

Chapter 4

Guidance on regulated activities connected with mortgages

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*.