* whose activities are exempted under Part XX of the *Act* (see ■ PERG 4.14 (Mortgage activities carried on by professional firms))?
- (7) if not, am I exempt as an *appointed representative* (see ■ PERG 4.12 (Appointed representatives))?
- (8) if not, am I otherwise an *exempt person* (see ■ PERG 4.13 (Other exemptions))?

If a *person* gets as far as question (8) and the answer to that question is 'no', that *person* requires *authorisation* and should refer to the *FCA* website "Apply for authorisation": www.fca.org.uk/firms/authorisation/apply-authorisation for details of the application process.

However, if a *person* wishes to carry on *CBTL business* see ■ PERG 4.10B (Regulation of buy to let lending) it may be able benefit from the exclusion for *CBTL firms* and be placed on the relevant register described in ■ PERG 4.10B if:

- (a) no other exclusion applies; and
- (b) the answer to questions (6) to (8) is “no”.

Note that *the person* would need to apply to be included on the relevant register described in ■ PERG 4.10B.

4.2.4 G [deleted]

Financial promotion.....

4.2.5 G An *unauthorised person* who intends to carry on activities connected with mortgages will also need to comply with section 21 of the *Act* (Restrictions on financial promotion). This *guidance* does not cover *financial promotions* that relate to mortgages. *Persons* should refer to the general *guidance* on *financial promotion* in Appendix 1 to the *Authorisation manual*, ■ PERG 8 (Financial promotion and related activities) and, in particular, to ■ PERG 8.17 (Financial promotions concerning agreements for qualifying credit).

4.3 Regulated activities related to mortgages

4.3.1 G There are six *regulated mortgage activities* requiring *authorisation* or exemption if they are carried on in the *United Kingdom*. These are set out in the *Regulated Activities Order*. They are:

- (1) *arranging (bringing about) regulated mortgage contracts* (article 25 A(1) and (2A) (Arranging regulated mortgage contracts));
- (2) *making arrangements with a view to regulated mortgage contracts* (article 25A(2) (Arranging regulated mortgage contracts));
- (3) *advising on regulated mortgage contracts* (article 53A (Advising on regulated mortgage contracts));
- (4) *entering into a regulated mortgage contract as lender* (article 61(1) (Regulated mortgage contracts));
- (5) *administering a regulated mortgage contract* where that contract is entered into by way of business on or after 31 October 2004 or the contract was entered into by way of business before that date and is a *legacy CCA mortgage contract* (article 61(2) (Regulated mortgage contracts)); and
- (6) *agreeing to carry on any of the above* (article 64 (Agreeing to carry on specific kinds of activity)).

4.3.2 G The scope of these activities is limited by certain exclusions contained in Parts II and III of the *Regulated Activities Order*. These exclusions are referred to in ■ PERG 4.5 (Arranging regulated mortgage contracts) to ■ PERG 4.10 (Exclusions applying to more than one regulated activity).

The business test

4.3.3 G A *person* will only need *authorisation* or exemption if he is carrying on a *regulated activity* 'by way of business' (see section 22 of the *Act* (Regulated activities)). There are, in fact, three different forms of business test applied to the *regulated mortgage activities*. In the *FCA's* view, however, the difference in the business tests should have little practical effect.

4.3.4 G There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. The *Business Order* has been made using this power (partly reflecting differences in the nature of

the different activities). The result (which is summarised in ■ PERG 4.3.5 G) is that:

- (1) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *entering into a regulated mortgage contract*;
- (2) the 'by way of business' test in section 22 of the *Act* applies unchanged in relation to the activity of *administering a regulated mortgage contract*, but another 'by way of business' test arises because the contract being administered by way of business must itself have been entered into by way of business (see ■ PERG 4.8.2 G); and
- (3) in the case of arranging and advising, the effect of article 3A of the *Business Order* (Arranging and advising on regulated mortgage contracts) is that a *person* is not to be regarded as acting 'by way of business' unless he is 'carrying on the business of engaging in one or more of those activities'.

4.3.5

G Summary of which variant of the business test applies to the different regulated mortgage activities. This table belongs to ■ PERG 4.3.4 G.

By way of business	Carrying on the business
<i>Entering into a regulated mortgage contract</i> (article 61(1))	<i>Arranging (bringing about) regulated mortgage contracts</i> (article 25A(1)) and arranging (bringing about) mortgage contracts behalf of a lender (article 25A(2A))
<i>Administering a regulated mortgage contract</i> (article 61(2)) (and the contract administered must have been entered into by way of business)	<i>Making arrangements with a view to regulated mortgage contracts</i> (article 25A(2))
	<i>Advising on regulated mortgage contracts</i> (article 53A)

4.3.6

G The 'carrying on the business' test in the *Business Order* is a narrower test than that of carrying on *regulated activities* 'by way of business' in section 22 of the *Act* as it requires the *regulated activities* to represent the carrying on of a business in their own right. Whether or not the business test is satisfied in any particular case is ultimately a question of judgement that takes account of a number of factors (none of which is likely to be conclusive). The nature of the particular *regulated activity* that is carried on will also be relevant to the factual analysis. The relevant factors include:

- (1) the degree of continuity;
- (2) the existence of a commercial element; and
- (3) the scale of the activity and, for the 'by way of business' test, the proportion which the activity bears to the other activities carried on by the same *person* but which are not regulated.

In the case of the 'carrying on the business' test, these factors will need to be considered having regard to all the activities together.

4.3.7 **G** The main factor that might cause an activity to satisfy the 'by way of business' test in section 22 but not the narrower 'carrying on the business' test in the *Business Order* is that of frequency or regularity. As a general rule, the activity would need to be undertaken with some degree of frequency or regularity to satisfy the narrower 'carrying on the business' test. Conversely, the 'by way of business' test in section 22 could be satisfied by an activity undertaken on an isolated occasion (provided that the activity would be regarded as done by 'way of business' in all other respects).

4.3.8 **G** It follows that whether or not any particular *person* may be carrying on a *regulated mortgage activity* 'by way of business' will depend on his individual circumstances. However, some typical examples where the applicable business test would be likely to be satisfied are where a *person*:

- (1) enters into one or more *regulated mortgage contracts* as lender in the expectation of receiving interest or another form of payment that would enable him to profit from his actions;
- (2) administers a *regulated mortgage contract* in return for a payment of some kind (whether in cash or in kind); and
- (3) arranges or advises on *regulated mortgage contracts*, or does both, on a regular basis and receives payment of some kind (whether in cash or in kind and whether from the borrower or from some other *person*).

4.3.9 **G** Some typical examples where the business test is unlikely to be satisfied are:

- (1) when an individual enters into or administers a one-off mortgage securing a loan to a friend or member of his family whether at market interest rates or not; or
- (2) when a *person* provides a service without any expectation of reward or payment of any kind, such as advice given or arrangements made by many Citizens Advice Bureaux and other voluntary sector agencies (but see ■ PERG 4.3.8G (3) where payment is received for advice).



4.4 What is a regulated mortgage contract?

The definition of "regulated mortgage contract".....

4.4.1

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Article 61(3)(a) of the *Regulated Activities Order* defines a *regulated mortgage contract* as a contract which, at the time it is entered into, satisfies the following conditions:

- (1) the contract is one where a lender provides credit to an individual or trustees (the 'borrower');
- (2) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the *EEA*; and
- (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling.

This section sets out the *FCA*'s understanding of some key concepts contained in article 61(3)(a). It should be noted that, where a contract meets the necessary requirements for both a *regulated mortgage contract* and a *home purchase plan*, it will be treated as a *home purchase plan* only and will not be a *regulated mortgage contract*. Guidance on the meaning of a *home purchase plan* is in ■ PERG 14.4 (Guidance on home reversion and home purchase activities).

4.4.1-A

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A contract is not a *regulated mortgage contract* if it is:

- (1) a loan to a commercial borrower excluded under ■ PERG 4.4.17 G or ■ PERG 4.4.21 G; or
- (2) a second charge loan by a credit union excluded under ■ PERG 4.4.24 G; or
- (3) a second charge bridging loan excluded under ■ PERG 4.4.27 G;
- (4) a *CBTL credit agreement* excluded as described in ■ PERG 4.4.31G.

Provision of credit.....

4.4.1A

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- (1) Article 61(3)(c) of the *Regulated Activities Order* states that credit includes a cash loan and any other form of financial accommodation. Although 'financial accommodation' has a potentially wide meaning, its scope is limited by the terms used in the definition of a *regulated mortgage contract* set out in ■ PERG 4.4.1 G. Whatever form the financial accommodation may take, article 61(3)(a) envisages that it

must include an obligation to repay on the part of the individual who receives it.

- (2) In the *FCA's* view, an obligation to repay implies the existence, or the potential for the existence, of a debt owed by the individual to whom the financial accommodation is provided (the 'borrower') to the *person* who provides it (the 'lender').
- (3) For example, a bank would be providing 'credit' which, subject to the other requirements being met, could amount to a *regulated mortgage contract* if it gives a guarantee that:
 - (a) creates a debt or a potential debt; and
 - (a) allows for deferred payment.

Which borrowers?

4.4.2

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The condition set out in ■ PERG 4.4.1G (1) limits the range of borrowers to whom the protections of the mortgage regulation regime apply to individuals and trustees. If a *company* (which is not acting as a trustee) borrows money for the purpose of funding the *company's* business, and the loan is secured by a mortgage over the *company's* property, the mortgage contract is not a *regulated mortgage contract*. So a lender will not carry on a *regulated activity* by entering into that contract, nor will the lender carry on a *regulated activity* if it advises on, arranges or administers that contract. However, if the lender makes a loan for business purposes to an individual sole trader, or (in England and Wales) a partnership, and the loan is secured on the borrower's house or houses, the contract will be a *regulated mortgage contract*.

4.4.2A

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- (1) A loan to a trustee is caught, even if the trustee or the beneficiary is not an individual.
- (2) Therefore, it is possible that a loan to a trustee acting for a large commercial *company* is a *regulated mortgage contract*.
- (3) In practice, the exclusions for loans to commercial borrowers (in particular, see ■ PERG 4.4.17 G and ■ PERG 4.4.21 G) are likely to prevent such loans from being *regulated mortgage contracts*.
- (4) If:
 - (a) the loan is made to a trustee;
 - (b) the trustee is a bare trustee or nominee; and
 - (c) the beneficiary of the trust is acting for commercial purposes;
 it is likely that the trustee will also be acting for commercial purposes.

4.4.2B

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A loan to a partnership may be a loan to an individual if the partnership is made up of real people (that is natural, as opposed to legal, *persons*).

Date the contract is entered into

4.4.3 **G** In order to meet the definition of a *regulated mortgage contract*, a mortgage contract must meet the conditions set out in ■ PERG 4.4.1G (1) to ■ PERG 4.4.1G (3) at the time it was entered into. The effect is that contracts which meet those conditions at that time remain *regulated mortgage contracts* throughout their remaining term, even if there are periods of time when some or all of the conditions are not satisfied. Conversely, contracts that do not start out as *regulated mortgage contracts* cannot subsequently become so, even if they meet all the conditions set out in ■ PERG 4.4.1G (1) to ■ PERG 4.4.1G (3). A *person* that only administers mortgage contracts which did not meet those conditions at the time they were entered into will not, therefore, need *permission* to *administer regulated mortgage contracts*.

4.4.4 **G** There may, however, be instances where an existing contract, which was not a *regulated mortgage contract* at the time it was entered into, is replaced as a result of a variation (whether the variation is initiated by the customer or by the lender), and the new contract qualifies as a *regulated mortgage contract*. A *person* may therefore need to consider this possibility (which could affect contracts initially entered into before 31 October 2004 as well as subsequent loans) when deciding whether he needs *permission* to carry on any of the *regulated mortgage activities*.

Land in the EEA

4.4.5 **G** The condition set out in ■ PERG 4.4.1G (2) means that a *regulated mortgage contract* must be secured on land in the *EEA*. Contracts which involve taking security over moveable property therefore cannot be *regulated mortgage contracts*. So a contract secured on a caravan will not be a *regulated mortgage contract*, unless the contract also involves a mortgage over the land on which the caravan stands.

Occupancy requirement

4.4.6 **G** The condition set out in ■ PERG 4.4.1G (3) means that loans secured on property which is entirely used for business purposes (such as an office block) cannot fall within the definition. However, loans secured on 'mixed use' property could be covered, provided that the occupier uses at least 40% of the total of the land as or in connection with a dwelling. Loans secured on a six-floor property, half of which was occupied by a family as their home and half let out for business purposes would therefore satisfy the definition. (Article 61(4)(b) makes it clear that 'land', in the context of a multi-storey building, means the aggregate of the floor area of each of the storeys.)

4.4.6A **G** The most obvious example of a *regulated mortgage contract* is a loan made to an individual to enable the individual to buy a home for themselves where the loan is secured on that home. However, there is no requirement that the borrower should occupy the property. There is a requirement that at least 40% of the land should be used as a house, but no requirement that it is the borrower who uses it as a house. So, for example:

- (1) a loan may be a *regulated mortgage contract* if the property on which it is secured is to be occupied by the borrower's relatives as their home; or

- (2) a loan may be a *regulated mortgage contract* if the borrower does not occupy the property on which the loan is secured and instead intends to sell the property to a third party, with the mortgage remaining on the house until then.
- (3) However, if the borrower is acting on a commercial basis, the loan in (2) may be excluded as a loan to a commercial borrower under the exclusions in ■ PERG 4.4.17 G or ■ PERG 4.4.21 G.
- (4) A buy-to-let loan secured on the property to be let is potentially a *regulated mortgage contract*. However, such a loan may be excluded as a loan to a commercial borrower under the exclusions referred to in (3) or under the buy-to-let exclusions described in ■ PERG 4.4.31G and ■ PERG 4.10B which refer to consumer borrowers.

4.4.7 G The expression 'as or in connection with a dwelling' set out in ■ PERG 4.4.1G (3) means that loans to buy a small house with a large garden would in general be covered. However, if at the time of entering into the contract the intention was for the garden to be used for some other purpose – for example, if it was intended that a third party were to have use of the garden – the contract would not constitute a *regulated mortgage contract*. Furthermore, the FCA would not regard a loan to purchase farmland and a farmhouse as constituting a *regulated mortgage contract* (where the farmhouse and garden amount to less than 40% of the land area), since it does not appear that the land could properly be said to be used 'in connection with' the farmhouse. The presence of the farmhouse is unconnected with the use to which the farmland is put (in contrast to a residential property's garden, which would have no existence independent of the property).

4.4.8 G [deleted]

4.4.9 G [deleted]

Purpose of the loan is irrelevant

4.4.10 G The definition of *regulated mortgage contract* contains no reference to the purpose for which the loan is being made. So, in addition to loans made to individuals to purchase residential property, the definition is wide enough to cover other loans secured on land, such as loans to consolidate debts, or to enable the borrower to purchase other goods and services.

Type of lending

4.4.11 G The definition of *regulated mortgage contract* also covers a variety of types of product. Apart from the normal mortgage loan for the purchase of property, the definition also includes other types of secured loan, such as secured overdraft facility, a *bridging loan* (although bridging loans described in ■ PERG 4.4.27 G are not *regulated mortgage contracts*), a secured credit card facility and *regulated lifetime mortgage contracts* under which the borrower (usually an older person) takes out a loan where repayment of the capital (and in some cases the interest) is not required until the property is sold, usually on the death of the borrower.

4.4.12 **G** Loans secured on commercial premises are not *regulated mortgage contracts* as the property will not be used as or in connection with a dwelling.

4.4.13 **G** [deleted]

4.4.14 **G** [deleted]

Type of security

4.4.15 **G** A loan may be a *regulated mortgage contract* whether it is secured by a first, second or subsequent mortgage.

4.4.16 **G** A mortgage has a wide meaning for the purpose of the definition of a *regulated mortgage contract*. It includes:

- (1) a legal mortgage;
- (2) equitable security;
- (3) (in Scotland) a heritable security; and
- (4) security commonly used in another *EEA State* for loans secured on residential property.

4.4.16A **G** It is possible for more than one mortgage contract to be secured by the same charge.

Exclusions for lending to commercial borrowers

4.4.17 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
- (2) less than 40% of the land secured by the mortgage is used, or intended to be used, as or in connection with a dwelling by the borrower or (for credit provided to trustees) by an individual who is a beneficiary of the trust, or by a *related person*; and
- (3) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

4.4.18 **G** The *Regulated Activities Order* refers to this as an “investment property loan”.

4.4.19 **G** Under the *Regulated Activities Order* '*related person*' means, in relation to the borrower or (for credit provided to trustees) a beneficiary of the trust:

- (1) that *person's* spouse or civil partner;

4.4.20

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- (2) a *person* (whether or not of the opposite sex) whose relationship with that *person* has the characteristics of the relationship between husband and wife; or
- (3) that *person's* parent, brother, sister, child, grandparent or grandchild.

(1) If less than 40% of the land secured by the mortgage is used, or intended to be used, as or in connection with a dwelling then the exclusion for loans to commercial borrowers described in ■ PERG 4.4.17 G is irrelevant, as the loan falls outside ■ PERG 4.4.1 G and so cannot be a *regulated mortgage contract*.

(2) The exclusion becomes relevant (if all the conditions in ■ PERG 4.4.17 G are met) if at least 40% of the land secured by the mortgage is used, or intended to be used, as or in connection with a dwelling by:

- (a) someone other than the borrower; or
- (b) the borrower and someone else, if the percentage used by the borrower as residential property is less than 40%.

(3) Therefore, the exclusion would, for example, cover a loan secured on residential property where a commercial borrower is not going to occupy any of the property but is going to sell it to a third party.

4.4.21

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There is also an exclusion for loans to commercial borrowers secured by a second or subsequent security. A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
- (2) the lender provides the borrower with credit exceeding £25,000; and
- (3) the mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
- (4) the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

4.4.22

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The *Regulated Activities Order* refers to this as a “second charge business loan”.

4.4.23

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- (1) There is no exclusion from the £25,000 floor in ■ PERG 4.4.21G (2) for an item entering into the *total charge for credit*.
- (2) Giving time for payment of interest if the borrower gets into difficulty, does not affect the calculation of the sum as the definition relates to the time at which the contract is entered into.
- (3) However, for example, if the credit includes a broker fee, that fee may be excluded in the calculation of the floor.

Exclusion for lending by credit unions

- 4.4.24 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:
- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
 - (2) the lender is a *credit union*; and
 - (3) it is a *borrower-lender agreement*; and
 - (4) the mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
 - (5) the rate of the *total charge for credit* does not exceed 42.6 per cent.

4.4.25 **G** The *Regulated Activities Order* refers to this as a “limited interest second charge credit union loan”.

- 4.4.26 **G** The exclusion in ■ PERG 4.4.24 G only applies if the loan meets the following conditions:
- (1) the borrower receives timely information on the main features, risks and costs of the contract at the pre-contractual stage; and
 - (2) any advertising of the contract is fair, clear and not misleading.

Exclusion for second charge bridging loans

- 4.4.27 **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:
- (1) it meets the conditions in ■ PERG 4.4.1G (1) to ■ (3); and
 - (2) it is a *borrower-lender-supplier agreement* financing the purchase of land; and
 - (3) it is used by the borrower as a temporary financing solution while changing to another financial arrangement for the land secured by the mortgage; and
 - (4) the mortgage ranks in priority behind one or more other mortgages affecting the land in question; and
 - (5) the number of payments to be made by the borrower under the contract is not more than four.

4.4.28 **G** The *Regulated Activities Order* refers to this as a “limited payment second charge bridging loan”.

Exclusion for equitable mortgage bridging loans

- 4.4.28A **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time is entered into, it meets the following conditions:

- (1) it is a *bridging loan* described in ■ PERG 4.13.6G;
- (2) it is secured by an equitable mortgage on *land*; and
- (3) it is an exempt agreement within the meaning of article 60B(3) (*regulated credit agreements*) of the *Regulated Activities Order* by virtue of article 60E(2): in summary, the *lender* is a *local authority*, or the agreement is specified in ■ CONC App 1.3 and the *lender* is a person or within class of persons specified in ■ CONC App 1.3 (see ■ PERG 2.7.19FG(1) and (2)).

4.4.28B G The *Regulated Activities Order* refers to such a contract as an 'exempt equitable mortgage bridging loan'.

Exclusion for housing association and other housing authority loans

4.4.28C G A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:

- (1) it provides for credit to be granted by a 'housing authority' within the meaning of article 60E of the *Regulated Activities Order*. The definition in article 60E includes housing associations registered under the relevant housing legislation (see ■ PERG 2.7.19FAG);
- (2) if entered into on or after 21 March 2016:
 - (a) it is an agreement of a kind to which the *MCD* does not apply by virtue of article 3(2) of the *MCD* (in other words, it is an agreement listed in ■ PERG 4.10A.5G(1) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or
 - (b) it is a *bridging loan* described in ■ PERG 4.13.6G; or
 - (c) it is a restricted public loan described in ■ PERG 4.13.7G.

4.4.28D G The *Regulated Activities Order* refers to such a contract as an 'exempt housing authority loan'.

Certificate that borrower is not a consumer

4.4.29 G The two exclusions for loans to commercial borrowers (■ PERG 4.4.17 G and ■ PERG 4.4.21 G) depend on the borrower not being a consumer. For these purposes, if an agreement includes a declaration which:

- (1) is made by the borrower; and
- (2) includes:
 - (a) a statement that the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower;
 - (b) a statement that the borrower understands that the borrower will not have the benefit of the protection and remedies that

would be available to the borrower under the *Act* if the agreement were a *regulated mortgage contract* under the *Act*; and

- (c) a statement that the borrower is aware that if the borrower is in any doubts as to the consequences of the agreement not being regulated by the *Act*, then the borrower should seek independent legal advice;

the agreement is to be presumed to have been entered into by the borrower wholly or predominantly for the purposes specified in (2)(a).

4.4.30

G

However, the presumption in ■ PERG 4.4.29 G does not apply if, when the agreement is entered into:

- (1) the lender (or, if there is more than one lender, any of the lenders); or
- (2) any *person* who has acted on behalf of the lender (or, if there is more than one lender, any of the lenders) in connection with the entering into of the agreement;

knows, or has reasonable cause to suspect, that the agreement is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.

Exclusion for certain consumer buy-to-let mortgage contracts

4.4.31

G

There is an exclusion for what the *RAO* refers to as an “exempt consumer buy-to-let mortgage contract”. This is explained in ■ PERG 4.10B (Regulation of buy-to-let lending).

4.4.32

G

For a *buy-to-let credit agreement* (described in ■ PERG 4.10B.5G), article 61A(5) of the *Regulated Activities Order* says that a borrower is to be regarded as entering into an agreement, or intending to enter into an agreement, for the purposes of a business if (1) or (2) are met:

- (1) (a) the borrower previously purchased, or is entering into the contract in order to finance the purchase by the borrower of, the land secured by the mortgage;
- (b) at the time of the purchase the borrower intended that the land would be occupied as a dwelling on the basis of a rental agreement and would not at any time be occupied as a dwelling by the borrower or by a *related person* (see ■ PERG 4.4.19G), or where the borrower has not yet purchased the land the borrower has such an intention at the time of entering into the contract; and
- (c) where the borrower has purchased the land, since the time of the purchase the land has not at any time been occupied as a dwelling by the borrower or by a *related person* (see ■ PERG 4.4.19G);
- (2) the borrower is the owner of land, other than the land secured by the mortgage, which is

- (a) occupied as a dwelling on the basis of a rental agreement and is not occupied as a dwelling by the borrower or by a *related person* (see ■ PERG 4.4.19G); or
- (b) secured by a mortgage under a *buy-to-let credit agreement*.

4.4A Mortgage contracts entered into before 21 March 2016

4.4A.1 **G** [deleted]

4.4A.1A **G** Prior to 21 March 2016, the definition of 'regulated mortgage contract' in article 61(3)(a) of the *Regulated Activities Order* was limited to mortgage contracts secured by a first legal mortgage (but not a second charge mortgage or an equitable mortgage) of *land* in the *United Kingdom* (rather than *land* in the *EEA*), and the regulated activity of *administering a regulated mortgage contract* was limited to mortgage contracts entered into on or after 31 October 2004, being the date on which mortgage regulation under the *Act* began. Accordingly, prior to 21 March 2016 some mortgage contracts were *regulated mortgage contracts* regulated under *MCOB*; some mortgage contracts were *regulated credit agreements* regulated under the *CCA* and, from 1 April 2014, *CONC*; and some mortgage contracts were outside regulation.

4.4A.1B **G** When the *Regulated Activities Order* was amended to implement the *MCD*, the limitations mentioned in ■ PERG 4.4A.1AG were removed: the legislative intention was to provide a single regulatory regime for mortgage contracts under *MCOB* from 21 March 2016, subject to a six month transitional period for first charge mortgages entered into before 31 October 2004. Mortgage contracts that were *regulated mortgage contracts* before that date did not cease to be *regulated mortgage contracts*. But many mortgage contracts that were not *regulated mortgage contracts* immediately before 21 March 2016 became *regulated mortgage contracts* on that date provided that they met the conditions set out in ■ PERG 4.4.1G(1) to (3), even though these conditions did not apply in that form at the time the contract was entered into.

4.4A.1C **G**

- (1) Mortgage contracts that potentially became *regulated mortgage contracts* on 21 March 2016 include, for example:
 - (a) mortgages entered into before 31 October 2004;
 - (b) second charge mortgages; and
 - (c) equitable mortgages.
- (2) However:
 - (a) a mortgage contract entered into before 21 March 2016, which was not already a *regulated mortgage contract* only became a *regulated mortgage contract* if it was a 'consumer credit back book mortgage contract' within the meaning of article 2 of the *MCD Order* (and see paragraph (a)(iii) of the *Glossary* definition

of regulated mortgage contract). Briefly, this means a regulated credit agreement that would have been a regulated mortgage contract if it had been entered into on or after 21 March 2016, with the exception of certain buy-to-let mortgages (which will remain regulated credit agreements if they were regulated credit agreements at the time they were entered into);

- (b) the exclusions set out in article 61A of the *Regulated Activities Order* and reflected in paragraph (a)(ii) of the *Glossary* definition of regulated mortgage contract replicate various consumer credit exemptions, for example equitable mortgage bridging loans; and
- (c) the regulated activities of administering a regulated mortgage contract, advising on regulated mortgage contracts and arranging (bringing about) regulated mortgage contracts are limited, in their application to mortgage contracts entered into before 21 March 2016, to mortgage contracts which were already regulated mortgage contracts or which are 'consumer credit back book mortgage contracts' within the meaning of article 2 of the *MCD Order* (see (a)).

4.4A.2 G [deleted]

4.4A.3 G [deleted]

4.4A.4 G [deleted]

4.4A.5 G
(2) [deleted]

4.4A.6 G [deleted]

4.4A.7 G [deleted]

4.4A.8 G
(3) [deleted]

4.4A.9 G [deleted]

4.4A.10 G [deleted]

(3) [deleted]

4.5 Arranging regulated mortgage contracts

Definition of the regulated activities involving arranging

4.5.1

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Article 25A of the *Regulated Activities Order* describes two types of *regulated activities* concerned with *arranging regulated mortgage contracts*. These are:

- (1) making arrangements:
 - (a) for another *person* to enter into a *regulated mortgage contract* as borrower; or
 - (b) to enter into a regulated mortgage contract with a borrower on behalf of a lender; or
 - (c) for another *person* to vary the terms of a *regulated mortgage contract* entered into by that person as borrower on or after 31 October 2004 or a *legacy CCA mortgage contract* entered into by that person as borrower in such a way as to vary that person's obligations under the contract; and
- (2) making arrangements with a view to a *person* who participates in the arrangements entering into a *regulated mortgage contract* as borrower.

4.5.2

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The first activity (article 25A(1) and (2A)) is referred to in this *guidance* as *arranging (bringing about) regulated mortgage contracts*. Various points arise:

- (1) It is not necessary for the potential borrower himself to be involved in making the arrangements.
- (2) This activity is carried on only if the arrangements bring about, or would bring about a *regulated mortgage contract*. This is because of the exclusion in article 26 (see ■ PERG 4.5.4 G). As explained in ■ PERG 4.5.4A G, this exclusion does not apply to the activity in ■ PERG 4.5.1G (1)(b).
- (3) This activity therefore includes the activities of brokers who make arrangements on behalf of a borrower to enter into or vary a *regulated mortgage contract* where these arrangements go beyond merely introducing (see ■ PERG 4.5.10 G) or advising (although giving advice may be the *regulated activity of advising on regulated mortgage contracts*). Such arrangements might include, for instance, negotiating the terms of the *regulated mortgage contract* with the eventual lender, on behalf of the borrower. It also includes the

activities of certain so-called 'packagers' (see ■ PERG 4.15 (Mortgage activities carried on by 'packagers').)

- (4) ■ PERG 4.6.2 G contains examples of variations that are, in the FCA's view, within the definition of *advising on regulated mortgage contracts* and would also be covered by article 25A(1) arrangements.

4.5.3

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The second activity (article 25A(2)) is referred to in this *guidance* as making *arrangements with a view to regulated mortgage contracts*. This activity is different from article 25A(1) and (2A)) because it requires a potential borrower to actively participate by utilising the arrangements to enter into a *regulated mortgage contract*. It does not require that the arrangements would bring about a *regulated mortgage contract*. Nor does it cover arrangements leading to contract variations. It includes the activities of introducers (see ■ PERG 4.5.10 G below) introducing potential borrowers to brokers and lenders. It may also, in certain circumstances, extend to the activities of a publisher, broadcaster, or website operator, albeit subject to exclusions in the *Regulated Activities Order* (see ■ PERG 4.5.5 G and ■ PERG 4.5.6 G).

Exclusion: article 25A(1) arrangements not causing a deal

4.5.4

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Article 26 of the *Regulated Activities Order* (Arrangements not causing a deal) excludes from article 25A(1) *arrangements* which do not bring about or would not bring about the *regulated mortgage contract* in question. In the FCA's view, a *person* brings about or would bring about a *regulated mortgage contract* if his involvement in the chain of events leading to the *transaction* is of enough importance that without that involvement it would not take place.

4.5.4A

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- (1) Article 26 does not apply to the activity described in ■ PERG 4.5.1G (1)(b).
- (2) As the activity in ■ PERG 4.5.1G (1)(b) covers a *person* that concludes a *regulated mortgage contract* with a borrower on behalf of a lender, in many cases the activity will only apply if the arrangements bring about, or would bring about, a *regulated mortgage contract*. Therefore, in many cases the fact that article 26 does not apply will make no difference.
- (3) However, if a *person* enters into a *regulated mortgage contract* on behalf of a lender, that *person* carries out the *regulated activity* described in ■ PERG 4.5.1G (1)(b). That activity is not excluded just because most of the work is done by another.

Exclusion: article 25(A)2 arrangements enabling parties to communicate

4.5.5

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Article 27 of the *Regulated Activities Order* (Enabling parties to communicate) contains an exclusion that applies to arrangements which might otherwise fall within article 25A(2) merely because they provide the means by which one party to a *regulated mortgage contract* (or potential *regulated mortgage contract*) is able to communicate with other parties. Simply providing the means by which parties to a *regulated mortgage contract* (or potential *regulated mortgage contract*) are able to communicate

with each other is excluded from article 25(A)2 only. This will ensure that *persons* such as Internet service providers or telecommunications networks are excluded if all they do is provide communication facilities (and these would otherwise be considered to be *arrangements made with a view to regulated mortgage contracts*).

- 4.5.6 G In the *FCA's* view, the crucial element of the exclusion in article 27 is the inclusion of the word "merely". When a publisher, broadcaster or Internet website operator goes beyond what is necessary for him to provide his service of publishing, broadcasting or otherwise facilitating the issue of promotions, he may well bring himself within the scope of article 25A(2). Further detailed *guidance* relating to the scope of the exclusion in article 27 is contained in ■ PERG 8.32.6 G to ■ PERG 8.32.11 G.

Exclusion: article 25A(1) and (2) arranging of contracts to which the arranger is a party

- 4.5.7 G Arranging a *regulated mortgage contract* (or contract variation) to which the arranger is to be a party is excluded from both article 25A(1) and (2) by article 28A of the *Regulated Activities Order* (Arranging contracts to which the arranger is a party). As a result, a *person* cannot both be *entering into a regulated mortgage contract* and arranging a *regulated mortgage contract* under article 25A as regards a particular *regulated mortgage contract*. This means that a direct sale by a mortgage lender does not involve the *regulated activity* of arranging but, if the transaction is completed, does involve the *regulated activity* of *entering into a regulated mortgage contract*. The *FCA's* rules on *arranging regulated mortgage contracts*, however, do apply to direct sales.

- 4.5.7A G Article 28A does not apply to the activity described in ■ PERG 4.5.1G (1)(b). This is because the activity described in ■ PERG 4.5.1G (1)(b) is defined so that it cannot apply to an activity carried out by the lender. There is, therefore, no need to apply article 28A.

Exclusion: article 25A(1) and (2) arrangements with or through authorised persons

- 4.5.8 G An *unauthorised person* who makes arrangements for or with a view to a *regulated mortgage contract* between a borrower and an *authorised person*, is excluded from article 25A(1) and (2), 25A(2A) and by article 29 of the *Regulated Activities Order* (Arranging deals with or through authorised persons) if specified conditions as to advice and remuneration are satisfied. For example, the exclusion is dependent on the borrower not receiving any advice on the *regulated mortgage contract* from the *unauthorised person* making the arrangements. Additionally, payment must not be received unless it is accounted for to the borrower (which, in the *FCA's* view, means that it must be paid over to, or treated as belonging to and held to the order of, the borrower).

- 4.5.8A G Article 29 does not apply if applying the exclusion would take activities outside article 25A that should be regulated under the *MCD*. Please see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive) for more details.

Exclusion: article 25A(1)(b) arrangements made in the course of administration by authorised person

4.5.9 **G** Article 29A of the *Regulated Activities Order* excludes from article 25A(1)(b) (which covers making arrangements for another *person* to vary the terms of a *regulated mortgage contract*) certain activities of an *unauthorised person* who is taking advantage of the exclusion from *administering a regulated mortgage contract* in article 62 (Exclusion: arranging administration by authorised persons) see ■ PERG 4.8.4 G).

Exclusion: article 25A(2) arrangements and introducing

4.5.10 **G** Article 33A of the *Regulated Activities Order* (Introducing to authorised persons) excludes from article 25A(2) arrangements under which a borrower is introduced to certain *persons*. Introducing is only a *regulated activity* under article 25A(2) as it does not of itself bring about *regulated mortgage contracts* (see ■ PERG 4.5.2 G).

4.5.11 **G** The exclusion applies for introductions to:

- (1) an *authorised person* who has *permission* to carry on a *regulated activity* specified in article 25A (Arranging regulated mortgage contracts) or article 53A (Advising on regulated mortgage contracts) or article 61(1) (Entering into a regulated mortgage contract as lender); introducers can check the status of an *authorised person* and its *permission* by visiting the *Financial Services Register* at <http://www.fsa.gov.uk/register/>;
- (2) an *appointed representative* who is appointed to carry on a *regulated activity* specified in article 25A or article 53A of the *Regulated Activities Order*; introducers can check the status of an *appointed representative* by visiting the *FCA's register* at www.fca.org.uk/firms/financial-services-register; the *FCA* would normally expect introducers to request and receive confirmation of the *regulated activities* that the *appointed representative* is appointed to carry on, prior to proceeding with an introduction; and
- (3) an *overseas person* who carries on a *regulated activity* specified in article 25A (Arranging regulated mortgage contracts) or article 53A (Advising on regulated mortgage contracts) or article 61(1) (Entering into a regulated mortgage contract).

4.5.12 **G** The exclusion in article 33A only applies when the introducer satisfies two conditions:

- (1) he does not receive any money paid by the borrower in connection with any transaction that the borrower enters into with or through the *person* to whom the borrower is introduced as a result of the introduction, other than money payable to him on his own account; and
- (2) before making the introduction he discloses to the borrower all relevant information described in ■ PERG 4.5.14 G.

- 4.5.13** **G** In the *FCA's* view, money payable to an introducer on his own account includes money legitimately due to him for services rendered to the borrower, whether in connection with the introduction or otherwise. It also includes sums payable to an introducer (for example, a housebuilder) by a buyer in connection with a transfer of property. For example, article 33A allows a housebuilder to receive the purchase price on a property that he sells to a borrower, whom he previously introduced to an *authorised person* or *appointed representative* to help him finance the purchase and still take the benefit of the exclusion. This is because the sums that the housebuilder receives in connection with the introduction and with the sale of his property to the borrower are both "payable to him on his own account". The housebuilder may also receive a commission from the *person* introduced to. He may not, however, receive any sums payable by the borrower to the *person* to whom the borrower is introduced, for example valuation fees, as those sums are not payable to the housebuilder on his own account.
- 4.5.14** **G** The information that the introducer must disclose to the borrower prior to making the introduction is, where relevant:
- (1) that he is a member of the same *group* as the *person* (N) to whom the borrower is introduced;
 - (2) details of any payment which he will receive from N, by way of fee or commission, for introducing the borrower to N; and
 - (3) an indication of any other reward or advantage arising out of his introducing to N.
- 4.5.15** **G** In the *FCA's* view, details of fees or commission referred to in **■ PERG 4.5.14G (2)** does not require an introducer to provide an actual sum to the borrower, where it is not possible to calculate the full amount due prior to the introduction. This may arise in cases where the fee or commission is a percentage of the eventual loan taken out and the amount of the required loan is not known at the time of the introduction. In these cases, it would be sufficient for the introducer to disclose the method of calculation of the fee or commission, for example the percentage of the eventual loan to be made by N.
- 4.5.16** **G** In the *FCA's* view, the information condition in **■ PERG 4.5.14G (3)** requires the introducer to indicate to the borrower any other advantages accruing to him as a result of ongoing arrangements with N relating to the introduction of borrowers. This may include, for example, indirect benefits such as office space, travel expenses, subscription fees and this and other relevant information may be provided on a standard form basis to the borrower, as appropriate.
- 4.5.17** **G** The *FCA* would normally expect an introducer to keep a written record of disclosures made to the borrower under article 33A of the *Regulated Activities Order* including those cases where disclosure is made on an oral basis only.

4.5.18 **G** In addition to the exclusion in article 33A, introducers may be able to take advantage of the exclusion in article 33 of the *Regulated Activities Order* (Introducing). This excludes arrangements where:

- (1) they are arrangements under which *persons* will be introduced to another *person*;
- (2) the *person* to whom the introduction is to be made is:
 - (a) an *authorised person*; or
 - (b) an *exempt person* acting in the course of business comprising a *regulated activity* in relation to which he is exempt; or
 - (c) a *person* who is not unlawfully carrying on *regulated activities* in the *United Kingdom* and whose ordinary business involves him in engaging in certain activities; and
- (3) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to *investments* generally or in relation to any class of *investments* (including mortgages) to which the arrangements relate.

Other exclusions.....

4.5.19 **G** The *Regulated Activities Order* contains a number of other exclusions which have the effect of preventing certain activities from amounting to *regulated activities* within article 25. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity). There is also an exclusion where both the arranger and borrower are overseas, which is referred to in ■ PERG 4.11 (Link between activities and the United Kingdom).

4.6 Advising on regulated mortgage contracts

Definition of 'advising on regulated mortgage contracts'

4.6.1

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Article 53A of the *Regulated Activities Order* (Advising on regulated mortgage contracts) makes *advising on regulated mortgage contracts* a *regulated activity*. This covers advice which is both:

- (1) given to a *person* in his capacity as borrower or potential borrower; and
- (2) advice on the merits of the borrower:
 - (a) entering into a particular *regulated mortgage contract* (whether or not the entering into is done by way of business); or
 - (b) varying the terms of a *regulated mortgage contract* entered into by the borrower on or after 31 October 2004, or a *legacy CCA mortgage contract* entered into by the borrower, in such a way as to vary the borrower's obligations under the contract.

4.6.2

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In the *FCA's* view, the circumstances in which a *person* is giving advice on the borrower varying the terms of a *regulated mortgage contract* so as to vary his obligations under the contract include (but are not limited to) where the advice is about:

- (1) the borrower obtaining a further advance secured on the same land as the original loan; or
- (2) a rate switch or a product switch (that is, where the borrower does not change lender but changes the terms for repayment from, say, a variable rate of interest to a fixed rate of interest or from one fixed rate to another); or
- (3) the borrower transferring from a repayment mortgage to an interest-only mortgage or the reverse situation.

Although advice on varying the terms of a *regulated mortgage contract* is not a *regulated activity* if the contract was entered into before 31 October 2004, unless the contract is a *legacy CCA mortgage contract*, there may be instances where the variation to the old contract is so fundamental that it amounts to *entering into a new regulated mortgage contract* (see ■ PERG 4.4.4 G). In that case, giving the advice would be a *regulated activity*.

- 4.6.3** **G** For advice to fall within article 53A as set out in **■ PERG 4.6.1 G** it must:
- (1) relate to a particular mortgage contract (that is, one that the borrower may enter into or, in the case of advice on a variation, one that he has already entered into);
 - (2) be given to a *person* in his capacity as a borrower or potential borrower;
 - (3) be advice (that is, not just information); and
 - (4) relate to the merits of the borrower entering into, or varying the terms of, the contract.

4.6.4 **G** Each of these aspects is considered in greater detail in **■ PERG 4.6.5 G** (Advice must relate to a particular regulated mortgage contract) to **■ PERG 4.6.17 G** (Advice must relate to the merits (of entering into as borrower or varying)). Additionally, the following should be borne in mind:

- (1) a *person* may be carrying on *regulated activities* involving arranging, whether or not that *person* is *advising on regulated mortgage contracts* (see **■ PERG 4.5**);
- (2) the provision of advice or information may involve the communication of a *financial promotion* (see **■ PERG 8** (Financial promotion and related activities)); and
- (3) **■ PERG 8.25** ((Advice must relate to an investment which is a security or contractually based investment) to **■ PERG 8.29** (Advice must relate to the merits (of buying or selling a particular investment)) will be relevant to any *person* who may be advising on other forms of investment at the same time as he advises on *regulated mortgage contracts*; this includes, for example, a *person* advising on the merits of using a particular endowment policy or *ISA* as the means for repaying the capital under an *interest-only mortgage*.

Advice must relate to a particular regulated mortgage contract

4.6.5 **G** Advice will come within the *regulated activity* in article 53A of the *Regulated Activities Order* only if it relates to a particular *regulated mortgage contract* (or several different *regulated mortgage contracts*). The question is whether a recommendation is made to a *customer* which either explicitly or implicitly steers the *customer* to a particular *regulated mortgage contract* because of its features.

4.6.6 **G** Advice relates to a particular contract if it recommends that a *person* should take out a mortgage with ABC Building Society without (expressly or by implication) specifying any particular ABC Building Society mortgage because it steers the customer towards specific identifiable mortgages and away from all others. The advice is essentially saying that there is a feature of each individual ABC Building Society mortgage that makes it better than a mortgage from any other lender. Advice may be regulated even though it relates to more than one possible mortgage. Advice also relates to a particular contract if it recommends that a *person* should not take out a mortgage with ABC Building Society.

4.6.7

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Typical recommendations and whether they will be regulated as advice under article 53A of the *Regulated Activities Order*

This table belongs to ■ PERG 4.6.5 G and ■ PERG 4.6.6 G.

Recommendation	Regulated or not?
I recommend you take out the ABC Building Society 2 year fixed rate mortgage at 5%.	Yes. This is advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into.
I recommend you do not take out the ABC Building Society 2 year fixed rate mortgage at 5%.	Yes. This is advice which steers the borrower away from a particular mortgage which the borrower could have entered into.
I recommend that you take out either the ABC Building Society 2 year fixed rate mortgage at 5% or the XYZ Bank standard variable rate mortgage.	Yes. This is advice which steers the borrower in the direction of more than one particular mortgage which the borrower could enter into.
I recommend you take out (or do not take out) an ABC Building Society fixed rate mortgage.	Yes. See PERG 4.6.6 G.
I suggest you take out (or do not take out) a mortgage with ABC Building Society.	Yes. See PERG 4.6.6 G.
I suggest you change (or do not change) your current mortgage from a variable rate to a fixed rate.	No in respect of the advice about rate type, as this does not steer the borrower in the direction of a particular mortgage which the borrower could enter into. Yes in respect of the advice about varying the terms of the particular mortgage that the borrower had already entered into.
I suggest you take out (or do not take out) a variable rate mortgage.	No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into.
I recommend you take out (or do not take out) a mortgage.	No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into.
I would always recommend buying a house and taking out a mortgage as opposed to renting a property.	No. This is an example of generic advice which does not steer the borrower in the direction of a particular mortgage that he could enter into.
I recommend you do not borrow more than you can comfortably afford.	No. This is an example of generic advice.
If you are looking for flexibility with your mortgage I would recommend you explore the possibilities of either a flexible mortgage or an offset mortgage. There are a growing number of lenders offering both.	No. This is an example of generic advice.

4.6.8 **G** Generic or general advice will not fall under article 53A. Examples of generic advice are shown in ■ PERG 4.6.7 G.

4.6.9 **G** In the FCA's view, guiding a *person* through scripted questions or a decision tree should not, of itself, involve advice within the meaning of article 53A (it should be generic advice). But the combination of advice, which in isolation may properly be considered generic, with the identification of a particular or several particular *regulated mortgage contracts* may well, in the FCA's view, cause the *person* to be *advising on regulated mortgage contracts*; the FCA considers that it is necessary to look at the process as a whole; this is considered in more detail, in the context of scripted questioning, in ■ PERG 4.6.22 G (Scripted questioning (including decision trees)).

Advice given to a person in his capacity as a borrower or potential borrower

4.6.10 **G** For the purposes of article 53A, advice must be given to or directed at someone who is acting as borrower or potential borrower. As indicated in ■ PERG 4.4.2 G (Which borrowers?), this means the individual or trustee to whom the credit has been provided by the lender or who is looking to obtain the credit on the security of his property. Advice given to a *body corporate* will not generally be caught because the advice will not concern a *regulated mortgage contract*, as defined. But this does not apply where the *body corporate* is acting as trustee.

4.6.11 **G** Article 53A will not, for example, apply where advice is given to *persons* who receive it as:

- (1) a lender under or administrator of a *regulated mortgage contract*; or
- (2) an adviser who may use it to inform advice given by him to others; or
- (3) a journalist or broadcaster; or
- (4) an agent of a borrower unless appointed as the borrower's attorney and therefore entering into the *regulated mortgage contract* as agent (or proxy) for the borrower.

4.6.12 **G** Advice will still be covered by article 53A even though it may not be given to or directed at a particular borrower (for example advice given in a periodical publication or on a website).

Advice or information

4.6.13 **G** In the FCA's view, advice requires an element of opinion on the part of the adviser which steers or is intended to steer a borrower or potential borrower in the direction of one or more particular mortgages. In effect, it is a recommendation as to a course of action. Information on the other hand, involves objective statements of facts and figures.

4.6.14 **G** In general terms, simply giving balanced and neutral information without making any comment or value judgement on its relevance to decisions which a borrower may make is not advice.

- 4.6.15** G Information relating to entering into *regulated mortgage contracts* may often involve one or more of the following:
- (1) an explanation of the terms and conditions of a *regulated mortgage contract*, whether given orally or in writing or by providing leaflets and brochures;
 - (2) a comparison of the features and benefits of one *regulated mortgage contract* with another;
 - (3) the production of scripted questions for the borrower to use in order to exclude options that would fail to meet his requirements; such questions may often go on to identify a range of *regulated mortgage contracts* with characteristics that appear to meet the borrower's requirements and to which he might wish to give detailed consideration (scripted questioning is considered in more detail in ■ PERG 4.6.21 G to ■ PERG 4.6.25 G (Scripted questioning (including decision trees)));
 - (4) tables that compare the interest rates and other features of different mortgages;
 - (5) leaflets or illustrations that help borrowers to decide which type of mortgage to take out;
 - (6) the provision, in response to a request from a borrower who has identified the main features of the type of mortgage he seeks, of several leaflets together with an indication that all the *regulated mortgage contracts* described in them have those features.

- 4.6.16** G In the *FCA's* opinion, however, such information is likely take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation as described in ■ PERG 4.6.10 G. Examples of situations where information provided by a *person* ('P') are likely to take the form of advice are given below.
- (1) P provides information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of the borrower. This may arise where P offers to provide information about mortgages that contain features specified by the borrower but then exercises discretion as to which mortgages to offer to the borrower.
 - (2) P, as a result of going through the sales process, discusses the merits of one *regulated mortgage contract* over another, resulting in advice to enter into or not enter into a particular one.

Advice must relate to the merits (of entering into as borrower or varying)

- 4.6.17** G Advice under article 53A must relate to the pros or cons of *entering into a regulated mortgage contract* as borrower.

- 4.6.18** G A neutral and balanced explanation of the implications under a *regulated mortgage contract* of, for example, exercising certain rights or failing to

make interest payments on time, need not, itself, involve advice on the merits of entering into that contract or varying its terms.

4.6.19 **G** Neither does advice on the merits of using a particular mortgage broker or adviser in his capacity as such amount to advice for the purposes of article 53A. It is not advice on the merits of entering into or varying the terms of a *regulated mortgage contract*.

4.6.20 **G** Without explicit or implicit advice on the merits of entering into as borrower or varying the terms of a *regulated mortgage contract*, advice will not fall under article 53A if it is advice on the likely meaning of uncertain provisions in a *regulated mortgage contract* or on how to complete an application form.

Scripted questioning (including decision trees)

4.6.21 **G** Scripted questioning involves using any form of sequenced questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a mortgage or other product that meets his needs. A decision tree is an example of scripted questioning. The process of going through the questions will usually narrow down the range of options that are available. Scripted questions must be prepared in advance of their actual use.

4.6.22 **G** Undertaking the process of scripted questioning gives rise to particular issues concerning advice. These mainly involve two aspects of this *regulated activity*. These are that advice must relate to a particular *regulated mortgage contract* (see ■ PERG 4.6.5 G) and the distinction between information and advice (see ■ PERG 4.6.13 G). Whether or not scripted questioning in any particular case is *advising on regulated mortgage contracts* will depend on all the circumstances. If the process involves identifying one or more particular *regulated mortgage contracts* then, in the *FCA's* view, to avoid *advising on regulated mortgage contracts*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the borrower as, assisting the borrower to make his own choice of product which has particular features which the borrower regards as important. The questioner will need to avoid making any judgement on the suitability of one or more products for the borrower. See also ■ PERG 4.6.4 G for other matters that may be relevant.

4.6.23 **G** The potential for variation in the form, content and manner of scripted questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, whether a borrower wishes to pay a fixed or variable rate of interest or the size of deposit available). In the *FCA's* view, this does not of itself amount to *advising on regulated mortgage contracts*, as it involves the provision of information rather than advice. There are various possible scenarios, including the following:

- (1) the questioner may go on to identify several *regulated mortgage contracts* which match features identified by the scripted questioning; provided these are presented in a balanced and neutral way (for example, they identify all the matching *regulated mortgage*

contracts, without making a recommendation as to a particular one) this need not of itself involve advising on regulated mortgage contracts;

- (2) the questioner may go on to advise the borrower on the merits of one particular *regulated mortgage contract* over another; this would be *advising on regulated mortgage contracts*;
- (3) the questioner may, before or during the course of the scripted questioning, give a recommendation or opinion which influences the choice of mortgage contract and, following the scripted questioning, identify one or more particular *regulated mortgage contracts*; the key issue then is whether the advice can be said to relate to a particular *regulated mortgage contract* (see further ■ PERG 4.6.22 G)).

4.6.24

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The second type of scripted questioning involves providing questions and answers incorporating opinion, judgement or recommendations (for example, whether a repayment mortgage or interest-only mortgage is a better option or whether interest rates are likely to rise). There are various possible scenarios, including the following:

- (1) the scripted questioning may not lead to the identification of any particular *regulated mortgage contract*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on regulated mortgage contracts*; or
- (2) the scripted questioning may lead to the identification of one or more particular *regulated mortgage contracts*; the key issue then is whether the advice can be said to relate to a particular *regulated mortgage contract* (see further ■ PERG 4.6.22 G).

4.6.25

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In the scenarios identified in ■ PERG 4.6.23G (3) and ■ PERG 4.6.24G (2), the FCA considers that it is necessary to look at the process and outcome of scripted questioning as a whole. It may be that the element of advice incorporated in the questioning may properly be viewed as generic advice if it were considered in isolation. But, although the actual advice may be generic, the process has ended in identifying one or more particular *regulated mortgage contracts*. The combination of the generic advice and the identification of a particular or several particular *regulated mortgage contracts* to which it leads may well, in the FCA's view, cause the questioner to be *advising on regulated mortgage contracts*. Factors that may be relevant in deciding whether the process involves *advising on regulated mortgage contracts* may include:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is to provide;
- (2) the context in which the questioning takes place;
- (3) the stage in the questioning at which the opinion is offered and its significance;
- (4) the role played by any questioner who guides a *person* through the scripted questions;

- (5) the outcome of the questioning (whether particular *regulated mortgage contracts* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (6) whether the scripted questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party (for example, the *FCA*), and all that the questioner has done is help the borrower understand what the questions or options are and how to determine which option applies to his particular circumstances.

Medium used to give advice

4.6.26 G With the exception of periodicals, broadcasts and other news or information services (see ■ PERG 4.6.30 G (Exclusion: periodical publications, broadcasts and websites)) the medium used to give advice should make no material difference to whether or not the advice is caught by article 53A.

4.6.27 G Advice can be provided in many ways including:

- (1) face to face;
- (2) orally to a group;
- (3) by telephone;
- (4) by correspondence (including e-mail);
- (5) in a publication, broadcast or website; and
- (6) through the provision of an interactive software system.

4.6.28 G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The same principles apply as with a paper version (see ■ PERG 4.6.21 G to ■ PERG 4.6.25 G (Scripted questioning (including decision trees))).

4.6.29 G Advice in publications, broadcasts and websites is subject to a special regime – see ■ PERG 4.6.30 G (Exclusion: periodical publications, broadcasts and websites) and ■ PERG 7 (Periodical publications, news services and broadcasts: applications for certification).

Exclusion: periodical publications, broadcasts and websites

4.6.30 G The main exclusion from *advising on regulated mortgage contracts* relates to advice given in periodical publications, regularly updated news and information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies if the principal purpose of any of these is neither to give advice of the kind to which article 53 (Advising on investments) or article 53A applies nor to lead or enable *persons* to:

- (1) acquire or dispose of *securities* or *contractually based investments*; or

- (2) enter as borrower into *regulated mortgage contracts* or vary the terms of *regulated mortgage contracts* entered into by such persons as the borrower.

This is explained in greater detail, together with the provisions on the granting of certificates, in ■ PERG 7 (Periodical publications, news services and broadcasts: applications for certification).

Exclusion: advice in the course of administration by authorised person

- 4.6.31 **G** Article 54A of the *Regulated Activities Order* excludes from *advising on regulated mortgage contracts* certain activities of an *unauthorised person* which is taking advantage of the exclusion from *administering a regulated mortgage contract* in article 62 (see ■ PERG 4.8.4 G).

Other exclusions

- 4.6.32 **G** The *Regulated Activities Order* contains a number of other exclusions which have the effect of preventing certain activities from amounting to *advising on regulated mortgage contracts*. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity) and ■ PERG 4.10B (Regulation of buy to let lending)

Further examples of what is and is not regulated advice

- 4.6.33 **G** The table in ■ PERG 4.6.34 G sets out some further examples of typical situations and whether they involve regulated advice under article 53A of the *Regulated Activities Order*.

- 4.6.34 **G** Further examples of what is and is not regulated advice

This table belongs to ■ PERG 4.6.33 G.

Example of what the firm says and does	Regulated or not?
(1) The <i>firm</i> says "We have a wide range of mortgages, including fixed and variable rates. Here are some leaflets which set out the main features."	No. Leaflets that just explain the terms and conditions of a lender's products are not advice (see PERG 4.6.15G (1)). Even if the leaflet contains promotional material, merely handing over the leaflet does not mean that the <i>firm</i> is giving advice.
(2) The <i>firm</i> says "We have a wide range of mortgages, our best rates are two-year fixed rates, you might want to look at those."	Yes. The <i>firm</i> has identified specific products that it offers and is steering the customer to those products. Identifying which products have the lowest rates is not advice on its own, only facts. However, "best" involves a value judgment, particularly when a comparison is made with other products that have different periods for which interest is fixed or that have variable interest rates.

(3) The *firm* says "In order to provide you with an illustration, I need to know how much you want to borrow, the term and the property value. Which product or products would you like an illustration for?"

No. The *firm* is collecting factual information to provide the customer with an illustration of costs.

(4) The *firm* says "Based on what you've told me I think you would be best to look at two-year fixed rates. Here is some information about our products."

Yes. The *firm* has made a judgment on what type of product is best for the customer and has identified specific products of that type that it offers.

(5) The *firm* says "Our fixed rates start at 4.99% for two years with a £900 fee. Our variable rates start at 4.50% with a £800 fee. Depending on how much you want to borrow and your circumstances, this may affect the rate available to you."

No. The *firm* is comparing two products without recommending either, nor is the *firm* steering the customer to one over the other.

(6) A lender with just one mortgage product advises a customer to take out that mortgage. The lender makes it clear that it does not give advice about products other than its own.

Yes. The lender may argue that this is not regulated advice because it is not recommending one product over another as it only has one product itself and does not give advice about the products of other lenders. However, in the *FCA's* view this is still regulated advice. For advice to be regulated it must be advice on the merits of entering into a particular *regulated mortgage contract* (or varying one). It is possible to give advice about the merits of a product without comparing that product with another.

Note: Unless otherwise specified, the *firm* might be the lender or an advisory or intermediary *firm*.

4.7 Entering into a regulated mortgage contract

Definition of 'entering into a regulated mortgage contract'

4.7.1 **G** Article 61(1) of the *Regulated Activities Order* makes *entering into a regulated mortgage contract* as lender a regulated activity.

Exclusions

4.7.2 **G** The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and personal representatives from amounting to *entering into a regulated mortgage contract*. There is also an exclusion for *local authorities* and their wholly-owned subsidiaries. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity). In addition, there are exclusions where both the lender and borrower are overseas, which is referred to in ■ PERG 4.11 (Link between activities and the United Kingdom) and related to consumer buy-to-let lending, which is described in ■ PERG 4.10B.

Transfer of lending obligations

4.7.3 **G** A *person* who provides credit to a borrower under a *regulated mortgage contract* will enter into a *regulated mortgage contract*, even if the lending obligations under that contract are subsequently transferred to a third party. Consequently, a *person* who acts as a so-called 'correspondent lender' in the mortgage market will need to seek *authorisation*.



4.8 Administering a regulated mortgage contract

Definition of 'administering a regulated mortgage contract'.....

4.8.1 **G** Article 61(2) of the *Regulated Activities Order* makes *administering a regulated mortgage contract* a *regulated activity* 'where the contract was entered into by way of business' on or after 31 October 2004 or the contract was entered into 'by way of business' before that date and is a *legacy CCA mortgage contract*.

4.8.2 **G** The definition does not include administration of a *regulated mortgage contract* which was not entered into by way of business. See ■ PERG 4.3.3 G for a discussion of the 'by way of business' test. The definition also does not include administration of a mortgage which was entered into before 31 October 2004 unless the contract is a *legacy CCA mortgage contract*. See, however, ■ PERG 4.4.4 G for a discussion of how a variation of a mortgage contract entered into before 31 October 2004 could amount to the entry into a new *regulated mortgage contract* on or after 31 October 2004.

4.8.3 **G** Under article 61(3)(b) of the *Regulated Activities Order*, *administering a regulated mortgage contract* is defined as either or both of:

- (1) notifying the borrower of changes in interest rates or payments due under the contract, or of other matters of which the contract requires him to be notified; and
- (2) taking any necessary steps for the purposes of collecting or recovering payments due under the contract from the borrower;

but does not include merely having or exercising a right to take action to enforce the *regulated mortgage contract*, or to require that action is or is not taken.

Exclusion: arranging administration by authorised persons.....

4.8.4 **G** Article 62 of the *Regulated Activities Order* provides that a *person* who is not an *authorised person* does not *administer a regulated mortgage contract* if he:

- (1) arranges for a *firm* with *permission* to administer a *regulated mortgage contract* (a '*mortgage administrator*') to administer the contract; or

(2) administers the *regulated mortgage contract* itself, provided that the period of administration is no more than one month after the arrangement in (1) has come to an end.

4.8.5 G This exclusion may be of a particular interest to a special purpose vehicle which administers *regulated mortgage contracts* transferred to it as part of a *securitisation* transaction.

4.8.6 G If an *unauthorised* administrator makes *arrangements* for a *mortgage administrator* to administer its *regulated mortgage contracts*, the exclusion may cease to be available because the *mortgage administrator* ceases to have the required *permission*, or because the arrangement is terminated. The exclusion gives the *unauthorised* administrator a one-month grace period during which it may administer the contracts itself. If the period of administration exceeds one month, the *unauthorised* administrator will be in breach of the *general prohibition*, and the *FCA* may take proceedings in respect of the breach. However:

(1) under section 23(3) of the *Act*, it is a defence in such proceedings for a *person* to show that 'he took all reasonable precautions and exercised all due diligence to avoid committing the offence';

(2) the *FCA* would consider whether a *person* had taken 'all reasonable precautions and exercised all due diligence' on a case-by-case basis; what is reasonable is a matter for the senior management of the *unauthorised* administrator to decide in each case, taking account of, for example, the financial standing of the *mortgage administrator* and its ability to perform its obligations under the administration contract;

(3) factors that the *FCA* would take into account in assessing whether an *unauthorised* administrator has taken 'all reasonable precautions and exercised all due diligence' would include:

- (a) the level of the *person's* preparedness for a *mortgage administrator* to cease providing administration services; and
- (b) the reasons for, and the circumstances of, the termination of *arrangements* with a *mortgage administrator*;

(4) whether any agreement made by an *unauthorised* administrator would be enforceable under section 26 of the *Act* (Agreements made by *unauthorised* persons) depends on whether the court is satisfied that this would be just and equitable; in this context, the court may have regard to the extent to which the administrator has complied with the *FCA's guidance*.

Exclusion: administration pursuant to agreement with authorised person

4.8.7 G Under article 63 of the *Regulated Activities Order*, a *person* who is not an *authorised person* does not administer a *regulated mortgage contract* if he administers the contract under an agreement with a *firm* with *permission* to administer a *regulated mortgage contract*. A *firm* with *permission* to administer a *regulated mortgage contract* may thus outsource or delegate the administration function to an *unauthorised* third party. A *firm* that

proposes to do this should however note, as set out in ■ SYSC 8.1.6 R and ■ 8.1.8 R, that the FCA will continue to hold it responsible for the way in which the administration is carried on.

Other exclusions

4.8.8

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The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and personal representatives from amounting to *administering regulated mortgage contracts*. There is also an exclusion for *local authorities* and their wholly-owned subsidiaries. These are referred to in ■ PERG 4.10 (Exclusions applying to more than one regulated activity). In addition, there are exclusions where both the administrator and borrower are overseas, which is referred to in ■ PERG 4.11 (Link between activities and the United Kingdom) and related to consumer buy-to-let lending, which is described in ■ PERG 4.10B.

4.9 Agreeing to carry on a regulated activity

- 4.9.1** **G** Under article 64 of the *Regulated Activities Order* (Agreeing to carry on specific kinds of activity), in addition to the *regulated activities* of *arranging (bringing about), making arrangements with a view to, advising on, entering into and administering regulated mortgage contracts*, agreeing to do any of these things is itself a *regulated activity*. In the FCA's opinion, this activity concerns the entering into of a legally binding agreement to provide the services that it concerns. So a *person* is not carrying on a *regulated activity* involving agreeing merely because he makes an offer to do so.
- 4.9.2** **G** To the extent that an exclusion applies in relation to a *regulated activity*, then 'agreeing' to carry on an activity within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order*.



4.10 Exclusions applying to more than one regulated activity

Exclusion: Activities carried on in the course of a profession or non-investment business

- 4.10.1** **G** The exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) applies to the *regulated activities of arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts.* ■ PERG 4.14 contains further *guidance* on mortgage activities carried on by *professional firms.*)
- 4.10.2** **G** *Arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts* are excluded if they are carried on by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is the case if it may reasonably be regarded as necessary for him to make the arrangements or give the advice in order to provide his professional or other services and he is not separately paid for making the arrangements or giving the advice.
- 4.10.3** **G** In the *FCA's* view, for arranging or advice to be a necessary part of other services it must, as a general rule, be the case that it is not possible for the other services to be provided unless the arranging or advising are also provided.
- 4.10.4** **G** Situations where this exclusion might apply, in the *FCA's* view, are set out below:

 - (1) Advice by solicitors: the provision of legal services may involve a solicitor advising his client on the legal effects and consequences of entering into a particular *regulated mortgage contract*. To the extent that this may involve advice on the merits of entering into the contract it is likely to be a necessary part of the legal advice. But it would not be necessary for the solicitor to go on to recommend that his client would be better to enter into a different particular *regulated mortgage contract*.
 - (2) Advice by licensed conveyancers: as a necessary part of conveyancing work and under their duty of care to the client, a licensed conveyancer may state that the mortgage the client has applied for is right for them or not. If the client has already applied for a mortgage and the conveyancer just says that their choice is right or wrong but does not recommend alternatives, then that advice is likely to be

excluded. But if the conveyancer recommends an alternative then that advice is unlikely to be excluded.

(3) Conveyancing as arranging: the provision of pure conveyancing services (whether performed by a solicitor or a licensed conveyancer) will, themselves, be arrangements within the scope of article 25A. So they will be excluded under article 67. But if the client does not yet have a mortgage, an introduction to or other arrangement involving a lender is unlikely to be a necessary part of conveyancing services.

(4) Debt counselling services: The provision of debt counselling services may involve the counsellor advising his client on the merits of varying the terms of an existing *regulated mortgage contract* and, in certain cases, assisting a distressed borrower in corresponding with a lender. Such advice and arrangements are likely to be a necessary part of the debt counselling services. But it would not be a necessary part of those services for the counsellor to offer advice on the merits of his client entering into a new particular *regulated mortgage contract*.

- 4.10.4A** G (1) The exclusion in article 67 of the Regulated Activities Order (Activities carried on in the course of a profession or non-investment business) does not apply if applying the exclusion would take activities covered by the *MCD* outside the definition of certain *regulated mortgage activities*.
- (2) Please see ■ **PERG 4.10A** (Activities regulated under the Mortgage Credit Directive) for more details.

Exclusion: Trustees, nominees and personal representatives.....

4.10.5 G There are exclusions that apply, in certain circumstances, in relation to each of the *regulated mortgage activities* if the *person* carrying on the activity is acting in the capacity of trustee or personal representative. Article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) sets out the circumstances in which the exclusions apply. The terms of these differ slightly depending on the *regulated activity*.

4.10.6 G For each of the *regulated activities of arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts*, the exclusions apply if the trustee or personal representative is acting in that capacity and:

- (1) the arrangements he makes concern the entering into or variation of *regulated mortgage contracts* and the contracts are to be entered into or varied either by himself and a fellow trustee or personal representative or by the beneficiary under the trust, will or estate on behalf of which he is acting; or
- (2) the advice is given to such trustees or personal representatives or beneficiaries.

4.10.7 G For each of the *regulated activities of entering into a regulated mortgage contract and administering a regulated mortgage contract*, the exclusions apply if the trustee or personal representative is acting in that capacity and

the borrower is a beneficiary under the trust, will or estate on behalf of which he is acting.

4.10.8 G In every case, the trustee or personal representative must not receive any remuneration that is additional to any he receives for acting in his capacity as trustee or personal representative. But a *person* is not to be regarded as receiving additional remuneration merely because his remuneration as trustee or personal representative is calculated by reference to time spent.

4.10.8A G

- (1) The exclusion in article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) does not apply if applying the exclusion would take activities covered by the *MCD* outside the definition of certain *regulated mortgage activities*.
- (2) Please see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive) for more details.

Exclusion: Managers of UCITS and AIFs

4.10.9 G Article 72AA of the *Regulated Activities Order* (Managers of UCITS and AIFs) contains an exclusion relating to *firms with a Part 4A permission to manage a UCITS or manage an AIF* (see ■ PERG 2.9.22 G)

Exclusion: Local authorities

4.10.10 G There are exclusions that apply, in relation to each of the *regulated mortgage activities* and to *advising on regulated credit agreements for the acquisition of land*, if the *person* carrying on the activity is a *local authority* or a wholly owned subsidiary of a *local authority*. They can be found in article 72G of the *Regulated Activities Order*, but only apply where:

- (a) the relevant agreement was entered into before 21 March 2016; or
- (b) the relevant agreement is entered into on or after 21 March 2016 and:
 - (i) the agreement is of a kind to which the *MCD* does not apply by virtue of article 3(2) of the *MCD* (in other words, it is an agreement listed in ■ PERG 4.10A.5G(1) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or
 - (ii) it is a *bridging loan* described in ■ PERG 4.13.6G; or
 - (iii) it is a restricted public loan described in ■ PERG 4.13.7G.

Exclusion: Buy to let

4.10.11 G There is an exclusion for *CBTL business*. It is described in ■ PERG 4.10B (Regulation of buy to let lending).

4.10A Activities regulated under the Mortgage Credit Directive

General treatment for activities regulated under the Mortgage Credit Directive

4.10A.1 **G** Article 4(4B) of the *Regulated Activities Order* says that certain exclusions in the *Regulated Activities Order* do not apply in cases covered by the *MCD*. This section explains the situations in which this applies.

4.10A.2 **G** Article 4(4B) of the *Regulated Activities Order* says that where:

- (1) a *person* is:
 - (a) a mortgage creditor (see ■ PERG 4.10A.6 G); or
 - (b) a credit intermediary (see ■ PERG 4.10A.12 G); or
 - (c) a *person* providing advisory services (see ■ PERG 4.10A.20 G); under the *MCD*; and
- (2) that *person* is (ignoring the exclusions in (3)) carrying on one of the following *regulated activities*:
 - (a) article 25A (*arranging (bringing about) regulated mortgage contracts and making arrangements with a view to regulated mortgage contracts*);
 - (b) article 53A (*advising on regulated mortgage contracts*); or
 - (c) article 61(1) (entering into a regulated mortgage contract as lender); and
- (3) in acting as described in (1), that *person* is relying on one of the following exclusions to take it outside the *regulated activities* in (2):
 - (a) article 29 (Arranging deals with or through authorised persons);
 - (b) article 66 (Trustees, nominees and personal representatives); or
 - (c) article 67 (Activities carried on in the course of a profession or non-investment business);

then the result is that:

- (4) the exclusions in (3) are switched off; and
- (5) that *person* is treated as carrying on the *regulated activity* in (2) in question.

The meaning of mortgage intermediary

- 4.10A.3 **G** The *Regulated Activities Order* refers to credit intermediaries (■ PERG 4.10A.2G (1)(b)) and providers of advisory services (■ PERG 4.10A.2G (1)(c)) as mortgage intermediaries.

What mortgages are covered by the Mortgage Credit Directive?: General

- 4.10A.4 **G** Article 4(4B) of the *Regulated Activities Order* only applies if the *regulated mortgage contract* is covered by the *MCD*. A *regulated mortgage contract* is covered if:

- (1) the lender is acting in the course of his trade, business or profession; and
- (2) the borrower is an individual; and
- (3) the borrower is acting for purposes which are outside their trade, business or profession; and
- (4) the *regulated mortgage contract* does not come within one of the exclusions summarised in ■ PERG 4.10A.5 G.

- 4.10A.5 **G**
- (1) This paragraph lists the *regulated mortgage contracts* outside the *MCD*.
 - (2) *MCD exempt lifetime mortgages* are excluded from the *Mortgage Credit Directive*. These are *regulated mortgage contracts* or *article 3(1)(b) credit agreements* where the creditor:
 - (a) contributes a lump sum, periodic payments or other forms of credit disbursement;
 - (b) contributes the sums in (a) in return for a sum deriving from the future sale of a residential property or a right relating to residential property; and
 - (c) will not seek repayment of the capital until the occurrence of one or more *specified life events* of the consumer.

However, notwithstanding (c), the creditor may seek early repayment if the consumer breaches his contractual obligations and the breach allows the creditor to terminate the credit agreement.

Only *lifetime mortgages* that do not meet these conditions fall within the *Mortgage Credit Directive*. Normally, these will be mortgages where partial repayment of the capital is, or may become, due. These are known as *MCD lifetime mortgages*.

- (3) Agreements where:
 - (a) the credit is granted by an employer to his employees;
 - (b) the employer does so as a secondary activity; and
 - (c) such a credit agreement is offered:
 - (i) free of interest; or

(ii) at an *APRC* lower than those prevailing on the market and not offered to the public generally;

are excluded from the *MCD*.

(4) Agreements where the credit is granted free of interest and without any other charges except those that recover costs directly related to the securing of the credit are excluded from the *MCD*.

(5) An *MCD exempt overdraft loan* is excluded from the *MCD*.

(6) Agreements which are the outcome of a settlement reached in court or before another statutory authority are excluded from the *MCD*.

(7) An *MCD exempt bridging loan* is excluded from the *MCD*.

(8) An *MCD exempt credit union loan* is excluded from the *MCD*.

What mortgages are covered by the Mortgage Credit Directive?: Borrower as consumer
What effect does article 4(4B) have on lenders?

4.10A.6 **G** To work out the effect of article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) on the *regulated activity* of entering into a regulated mortgage contract as lender, it is necessary to look at what a mortgage creditor means.

4.10A.7 **G** In relation to a *regulated mortgage contract*, mortgage creditor means a *person* who grants or promises to grant credit falling within the scope of the definition of a *regulated mortgage contract* in the course of its trade, business or profession.

4.10A.8 **G** Therefore, article 4(4B) means that the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to entering into a regulated mortgage contract as lender unless:

(1) the *regulated mortgage contract* falls outside the *MCD* (see ■ PERG 4.10A.5 G); or

(2) the lender is not acting in the course of his trade, business or profession.

The effect of article 4(4B) on arrangers: The basics

4.10A.9 **G** Article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) does not affect the *regulated activity* of *making arrangements with a view to regulated mortgage contracts*. This is because, in the *FCA's* view, the activities covered by this *regulated activity* are not covered by the *MCD*.

4.10A.10 **G** Article 4(4B) of the *Regulated Activities Order* disapplies the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) for the *regulated activity* of *arranging (bringing about) regulated mortgage contracts*, but only in relation to the credit intermediary activities described in ■ PERG 4.10A.12 G.

4.10A.11 **G** To work out the effect of article 4(4B) of the *Regulated Activities Order* on the *regulated activity of arranging (bringing about) regulated mortgage contracts*, it is necessary to look at what a credit intermediary (as referred to in ■ PERG 4.10A.2G (1)(b)) means.

The effect of article 4(4B) on arrangers: What does credit intermediary mean?: General

4.10A.12 **G** A credit intermediary means a *person* who:

- (1) is not acting as a creditor or notary; and
- (2) is not merely introducing, either directly or indirectly, a consumer to a creditor or credit intermediary; and
- (3) carries out the following activities:
 - (a) presenting or offering *regulated mortgage contracts* to consumers;
 - (b) assisting consumers by undertaking preparatory work or other pre-contractual administration in respect of *regulated mortgage contracts*, other than as referred to in (a); or
 - (c) concluding *regulated mortgage contracts* with consumers on behalf of the creditor.
- (4) carries out those activities in the course of his trade, business or profession, for remuneration;

4.10A.13 **G** The remuneration in ■ PERG 4.10A.19 G may take a pecuniary form or any other agreed form of financial consideration.

4.10A.14 **G**

- (1) A *person* who merely introduces or refers a consumer to a creditor or credit intermediary does not act as a credit intermediary.
- (2) An example of a *person* who merely introduces is someone who just indicates to a potential borrower:
 - (a) the existence of a creditor or credit intermediary; or
 - (b) a type of product provided by a particular creditor or credit intermediary;without further advertising or engaging in the presentation, offering, preparatory work or conclusion of the *regulated mortgage contract*.

The effect of article 4(4B) on arrangers: Conclusion about the effect on arranging (bringing about) regulated mortgage contracts

4.10A.15 **G** In the *FCA's* view, credit intermediation under the *MCD* covers the same activities as the *regulated activity of arranging (bringing about) regulated mortgage contracts*, except that:

- (1) credit intermediation only applies if the intermediary acts for remuneration; and

- (2) the *MCD* does not cover the *regulated mortgage contracts* listed in ■ PERG 4.10A.5 G; and
- (3) the *MCD* only applies to services provided to consumers;
- (4) if the intermediary only acts for the creditor, the *MCD* intermediation activity is narrower, as described in ■ PERG 4.10A.17 G.

4.10A.16 G Except as described in ■ PERG 4.10A.15 G, the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to the *regulated activity of arranging (bringing about) regulated mortgage contracts*.

The effect of article 4(4B) on arrangers: Remuneration under the MCD

4.10A.17 G ■ PERG 5.4 (The business test for insurance distribution) has *guidance* on the meaning of remuneration in the *IDD*. That *guidance* is also applicable to the meaning of remuneration for the purpose of ■ PERG 4.10A.12 G.

4.10A.18 G Article 4(4B) is not relevant to an intermediary that carries on its activities by way of business (see ■ PERG 4.3.3 G to ■ PERG 4.3.9 G) but does not act for remuneration. The *FCA* does not expect this distinction to apply in practice.

The effect of article 4(4B) on arrangers: Acting for the creditor

- 4.10A.19** G
- (1) The *MCD* applies to credit intermediation activities performed for the creditor, as well as for the borrower.
 - (2) However, the activities carried out for the creditor are defined differently from the ones carried out for the borrower. They seem to be narrower. The activities are limited to concluding *regulated mortgage contracts* with consumers on behalf of the creditor.
 - (3) Just assisting the creditor by undertaking preparatory work or other pre-contractual administration is not enough on its own.
 - (4) The activity covers actually entering into the *regulated mortgage contract* on behalf of the creditor.
 - (5) The activity also covers activities that result in the lender entering into the *regulated mortgage contracts* if the role of the creditor and any *person* acting for the creditor is minimal.
 - (6) When deciding whether the intermediary is acting for the creditor alone, the *FCA* will not just look at the contractual position. In particular, the *FCA* will also look at whether a separate intermediary is acting for the borrower.
 - (7) The *guidance* in ■ PERG 4.5.4A G (*Guidance on making arrangements to enter into a regulated mortgage contract with a borrower on behalf of a lender*) applies here too.

The effect of article 4(4B) on advisers

4.10A.20 **G** To work out the effect of article 4(4B) of the *Regulated Activities Order* (see ■ PERG 4.10A.2 G) on the *regulated activity of advising on regulated mortgage contracts*, it is necessary to look at what advisory services as referred to in ■ PERG 4.10A.2G (1)(c) means.

4.10A.21 **G** Advisory services mean the provision of personal recommendations to a consumer in respect of one or more transactions relating to *regulated mortgage contracts* covered by the *MCD*.

4.10A.22 **G** Where *advising on regulated mortgage contracts* falls within the *MCD*, the *Regulated Activities Order* exclusions in ■ PERG 4.10A.2G (3) do not apply to this activity. Advisers should note that:

- (1) if the adviser does not act for remuneration, the *MCD* does not apply;
- (2) the *MCD* does not cover the *regulated mortgage contracts* listed in ■ PERG 4.10A.5 G;
- (3) the *MCD* only applies to advisory services provided to consumers;
- (4) the *MCD* only applies to personal recommendations.

4.10A.23 **G** Giving personal recommendations is narrower than giving advice. The *guidance* on this point in relation to *MiFID* in Q18 to Q21 in ■ PERG 13.3 (Investment Services and Activities) is relevant here.

4.10A.24 **G** A *firm* that does not give personal recommendations is not affected by article 4(4B).

4.10A.25 **G** A *firm* can provide advisory services even though it does not act as a credit intermediary.

The effect of article 4(4B) on professional firms

4.10A.26 **G** Article 4(4B) does not apply to advising or arranging activities if:

- (1) they are carried out on an incidental basis in the course of professional activity;
- (2) that professional activity is regulated; and
- (3) the rules governing that professional activity do not prohibit the carrying out, on an incidental basis, of credit intermediation activities.

4.10A.27 **G** Work carried out by a *professional firm* which may reasonably be regarded as a necessary part of legal conveyancing services provided by that *professional firm* can still take advantage of the exclusion in article 67 (Activities carried on in the course of a profession or non-investment business).

4.10A.28 **G** Article 4(4B) does not cut back the *Part XX exemption*.



4.10B Regulation of buy to let lending

Introduction

4.10B.1 **G** Article 721 of the *Regulated Activities Order* (Registered consumer buy-to-let mortgage firms) excludes certain consumer buy-to-let credit business from the *Regulated Activities Order*. Instead that business is regulated under Part 3 of the *MCD Order*. This section provides more detail about the regulation of consumer-buy-to-let business.

Details about the Regulated Activities Order exclusion

4.10B.2 **G** Article 721 of the *Regulated Activities Order* excludes *CBTL business* from the *regulated activities* listed in ■ PERG 2.9.28G.

4.10B.3 **G** The exclusion only applies to a *person* included on the *FCA* register described in ■ PERG 4.10B.16.

4.10B.4 **G** There are three main conditions for regulated mortgage activities to be *CBTL business*:

- (1) the activities must relate to *buy-to-let credit agreements* (see ■ PERG 4.10B.5G);
- (2) the borrower must be acting as a consumer (see ■ PERG 4.10B.10G(2)); and
- (3) the activities must come within the definition of *CBTL business* (see ■ PERG 4.10B.8G).

What does buy-to-let credit agreement mean?

4.10B.5 **G** (1) A *buy-to-let credit agreement* means either:

- (a) a contract that at the time it is entered into has the following characteristics:
 - (i) a lender provides credit to an individual or trustees (the 'borrower');
 - (ii) the contract provides for the obligation of the borrower to repay to be secured by a mortgage on land in the *EEA*;
 - (iii) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling (or, where trustees are

the borrower, by an individual who is a beneficiary of the trust or by a *related person*); and

(iv) provides that the land secured by the mortgage is subject to the requirements in (2); or

(b) is an *MCD article 3(1)(b) credit agreement* which provides that the land, or existing or projected building, to which it relates is subject to the requirements in (2).

(2) The requirements are that the land, or existing or projected building (as applicable):

(a) cannot at any time be occupied as a dwelling by the borrower or by a *related person*; and

(b) is to be occupied as a dwelling on the basis of a rental agreement.

4.10B.6 G *Related person* is described in ■ PERG 4.4.19.

4.10B.7 G ■ PERG 4.4.6AG explains why the requirement in ■ PERG 4.10B.5G that the borrower does not use the land as a dwelling does not take the contract out of the definition of *regulated mortgage contract* altogether without having to rely on the consumer buy-to-let exclusion described in this section.

Business covered by Part 3 of the Mortgage Credit Directive Order 2015: Introduction

4.10B.8 G *CBTL business* means the activities in the table in ■ PERG 4.10B.9G.

4.10B.9 G Table: Definition of consumer buy-to-let business

Activity	Explanation
Entering into, or promising to enter into, a <i>CBTL credit agreement</i> in the course of a trade, business or profession (acting as a <i>CBTL lender</i>)	See PERG 4.10B.11G(1)
Administering a <i>CBTL credit agreement</i> in the course of a trade, business or profession (acting as a <i>CBTL lender</i>)	See PERG 4.10B.11G(2)
Acting as a <i>CBTL arranger</i> in relation to a <i>CBTL credit agreement</i>	See PERG 4.10B.12G
Acting as a <i>CBTL adviser</i> in relation to a <i>CBTL credit agreement</i>	See PERG 4.10B.13
A <i>CBTL credit agreement</i> is explained in PERG 4.10B.10G	

Meaning of CBTL credit agreement

4.10B.10 G A *CBTL credit agreement* means a contract that meets the following conditions:

(1) it meets the definition of a *buy-to-let credit agreement* in ■ PERG 4.10B.5G; and

- 4.10B.11 **G**
- (2) it is not entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower.
 - (1) ■ PERG 4.4.32G explains when a borrower is regarded as entering into a *buy-to-let credit agreement* for the purpose of a business carried on, or intended to be carried on, by the borrower.
 - (2) A person administers a *CBTL credit agreement* if the person carries on *administering a regulated mortgage contract* in respect of the *CBTL credit agreement*, or would carry on that regulated activity in respect of the *CBTL credit agreement* if it was not a person included on the FCA register described in ■ PERG 4.10B.16.

Business covered by Part 3 of the Mortgage Credit Directive Order 2015: Credit intermediaries

- 4.10B.12 **G** A person is acting as a *CBTL arranger* if the person:
- (1) is not a lender as described in the first row of the table in ■ PERG 4.10B.9G;
 - (2) is not merely introducing, either directly or indirectly, a borrower to a lender or credit intermediary;
 - (3) is acting in the course of the *person's* trade, business or profession, for remuneration, which may take a pecuniary form or any other agreed form of financial consideration; and
 - (4) meets one or more of the following conditions:
 - (a) the *person* presents or offers *CBTL credit agreements* to consumers; or
 - (b) the person assists consumers by undertaking preparatory work or other pre-contractual administration in respect of *CBTL credit agreements* other than as referred to in (a); or
 - (c) the *person* concludes *CBTL credit agreements* with consumers on behalf of the lender.

Business covered by Part 3 of the Mortgage Credit Directive Order 2015: Advisers

- 4.10B.13 **G** Under article 6(1) of the *MCD Order* a person is acting as a *CBTL adviser* if in the course of that *person's* trade, business or profession, the *person* provides personal recommendations to a consumer in respect of one or more transactions relating to *CBTL credit agreements*.
- 4.10B.14 **G** Under article 6(2) of the *MCD order* a person who provides personal recommendations to a consumer in respect of one or more transactions relating to *CBTL credit agreements* is not acting as a *CBTL adviser* if the recommendations are provided:
- (1) in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of

ethics governing the profession which do not exclude the making of those recommendations; or

- (2) in the context of managing existing debt as an insolvency practitioner where that activity is regulated by legal or regulatory provisions or as part of public or voluntary debt advisory services which do not operate on a commercial basis.in the context of managing existing debt as an insolvency practitioner where that activity is regulated by legal or regulatory provisions or as part of public or voluntary debt advisory services which do not operate on a commercial basis.

Link to the Mortgage Credit Directive

- 4.10B.15 **G**
- (1) The definitions of *CBTL arranger* and *CBTL adviser* are largely the same as those under the *Mortgage Credit Directive*.
 - (2) There is *guidance* on these terms in ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive).
 - (3) The main difference between the definitions in this section and those in ■ PERG 4.10A is that this section only relates to CBTL credit agreements.

Registration of consumer buy-to-let mortgage firms

- 4.10B.16 **G** Part 3 of the *MCD Order* has a procedure for the *FCA* to include a person carrying on one of the activities described in ■ PERG 4.10.9G in a register.

- 4.10B.17 **G** There are two types of person subject to the regime:

- (1) *firms with Part 4A permissions* (including firms with an interim permission to carry on one or more regulated activities under article 56 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013)); and
- (2) *unauthorised persons* described in article 8(3) of the *MCD order*.

- 4.10B.18 **G**
- (1) There are detailed conditions for admission to the register that apply to an unauthorised *person* described in article 8(3) of the *MCD Order*.
 - (2) These detailed conditions do not apply to a *firm* in ■ PERG 4.10B.17(1). The conditions for a firm in ■ PERG 4.10B.17(1) to be included on the register are simpler.

- 4.10B.19 **G** Part 3 of the *MCD Order* has a detailed regulatory regime for firms subject to that regime.

Exempt consumer buy-to-let contracts

- 4.10B.20** **G** There is another exclusion for buy-to-let contracts in addition to the one in article 72I of the *Regulated Activities Order* (see ■ PERG 4.10B.1G for article 72I).
- 4.10B.21** **G** A contract is excluded from the definition of *regulated mortgage contract* if, at the time it is entered into, it meets the following conditions:
- (1) it is a consumer buy-to-let mortgage contract within the meaning of the *MCD Order* (see ■ PERG 4.10B.10G for an explanation of what this means); and
 - (2) it is either:
 - (a) of a kind to which the *Mortgage Credit Directive* does not apply by virtue of the exclusions summarised in ■ PERG 4.10A.5G(1) to (8); or
 - (b) a bridging loan (see ■ PERG 4.13.6G).
- 4.10B.22** **G** The *RAO* refers to the contract described in ■ PERG 4.10B.21G as an “exempt consumer buy-to- let mortgage contract”.
- 4.10B.23** **G**
- (1) The exclusion for exempt consumer buy-to-let mortgage contracts has the effect that a *person* whose business covers exempt consumer buy-to-let lending does not have to consider its position in respect of Part 3 of the *MCD Order* or consider the exclusion in ■ PERG 4.10B.2G.
 - (2) However, exempt consumer buy-to-let lending is not excluded from the regime in Part 3 of the *MCD Order* altogether. This is because the *Part 4A permission* of a *firm* that has *permission* to carry out any of the following activities:
 - (a) *arranging (bringing about) regulated mortgage contracts;*
 - (b) *making arrangements with a view to regulated mortgage contracts;*
 - (c) *credit broking;*
 - (d) *advising on regulated mortgage contracts;*
 - (e) *entering into a regulated mortgage contract;*
 - (f) *administering a regulated mortgage contract;*
 is subject to a *requirement* that the *firm* does not carry on any activity that would constitute *CBTL business* as defined in ■ PERG 4.10B.9G unless the *firm* is registered as described in ■ PERG 4.10B.16.
 - (3) That *requirement* covers the exempt consumer buy-to-let lending referred to in (1).
- 4.10B.24** **G** Another purpose of the exclusion in ■ PERG 4.10B.2G is that it provides an exclusion in relation to *credit broking*.

Does all buy-to-let business fall under this regime?

- 4.10B.25** **G** Part 3 of the *MCD Order* does not apply to all mortgage contracts secured on buy-to-let property.
- 4.10B.26** **G** The regime is only relevant to credit secured on residential property. If a loan to a buy-to-let borrower is secured on commercial property, the loan is not a residential mortgage contract and this chapter does not apply.
- 4.10B.27** **G** The Part 3 regime is only relevant to consumer borrowers. Non-consumer borrowers fall outside Part 3. Many will be excluded from *regulated mortgage activities* altogether by the exclusions for loans to business borrowers in ■ PERG 4.4.17G to ■ PERG 4.4.21G.



4.11 Link between activities and the United Kingdom

Introduction

4.11.1 **G** Section 19 of the Act (The general prohibition) provides that the requirement to be *authorised* under the Act only applies in relation to *regulated activities* which are carried on 'in the *United Kingdom*'. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a borrower is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on. This section describes the legislation that is relevant to this question and gives the FCA's views on various scenarios.

4.11.2 **G** Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the Act that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the Act) (see ■ PERG 8 (Financial promotion and related activities)), and on giving the impression that a *person* is authorised (section 24 (False claims to be authorised or exempt)).

Legislative provisions: definition of "regulated mortgage contract"

4.11.3 **G** A contract is only a *regulated mortgage contract* if the land is in the EEA (see ■ PERG 4.4.5 G (Land in the EEA)).

Legislative provisions: section 418 of the Act

4.11.4 **G** Section 418 of the Act deals with the carrying on of *regulated activities* in the *United Kingdom*. It extends the meaning that 'carry on a *regulated activity* in the *United Kingdom*' would ordinarily have by setting out additional cases. The Act states that in these cases a *person* who is carrying on a *regulated activity* but would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the Act, to be regarded as carrying on the activity in the *United Kingdom*.

4.11.5 **G** For the purposes of *regulated mortgage activities*, sections 418(2), (4), (5), (5A) and (6) are relevant, as follows:

- (1) Section 418(2) refers to a case where a UK-based *person* carries on a *regulated activity* in another EEA State in the exercise of rights under

a *Single Market Directive*. The only *Single Market Directives* which are relevant to mortgages are the *CRD* and the *MCD*.

- (2) Section 418(4) refers to the case where a UK-based *person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.
- (3) Section 418(5) refers to the case where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an *establishment* maintained by him in the *United Kingdom*.
- (4) Section 418(5A) refers to the case where an *electronic commerce activity* is carried on with or for a *person* in an *EEA State* from an establishment in the *United Kingdom*. See further ■ PERG 4.11.21 G (E-Commerce Directive).
- (5) Section 418(6) makes it clear that for the purposes of sections 418(2) to (5A), it is irrelevant where the *person* with whom the activity is carried on is situated.

Legislative provisions: overseas persons exclusion

4.11.6

G

The exclusions in article 72(5A) to (5F) of the *Regulated Activities Order* (Overseas persons) provide that an *overseas person* does not carry on the *regulated activities* of:

- (1) *arranging (bringing about) or making arrangements with view to a regulated mortgage contract;*
- (2) *entering into a regulated mortgage contract; or*
- (3) *administering a regulated mortgage contract;*

of the borrower (and each of them, if more than one) is an individual and is normally resident outside the *United Kingdom*. In the case of arranging a variation of, or administration of, an existing *regulated mortgage contract*, each borrower must be an individual who was normally resident outside the *United Kingdom* when he entered into the contract. In the *FCA's* view, normal residence for the purposes of this exclusion envisages physical presence with a degree of continuity, making allowance for occasional temporary absences (e.g. holiday). An *overseas person* under article 3 of the *Regulated Activities Order* (Interpretation) is a *person* who carries on certain *regulated activities* albeit not from a permanent place of business maintained by him in the *United Kingdom*.

4.11.6A

G

The exclusion for *overseas persons* described in ■ PERG 4.11.6 G does not apply where the *overseas person* is a mortgage intermediary whose *home Member State* is the *United Kingdom*. A mortgage intermediary is defined in ■ PERG 4.10A.3 G.

4.11.7

G

An *overseas person* might advise a *person* in the *United Kingdom* on an *endowment assurance* at the same time as advising on a *regulated mortgage contract*. If so, whilst the *overseas person* exclusion in article 72(5) will apply in relation to the advice on the *endowment assurance*, there will be no

'overseas persons exclusion' for the advice on the *regulated mortgage contract*.

Territorial scenarios: general

4.11.8

G

The *FCA's* view of the effect of the *Act* and *Regulated Activities Order* in various territorial scenarios is set out in the remainder of this section. In those scenarios:

- (1) the term "service provider" is used to describe a *person* carrying on any of the *regulated mortgage activities*;
- (2) the term "borrower" refers to a borrower who is an individual and not a trustee; the position of a borrower acting as a trustee is not considered; and
- (3) it is assumed that the activity is not an *electronic commerce activity* (as to which, see ■ PERG 4.11.21 G (E-Commerce Directive)).

■ PERG 4.11.9 G contains a simplified tabular summary of those views, which should be used only in conjunction with the more detailed analysis.

4.11.9

G

Simplified summary of the territorial scope of the regulated mortgage activities, to be read in conjunction with the rest of this section.

This table belongs to ■ PERG 4.11.8 G

Regulated activities other than advice				
Location of establishment of service provider:	Location of land:	Individual borrower resident and located:		
		in the UK	in another EEA State	outside the EEA
UK or non-UK person: Establishment in the UK	land in the UK	Yes	Yes	Yes
	land in another EEA State	Yes	Yes	Yes
UK person: Establishment in another EEA State or in a country outside the EEA	land in the UK	Yes	Yes	Yes
	land in another EEA State (Note 1)	No	No	No
Non-UK person: Establishment in another EEA State or in a country outside the EEA	land in the UK	Yes	No	No
	land in another EEA State	No	No	No

Yes = *authorisation* or exemption required

No = *authorisation* or exemption not required

Note 1: If the service provider is a *UK firm* operating from an office in another *EEA State* in the exercise of rights under a *Single Market Directive*, the activities will be treated as taking place in the *United Kingdom* and the *firm* will need to make sure that its *permission* covers the *regulated mortgage activities* it is carrying out. See PERG 4.11.5G (1).

The regulated activity of advice

Location of establishment of service provider:	Location of land:	Individual borrower resident and located:		
		in the UK	in another EEA State	outside the EEA
UK or non-UK person: Establishment in the UK	land in the UK	Yes	Yes	Yes
	land in another EEA State	Yes	Yes	Yes
UK person: Establishment in another EEA State or in a country outside the EEA	land in the UK	Yes	No	No
	land in another EEA State (Note 1)	Yes	No	No
Non-UK person: Establishment in another EEA State or in a country outside the EEA	land in the UK	Yes	No	No
	land in another EEA State	Yes	No	No

Yes = *authorisation* or exemption required

No = *authorisation* or exemption not required

Note 1: If the service provider is a *UK firm* operating from an office in another *EEA State* in the exercise of rights under a *Single Market Directive*, the activities will be treated as taking place in the *United Kingdom* and the *firm* will need to make sure that its *permission* covers the *regulated mortgage activities* it is carrying out. See PERG 4.11.5G (1).

Service provider in the United Kingdom

4.11.10 **G** Where a *person* is carrying on any of the *regulated mortgage activities* from an establishment maintained by him in the *United Kingdom*, that *person* will be 'carrying on a *regulated activity* in the *United Kingdom*'. The location and residence of the borrower is irrelevant. That is the practical effect of sections 418(4), (5) and (6) of the *Act*.

4.11.11 **G** There may also be situations where a lender, who does not maintain an *establishment* in the *United Kingdom*, provides services in the *United Kingdom*. For instance, a lender might attend a property exhibition in the

United Kingdom at which he sets up a loan with a borrower. A lender might also attend the offices of its *UK*-based lawyers, or appoint them as its agent, to enter into a contract with a borrower. In these cases, the overseas lender would only be carrying on a *regulated activity* in the *United Kingdom* if he subsequently enters into a *regulated mortgage contract* with a *UK* resident. This is because *arrangements* made with borrowers at the exhibition would be subject to the exclusion in article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) (see ■ PERG 4.5.7 G). As regards *entering into a regulated mortgage contract* with a borrower resident overseas, this would be subject to the *overseas persons* exclusion.

Service provider overseas: general

4.11.12 G If a service provider is overseas, the question of whether that *person* is carrying on a *regulated activity* in the *United Kingdom* will depend upon:

- (1) the type of *regulated activity* being carried on;
- (2) section 418 of the *Act*;
- (3) the residence and location of the borrower;
- (4) the application of the *overseas persons* exclusion in article 72(5A) to (5F) of the *Regulated Activities Order*; and
- (5) whether the service provider is carrying on an *electronic commerce activity*.

The factors in (1), (3) and (4) are considered in relation to each *regulated activity* in ■ PERG 4.11.13 G to ■ PERG 4.11.20 G. The factor in (5) is considered in ■ PERG 4.11.21 G.

4.11.12A G If the service provider is a *UK firm* exercising its rights under a *Single Market Directive* by providing services from another *EEA State*, section 418 of the *Act* means that the services are treated as being carried on in the *United Kingdom*. This factor is not covered further in the remainder of this section.

Service provider overseas: arranging regulated mortgage contracts

4.11.13 G When a *person* is *arranging (bringing about) regulated mortgage contracts* or *making arrangements with a view to regulated mortgage contracts* from overseas, the question of whether he will be carrying on *regulated activities* in the *United Kingdom* will depend on the relevant circumstances. In the *FCA's* view, factors to consider include:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the *EEA*;
- (2) the *overseas persons* exclusion in article 72(5A) to (5C) of the *Regulated Activities Order*; and
- (3) where the arrangements are in fact made.

4.11.14

G

In the *FCA's* view:

- (1) if the borrower is *normally resident* in the *United Kingdom* and the land is in the *United Kingdom*, the clear territorial limitation in the definition of *regulated mortgage contract* carries most weight in determining where regulation should apply; it is likely that the arranger will be carrying on *regulated activities* in the *United Kingdom*;
- (2) if the borrower is *normally resident* overseas, the arrangements are excluded by the *overseas persons* exclusion if the lender is an *overseas person*.

In the case of *arranging (bringing about) regulated mortgage contracts*, the normal residence of the borrower at the time the arrangements are made is the determining factor, except in the case of *arranging (bringing about) a variation of a contract*, in which case it is the normal residence of the borrower at the time that the *regulated mortgage contract* was entered into. In the case of *making arrangements with a view to regulated mortgage contracts*, the *normal residence* of the borrower at the time he participates in the arrangements is the determining factor.

Service provider overseas: advising on regulated mortgage contracts

4.11.15

G

In the *FCA's* view, *advising on regulated mortgage contracts* is carried on where the borrower receives the advice. Accordingly:

- (1) if the borrower is located in the *United Kingdom*, a *person* advising that borrower on *regulated mortgage contracts* is carrying on a *regulated activity* in the *United Kingdom*; but
- (2) if the service provider and borrower are both located overseas, the *regulated activity* is not carried on in the *United Kingdom*.

Service provider overseas: entering into a regulated mortgage contract

4.11.16

G

The effect of article 72(5D) of the *Regulated Activities Order* is that an *overseas person* does not carry on the *regulated activity* of *entering into a regulated mortgage contract* if the borrower is resident overseas at the time the contract is entered into.

4.11.17

G

In the *FCA's* view, in circumstances other than those excluded by article 72(5D) of the *Regulated Activities Order*, the need for an overseas lender to be *authorised* or to have an exemption will depend on the location of the land. This is because of:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation applies only if the land is in the *EEA*;
- (2) the general principle and practice that contracts relating to land are usually governed by the law of the place where the land is situated; and

(3) practical issues of conveyancing; a lender is likely to use the services of a lawyer or licensed conveyancer operating from the *United Kingdom* or the other *EEA State* in question, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom* or the other *EEA State* in question; and

(4) the existence of the *overseas persons* exclusion in article 72(5D).

Service provider overseas: administering a regulated mortgage contract

4.11.18 **G** The effect of article 72(5E) and (5F) of the *Regulated Activities Order* is that an *overseas person* who administers a *regulated mortgage contract*, where the borrower was resident overseas at the time that the contract was entered into, does not carry on the *regulated activity* of *administering a regulated mortgage contract*.

4.11.19 **G** In the *FCA's* view, in circumstances other than those excluded by article 72(5E) of the *Regulated Activities Order*, the need for an overseas administrator to be *authorised* or to have an exemption will depend on the location of the land. This is because:

(1) the territorial limitation in the definition of *regulated mortgage contract* means that regulation applies only if the land is in the *EEA*;

(2) when administrators notify borrowers resident in the *United Kingdom* or the other *EEA State* in question of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom* or the other *EEA State* in question;

(3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his address in the *United Kingdom* or the other *EEA State* in question;

(4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom* or the other *EEA State* in question, either to enforce *regulated mortgage contracts* subject to the jurisdiction of these courts or to register and enforce judgements obtained elsewhere, in the case of contracts subject to non-UK jurisdictions; and

(5) of the existence of the exclusion in article 72(5E) (*Overseas persons*).

Service provider: agreeing to carry on a regulated activity

4.11.20 **G** In most cases, there will be no preliminary agreement to enter into a *regulated mortgage contract* in advance of entering into the contract itself. Moreover, the exclusions relevant to a *regulated activity* are taken into account to determine whether a *person* is *agreeing to carry on* that *regulated activity*. So, for example, agreeing to arrange *regulated mortgage contracts* in cases where borrower and service provider are overseas, would not be *regulated activities* because the activities themselves are outside the scope of regulation. Otherwise, in the *FCA's* view, the issue of where agreeing to carry on a *regulated activity* takes place will depend on such factors as a contractual analysis of where the agreement is entered into,

including where appropriate the general position at common law (see, for example, ■ PERG 4.11.17 G).

E-Commerce Directive

4.11.21 **G** The *E-Commerce Directive* removes restrictions on the cross-border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose their requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* contains only a few exceptions, termed derogations, from this principle. The *E-Commerce Directive* defines an e-commerce service (termed an information society service) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television.

Distance marketing directive

4.11.22 **G** The *FCA* will be responsible for implementing the *Distance Marketing Directive* for those firms and activities it regulates. The *FCA* and the Treasury agree that the *Distance Marketing Directive* is intended to operate on a *country of origin* basis, except where a firm is *marketing* into the *UK* from an establishment in an *EEA State* which has not implemented the Directive.



4.12 Appointed representatives

What is an appointed representative?

4.12.1 **G** Section 39 of the Act makes provision exempting *appointed representatives* from the need to obtain *authorisation*. An *appointed representative* is a *person* who is a party to a contract with an *authorised person* which permits or requires the *appointed representative* to carry on certain regulated activities. ■ SUP 12 (Appointed representatives) contains *guidance* relating to *appointed representatives*.

4.12.2 **G** Unless a person has only a *limited permission* for certain *credit-related regulated activities*, a *person* who is an *authorised person* cannot be an *appointed representative* (see section 39(1) of the Act (Exemption of appointed representatives)).

Business for which an appointed representative is exempt

4.12.3 **G** An *appointed representative* can carry on only those *regulated activities* which are specified in the *Appointed Representatives Regulations*. As respects *regulated mortgage contracts*, these are *arranging (bringing about)*, *making arrangements with a view to* and *advising on regulated mortgage contracts* (as well as agreeing to do so).

Persons who are not already appointed representatives

4.12.4 **G** A *person* who is not already an *appointed representative* for *designated investment business* activities, and who may wish to become one in relation to the *regulated activities* of *arranging (bringing about)*, *making arrangements with a view to* or *advising on regulated mortgage contracts*, can do so. He must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities*, and who accepts responsibility for the *appointed representative's* actions when acting for him. ■ SUP 12.4 (What must a firm do when it appoints an appointed representative?) and ■ SUP 12.5 (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made.

Persons who are already appointed representatives

4.12.5 **G** Where a *person* is already an *appointed representative* (in relation to any non-mortgage activities) and he proposes to carry on any *regulated mortgage activities*, he will need to consider the following matters.

- (1) He must become *authorised* if his proposed mortgage activities include either *entering into a regulated mortgage contract* or

administering a regulated mortgage contract. These activities may not be carried on by *appointed representatives* and the *Act* does not permit any *person* to be exempt for some activities and *authorised* for others. Once *authorised*, the *person* may only carry on the *regulated activities* that are covered by his *permission*. He will therefore need to apply for a *permission* to cover all the *regulated activities* that he proposes to carry on.

- (2) If he proposes to carry on the *regulated activities of arranging (bringing about), making arrangements with a view to or advising on regulated mortgage contracts*, he may be able to do so as an *appointed representative*. But this will depend on a number of issues.
 - (a) He will need to be appointed by an *authorised person* who is prepared to accept responsibility for the *appointed representative's regulated mortgage activities* when acting for him. The *authorised person* must have *permission* to carry on these *regulated mortgage activities*.
 - (b) If these *regulated mortgage activities* are to be carried on for the same *authorised person* who has already appointed him for his non-mortgage regulated activities, the contract between them will need to be amended to reflect the additional activities. Other amendments to the contract may be required.
 - (c) It may be that these *regulated mortgage activities* are to be carried on for a different *person*.
 - (d) If the *regulated mortgage activities* relating to *arranging* are to be limited to making introductions, he may be able to operate within the exclusion for introducers described at ■ PERG 4.5.10 G. This is different from the exclusions for introductions relating to *securities* and *contractually based investments*, which are described at ■ PERG 8.33.

The mortgage register

4.12.6

G

■ SUP 12.4.10A R to ■ SUP 12.4.10C G explain some special requirements that apply to an *appointed representative* for an *MCD mortgage lender* or *MCD mortgage credit intermediary*. For example, it may be necessary for the *appointed representative* to be included in the *Financial Services Register*.

4.13 Other exemptions

4.13.1 **G** Certain named *persons* are exempted by the *Exemption Order* from the need to obtain *authorisation*. The following bodies have exemptions (which are explained in more detail in this section) in relation to carrying on by them of the *regulated mortgage activities*:

- (1) [deleted]
- (2) registered social landlords in England and Wales within the meaning of Part I of the Housing Act 1996 (paragraph 48(2)(a) of the Schedule to the *Exemption Order*) but not their subsidiaries;
- (3) registered social landlords in Scotland within the meaning of the Housing (Scotland) Act 2001 (paragraph 48(2)(b) of the Schedule to the *Exemption Order*) but not their subsidiaries;
- (4A) The Homes and Communities Agency (paragraph 48(2)(ca) of the Schedule to the *Exemption Order*);
- (5) Scottish Homes (paragraph 48(2)(d) of the Schedule to the *Exemption Order*);
- (6) The Northern Ireland Housing Executive (paragraph 48(2)(e) of the Schedule to the *Exemption Order*);
- (7) Communities Scotland (paragraph 48(2)(f) of the Schedule to the *Exemption Order*);
- (8) a housing association within the meaning of Part 2 of the Housing (Northern Ireland) Order 1992 (paragraph 48(2)(g) of the Schedule to the *Exemption Order*); and
- (9) a wholly-owned subsidiary of a registered social landlord within the meaning of Part I of the Housing Act 1996 (paragraph 48(3) of the Schedule to the *Exemption Order*).

4.13.2 **G** The bodies in ■ PERG 4.13.1 G are exempt in relation to the *regulated activity* of arranging the variation of a *regulated mortgage contract* (article 25A(1)(b) of the *Regulated Activities Order*).

4.13.3 **G** The bodies in ■ PERG 4.13.1 G are exempt in relation to the following *regulated activities*:

- (1) *arranging (bringing about) regulated mortgage contracts* (except in relation to variations) (article 25A(1)(a) and (2A));
- (2) *advising on regulated mortgage contracts* (article 53A);
- (3) *entering into a regulated mortgage contract* (article 61(1)); and
- (4) *administering a regulated mortgage contract* (article 61(2)).

4.13.4 G The exemption in ■ PERG 4.13.3 G only applies in relation to *regulated mortgage contracts* entered into before 21 March 2016 and to a limited range of *regulated mortgage contracts* entered into on or after that date. These are set out in the table in ■ PERG 4.13.5 G.

4.13.5 G Exempted regulated mortgage contracts

Type of <i>regulated mortgage contract</i>	Explanation
Exempted under article 3(2) of the <i>Mortgage Credit Directive</i>	See PERG 4.10A.5G (1) to PERG 4.10A.5G (6)
Bridging loan	See PERG 4.13.6 G
Restricted public loan	See PERG 4.13.7 G

4.13.6 G A bridging loan is exempt if it meets the following conditions:

- (1) it is:
 - (a) either of no fixed duration; or
 - (b) is due to be repaid within 12 months; and
- (2) the borrower is:
 - (a) an individual; and
 - (b) acting for purposes which are outside their trade, business or profession; and
- (3) the loan is used by the borrower as a temporary financing solution while transitioning to another financial arrangement for the land.

4.13.7 G A loan is exempted as a restricted public loan if it meets the following conditions:

- (1) it is granted to a restricted public under a statutory provision with a general interest purpose; and
- (2) it meets the condition in (a) or (b):
 - (a) it is:
 - (i) free of interest; or
 - (ii) at lower borrowing rates than those prevailing on the market; or
 - (b) it meets the condition in (i) and (ii):

- (i) it is on other terms which are more favourable than those prevailing on the market; and
 - (ii) it is on other terms which are more favourable than those prevailing on the market; and
- (3) the borrower receives timely information on the main features, risks and costs of the loan at the pre-contractual stage; and
- (4) any advertising of the loan is fair, clear and not misleading.

4.14 Mortgage activities carried on by professional firms

Introduction

- 4.14.1** **G** *Professional firms* (broadly, firms of solicitors, accountants and actuaries) may carry on *regulated mortgage activities* in the course of their usual professional activities. The *regulated activities* of *advising on, arranging (bringing about), making arrangements with a view to and administering regulated mortgage contracts* are those most likely to be relevant.
- 4.14.2** **G** In the *FCA's* view, the following exclusions are likely, in many cases, to exclude the normal activities of *professional firms* from amounting to *regulated mortgage activities*:
- (1) article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business), which applies in relation to the advising and arranging activities (see ■ PERG 4.10.1 G);
 - (2) article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) which applies in relation to each of the *regulated mortgage activities* (see ■ PERG 4.10.5 G); and
 - (3) article 63 of the *Regulated Activities Order* (Administration pursuant to agreement with authorised person) which applies in relation to *administering a regulated mortgage contract* (see ■ PERG 4.8.7 G); in the *FCA's* view, this would exclude steps taken by a solicitor to recover payments due under a *regulated mortgage contract* if his instructions come from an *authorised person* with *permission* to administer a *regulated mortgage contract*.
- 4.14.2A** **G** ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive) explains that some of these exclusions do not apply to activities which fall under the *MCD*.
- 4.14.3** **G** In addition, a *professional firm* may, in certain circumstances, be able to use the *Part XX exemption* to avoid any need for *authorisation*. ■ PROF 2 (Status of exempt professional firm) contains general *guidance* on the *Part XX exemption*. In particular, ■ PROF 2.1.9 G explains that the Treasury have specified certain *regulated activities* to which the *Part XX exemption* cannot apply in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities Order 2001 ("the Non-Exempt Activities Order").

■ PERG 4.14.4 G to ■ PERG 4.14.6 G explain which of the *regulated activities* relating to *regulated mortgage contracts* have been so specified.

Part XX exemption: arranging regulated mortgage contracts

4.14.4

G

Arranging (bringing about) a regulated mortgage contract and making arrangements with a view to a regulated mortgage contract have not been specified in the *Non-Exempt Activities Order*. Accordingly, a *professional firm* may carry on these *regulated activities* without *authorisation*, provided the other conditions of the *Part XX exemption* are complied with.

Part XX exemption: advising on regulated mortgage contracts

4.14.5

G

Advising on regulated mortgage contracts has been specified in the *Non-Exempt Activities Order*. However, a *professional firm* is prevented from using the *Part XX exemption* to advise on *regulated mortgage contracts* only if the advice it gives consists of a recommendation. This will be the case if the recommendation is made to an individual to enter into a *regulated mortgage contract* with a lender who would, in entering into the contract, carry on the *regulated activity* of *entering into a regulated mortgage contract*, irrespective of whether the lender is an *authorised* or *exempt person* or would carry on the activity by way of business. However, a *professional firm* is allowed to give advice that involves a recommendation of this kind provided the advice endorses a corresponding recommendation given to the borrower by an *authorised person* who has *permission to advise on regulated mortgage contracts* or an *exempt person* whose exemption covers that activity.

Part XX exemption: entering into and administering a regulated mortgage contract

4.14.6

G

Entering into a regulated mortgage contract and administering a regulated mortgage contract have both been specified in the *Non-Exempt Activities Order*. As an exception, a *professional firm* is allowed under the *Part XX exemption* to carry on these *regulated activities* if the firm is acting as a trustee or personal representative. But this is provided that the borrower is a beneficiary under the trust, will or intestacy.

4.15 Mortgage activities carried on by 'packagers'

Introduction

- 4.15.1 G The term 'packagers' is used variously to describe a range of intermediaries and their different activities in the mortgage process. Depending on the nature of their activities, these intermediaries may carry on *regulated mortgage activities*. The *regulated activities* likely to be of most relevance are *arranging (bringing about) or making arrangements with a view to regulated mortgage contracts* (described in more detail at ■ PERG 4.5) and *advising on regulated mortgage contracts* (described in more detail at ■ PERG 4.6). It is important to note that it is the nature of the relevant activities and not an entity's own description of itself or its activities that will determine the need for *authorisation*. This section describes the activities of various types of 'packagers'.

Mortgage Clubs (sometimes called mortgage wholesalers)

- 4.15.2 G So-called 'mortgage clubs' or 'wholesalers' essentially act as a distribution function for lenders, providing information to intermediaries about current deals available from a range of lenders. They provide information (often through an electronic sourcing system) in a way that helps intermediaries search the market effectively and, as such, do not deal directly with individual borrowers. If only engaged in these activities and without direct contact with individual borrowers, in the FCA's view these entities are unlikely to carry on a *regulated mortgage activity* because they will not:
- (1) *arrange (bring about) regulated mortgage contracts*; their involvement is too indirect to bring about the contract;
 - (2) *make arrangements with a view to regulated mortgage contracts*; borrowers will not be participating in the arrangements which they make; or
 - (3) *advise on regulated mortgage contracts*, because they provide information not advice and the information is, in any event, directed to intermediaries rather than borrowers.

Mortgage packaging companies

- 4.15.3 G So-called 'mortgage packaging companies' may undertake certain parts of the mortgage process for lenders on an outsourced basis, ensuring that a complete set of documentation is collated and sent to the lender. This might include receiving application forms from intermediaries, undertaking credit reference checks and instructing a valuer. Other activities might include a

product placement service for other intermediaries who provide product advice or recommendations to their clients. In the *FCA's* view, mortgage packaging companies engaged in these activities are unlikely to be carrying on a *regulated activity* where they have no direct contact or contract with potential borrowers (for the reasons given in ■ PERG 4.15.2 G).

Broker packagers (sometimes called 'intermediary brokers')

4.15.4

G

The term 'broker packagers' is typically used to describe intermediaries who either market their services directly to borrowers or who offer other intermediaries a complete mortgage outsourcing service. They are often involved in the sales and advice process, including helping the borrower complete application forms. In the *FCA's* view, broker packagers carrying on these types of activity in direct contact with the borrower are likely to be carrying on the *regulated activities of arranging (bringing about) and making arrangements with a view to regulated mortgage contracts*. They may also be *advising on regulated mortgage contracts* depending on the circumstances.

4.16 Mortgage activities

Introduction

4.16.1 **G** It is common practice in the mortgage industry for the original lender which makes the loan to pass on ownership of the loan to a third party through *securitisation*. *Securitisation* transactions take different forms, but the essence is that the original lender sells the beneficial interest (with or without the legal interest) in a mortgage portfolio to a special purpose vehicle ('SPV'), which raises finance to pay for the portfolio by selling its own *securities*. The original lender may (or may not) retain the legal charge on each mortgage in the portfolio. There may also be other parties to the transaction, for example a security trustee to whom the SPV in turn charges the portfolio. Invariably, the SPV will also appoint either the original lender or a third party to administer the portfolio on its behalf. This section discusses whether, on a typical *securitisation* transaction, a SPV (and similarly a security trustee) carries on a *regulated mortgage activity*.

4.16.2 **G** The government's intention behind the regulatory regime for mortgages was "to ensure that, at any one time, it would be possible for each mortgage to be linked to one and only one authorised firm (with mortgage permission) to have the ongoing regulatory responsibility towards consumers" (HM Treasury, *Regulating Mortgages*, February 2002, paragraph 47). In other words, it should be possible to arrange a *securitisation* transaction so that the SPV and other third parties do not carry on *regulated activities*, so long as an *authorised person* (with appropriate *permission*) is involved.

Entering into a regulated mortgage contract

4.16.3 **G** A SPV does not carry on the *regulated activity* of *entering into a regulated mortgage contract* (or agreeing to do so), merely by acquiring the legal or beneficial interest in the contract from the original lender, or by providing funding to the original lender. If the contract is subsequently varied, a SPV should take care to avoid the original contract being replaced with a new *regulated mortgage contract* (see ■ PERG 4.4.4 G). The original lender is, of course, likely to require *authorisation*.

Administering, arranging and advising on a regulated mortgage contract

4.16.4 **G** If an unauthorised SPV arranges for an *authorised person* with *permission* to administer a *regulated mortgage contract* to administer its *regulated mortgage contracts*, it can avoid carrying on the *regulated activities* of:

- (1) *administering a regulated mortgage contract*, because of the exclusion in article 62 of the *Regulated Activities Order* (described in ■ PERG 4.8.4 G);
- (2) *arranging (bringing about) or making arrangements with a view to regulated mortgage contracts*, because any arrangements that may be made by the *authorised person* in *administering* the contract are excluded, for the SPV, by article 29A of the *Regulated Activities Order* (referred to at ■ PERG 4.5.9 G); in addition, making the original *securitisation* arrangements is unlikely to be a *regulated activity*, as it is unlikely to "bring about" the entering into of the contract and the borrower is unlikely to participate in the arrangements;
- (3) *advising on regulated mortgage contracts*, because any advice given by the *authorised person* in *administering* the contract is excluded, for the SPV, by article 54A of the *Regulated Activities Order* (referred to at ■ PERG 4.6.28 G); and
- (4) agreeing to carry on any of the activities in (1) to (3) because agreeing to carry on an activity is only a *regulated activity* if the activity to be carried on would itself be a *regulated activity*.

4.17 Interaction with the Consumer Credit Act and consumer credit regulated activities

Entering into and administering a regulated mortgage contract

- 4.17.1** G The cumulative effect of article 20(3) of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (the 2013 Order) and Chapter 14A of Part 2 of the *Regulated Activities Order* is to essentially carve out *regulated mortgage contracts* from regulation under the CCA and from regulation as a *credit-related regulated activity*.
- 4.17.2** G Section 126(2) of the CCA (as inserted by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014) provides, however, that for the purposes of section 126(1) of the CCA (a land mortgage securing a *regulated credit agreement* is enforceable (so far as provided in relation to the agreement) on an order of the court only) and Part 9 of the CCA (judicial control) a *regulated mortgage contract* which would, but for the exemption in PERG 2.7.19CG(1), be a *regulated credit agreement* is to be treated as if it were a *regulated credit agreement*. This is subject to section 140A(5) of the CCA (unfair relationships between creditors and debtors), which provides that an order under section 140B of the CCA (powers of court in relation to unfair relationships) shall not be made in connection with a *credit agreement* which is an exempt agreement under ■ PERG 2.7.19C G. It therefore follows that, for example, the CCA provisions relating to time orders apply to *regulated mortgage contracts*.
- 4.17.3** G [deleted]
- 4.17.4** G Unsecured loans are not subject to carve-out described above and may be *regulated credit agreements* for the purposes of the CCA and the *credit-related regulated activities* for which a *person* may need *permission*.
- 4.17.5** G
- 4.17.6** G
- 4.17.7** G

4.17.8 **G**

4.17.9 **G**

4.17.10 **G**

4.17.11 **G**

4.17.12 **G**

4.17.13 **G**

4.17.14 **G**

Financial Promotion and advertisements

4.17.15 **G** Article 17 of the 2013 Order has the effect that the *controlled activity* of providing relevant consumer credit for the purposes of the *financial promotion* regime does not include *regulated mortgage contracts*.

4.17.16 **G** For more detailed *guidance* concerning the application of the *financial promotion* regime to *qualifying credit* and relevant consumer credit, see ■ PERG 8.17.17 G.

Consumer credit regulated activities

4.17.17 **G** Whether a business decides that this chapter does or does not apply to its mortgage activities, it should go on to consider whether the activities are consumer credit *regulated activities*. ■ PERG 2 has *guidance* on consumer credit *regulated activities*.

4.17.18 **G** A number of *Regulated Activities Order* exclusions from the consumer credit *regulated activities* are relevant to lenders under loans secured on land. These include:

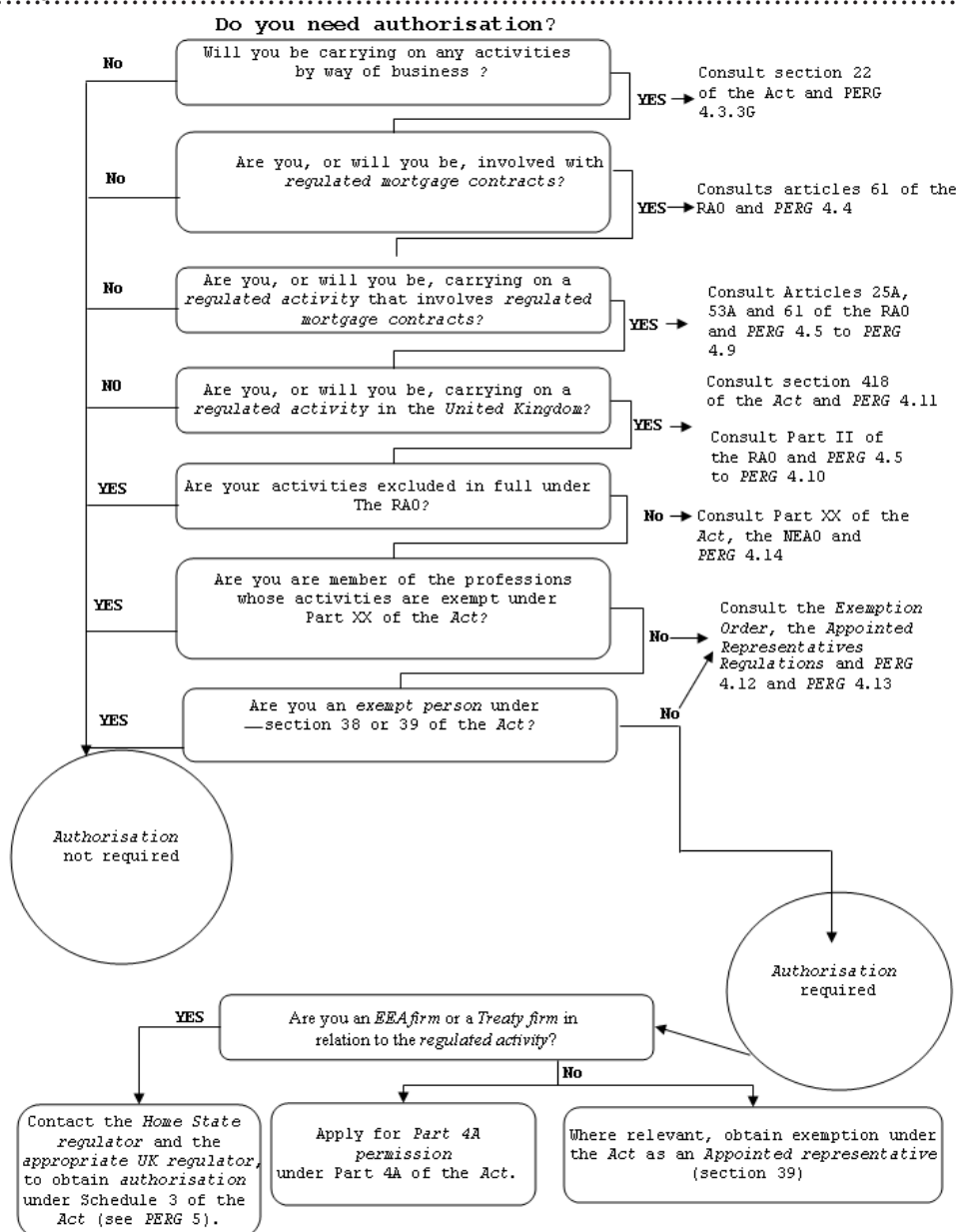
- (1) article 60C(2) (*regulated mortgage contract* is an exempt *credit agreement*, as summarised in ■ PERG 2.7.19CG (1));
- (2) article 60C(3) (commercial lending, as summarised in ■ PERG 2.7.19CG (2));
- (3) article 60D (loans secured on non-residential property, as summarised in ■ PERG 2.7.19E G);
- (4) article 60F (loans with a limited number of repayments, as summarised in ■ PERG 2.7.19G G);
- (5) article 60H (high net worth borrowers, as summarised in ■ PERG 2.7.19J G); and

- (6) articles 36E and 39H (exclusions for lenders in relation to *credit broking, debt adjusting, debt counselling, debt collecting and debt administration*, as summarised in ■ PERG 2.8.6C G and ■ PERG 2.8.7C G).

4.18 Regulated activities related to mortgages: flowchart

Do you need authorisation?

4.18.1



Key to Abbreviations:
 NEAO = The Financial Services and Markets Act 2001 (Professions)(Non Exempt Activities) Order 2001
 RAO = The Financial Services and Markets Act 2001 (Regulated Activities) Order 2001

