

Chapter 4

Guidance on regulated activities connected with mortgages

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).