

Chapter 4

Guidance on regulated activities connected with mortgages

4.5 Arranging regulated mortgage contracts

Definition of the regulated activities involving arranging

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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.

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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.

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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

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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.

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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

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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.

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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

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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).