

Chapter 4

Guidance on regulated activities connected with mortgages

4.6 Advising on regulated mortgage contracts

Definition of 'advising on regulated mortgage contracts'

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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.

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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 8.31** (Exclusions for advising on investments) will be relevant to any person who may be advising on other forms of investment at the same time as they advise 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*). Generic or general advice is not covered: examples of generic advice are shown in **■ PERG 4.6.7G** (but see **■ PERG 4.6.7AG** as well). Generic or general advice may, however, be a financial promotion (see **■ PERG 8.4** (Invitation or inducement)).

- 4.6.5A** **G** **■ PERG 4.6.21G** to **■ 4.6.25BG** includes material about guiding a *person* through a decision tree.

- 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 is advice on the merits of specific identifiable mortgages and compared to 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.

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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 on 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 on 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 on 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.	Yes. This is advice 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 on 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 on 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 is not advice on a particular mortgage that the borrower 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.

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(1) Although giving generic advice is generally not a *regulated activity*, if it is given in the course of or in preparation for a *regulated activity* it can form part of that *regulated activity*.

(2) For example, if a *firm* gives generic advice (for instance about the merits of a fixed rate mortgage rather than a variable rate mortgage) and then goes on to identify a particular fixed rate mortgage, the generic advice will form part of the *regulated activity of advising on regulated mortgage contracts*.

(3) Another example is a *firm* that provides generic advice to a *customer* or a potential customer prior to or in the course of carrying on the *regulated activity of arranging (bringing about) regulated mortgage contracts* for the *customer*. That generic advice is part of that *regulated activity of arranging (bringing about) deals in investments*.

4.6.8 **G** [deleted]

4.6.9 **G** [deleted]

Advice given to a person in their 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. In effect, it is a recommendation as to a course of action. Information on the other hand, involves objective statements of facts and figures.

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- (1) In general terms, simply giving information without making any comment or value judgement on its relevance to decisions which a borrower may make is not advice.
- (2) The provision of purely factual information does not become regulated advice merely because it feeds into the *customer's* own decision-making process and is taken into account by them.
- (3) Regulated advice includes any communication with the *customer* which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into a particular *regulated mortgage contract* or to vary an existing *regulated mortgage contract*.
- (4) A key to the giving of advice is that the information:
 - (a) is either accompanied by comment or value judgement on the relevance of that information to the *customer's* decision; or
 - (b) is itself the product of a process of selection involving a value judgement so that the information will tend to influence the decision.
- (3) Advice can still be regulated advice if the *person* receiving the advice:
 - (a) is free to follow or disregard the advice; or
 - (b) may receive further advice from another *person* before making a final decision.

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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) [deleted]
- (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.

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In the *FCA's* opinion, however, such information may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation. For example:

- (1) a *person* may provide information on a selected, rather than balanced, basis that would tend to influence the decision of the borrower; and
- (2) a *person*, as a result of going through the sales process, may discuss the merits of one *regulated mortgage contract* over another, resulting in advice to enter into or not enter into a particular one.

4.6.16A G A key question is whether an impartial observer, having due regard to the *FCA rules* and guidance, context, timing and what passed between the parties, would conclude that what the adviser says could reasonably have been understood by the *customer* as being advice.

4.6.16B G An explicit recommendation to enter into a particular *regulated mortgage contract* is likely to be advice. However, something falling short of an explicit recommendation can be advice too. Any significant element of evaluation, value judgement or persuasion is likely to mean that advice is being given.

4.6.16C G

- (1) A *person* can give advice without saying (or implying) categorically that the *customer* should enter into a particular *regulated mortgage contract*. The adviser does not have to offer a definitive recommendation as to whether the *customer* should enter into that particular *regulated mortgage contract*.
- (2) For example, saying the following can still be advice:
 - (a) “this regulated mortgage contract is a very good deal but it is your decision whether or not to enter into it”; or
 - (b) “this regulated mortgage contract is a very good deal but I am going to leave it to you to decide because I don’t know how important it is to you to have certainty about your monthly mortgage payments”.
- (3) The examples in (2):
 - (a) involve advice and not just information; and
 - (b) involve advice on the merits of entering into a particular *regulated mortgage contract* (see ■ PERG 4.6.17G to ■ 4.6.20G (Advice must relate to the merits (of entering into as borrower or varying)).

4.6.16D G One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If a *customer* asks for a recommendation, any response is likely to be regarded as advice.

4.6.16E G On the other hand, if a *customer* makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that they do not give advice, or whether the adviser runs an advisory business.

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 An 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 an explicit or implicit recommendation 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:
 - (1) the likely meaning of uncertain provisions in a *regulated mortgage contract*; or
 - (2) how to complete an application form; or
 - (3) the effect of contractual terms and their consequences; or
 - (4) terms which are common in the market.

Pre-sale questioning (including decision trees)

- 4.6.21 G Pre-sale questioning involves putting a sequence of questions in order to extract information from a person to help them best select a mortgage that meets their needs. A decision tree is an example of pre-sale questioning. The process of going through the questions will usually narrow down the range of options that are available.
- 4.6.22 G
 - (1) There are two aspects of the definition of *advising on regulated mortgage contracts* that are particularly relevant to whether pre-sale questioning involves *advising on regulated mortgage contracts*:
 - (a) the fact that advice must relate to a particular *regulated mortgage contract* (see ■ PERG 4.6.5G); and
 - (b) the distinction between information and advice (see ■ PERG 4.6.13G).
 - (2) Whether or not pre-sale questioning in any particular case is *advising on regulated mortgage contracts* will depend on all the circumstances.
 - (3) The pre-sale questioning process may involve identifying one or more particular *regulated mortgage contracts*. If so, 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 their 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 4.6.4G for other matters that may be relevant.

4.6.22A **G** There is considerable potential for variation in the form, content and manner of pre-sale questioning, but there are two broad types, as described in ■ PERG 4.6.23G and ■ 4.6.24G.

4.6.23 **G** The first type involves identifying *regulated mortgage contracts* based on factual matters. For example, the purpose may be to identify whether a borrower wishes to pay a fixed or variable rate of interest or the size of deposit available. There are various possible scenarios, including the following:

- (1) the questioner may go on to identify several particular *regulated mortgage contracts* which match features identified by the pre-sale 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 pre-sale questioning, give information that considered on its own would not involve *advising on regulated mortgage contracts*, but may, following the pre-sale questioning, identify one or more particular *regulated mortgage contracts*. The factors described in ■ PERG 4.6.25G are relevant to deciding whether or not the questioner is *advising on regulated mortgage contracts*.

4.6.24 **G** The second type of pre-sale questioning involves providing questions and answers incorporating opinion, judgement or recommendations. There are various possible scenarios, including the following:

- (1) the pre-sale 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 pre-sale questioning may lead to the identification of one or more particular *regulated mortgage contracts*. In principle, this is likely to involve *advising on regulated mortgage contracts* as regulated advice includes any communication with the *customer* which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into the *regulated mortgage contract* (see ■ PERG 4.6.14G). However, the factors described in ■ PERG 4.6.25G are still relevant to deciding whether or not the questioner is *advising on regulated mortgage contracts*.

- 4.6.25 **G** When the scripted pre-sale questioning identifies particular *regulated mortgage contracts* (see ■ 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 the pre-sale questioning as a whole in deciding whether the process involves *advising on regulated mortgage contracts*. Factors that may be relevant include:
- (1) any representations made by the questioner at the start of the questioning relating to the service they are 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 pre-sale 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 pre-sale questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party, 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 their particular circumstances.
- 4.6.25A **G** A *firm* selling *regulated mortgage contracts* through its website might make its list of the *regulated mortgage contracts* it sells easier to search by allowing the *customer* to filter mortgages based on factors presented by the website and selected by the *customer*. Only products that meet the search criteria input by the *customer* are displayed.
- 4.6.25B **G**
- (1) The filtering described in ■ PERG 4.6.25AG might be based upon simple objective factors like price or eligibility criteria. This should not generally involve *advising on regulated mortgage contracts*, as explained in ■ PERG 4.6.23G(1).
 - (2) The filtering described in ■ PERG 4.6.25AG might, however, be based upon factors such as balancing *customer* preferences on price, interest rate and term. This is not a simple objective factor like price alone.
 - (3) Where all a *firm* is doing is listing product features of its own *regulated mortgage contracts*, for example by ranking objectively by the cost of any arrangement fee, that *firm* is unlikely to be *advising on regulated mortgage contracts* as long as it is clear to the *customer* that this objective ranking is all that the *firm* is doing. A description of a product's features is not advice.
 - (4) Where a *firm* is describing *regulated mortgage contracts* offered by a third party and the product features are drawn directly from information made available to the *firm* by that third party, the *firm* is also unlikely to be *advising on regulated mortgage contracts* as long as it is clear to the *customer* that all the *firm* is doing is describing *regulated mortgage contracts* offered by a third party. A description

of the product features is the factual representation of the *regulated mortgage contracts* and therefore likely to be information and not advice.

- (5) Similarly, an eligibility tool can draw on information supplied by third parties (such as eligibility criteria provided by lenders, or the results of a credit reference search) to provide an indication of whether a customer is likely to qualify for mortgage lending. Where it is clear to the *customer* that the tool is simply applying details provided by the *customer* to that information, to provide a view on whether a *customer's* application is likely to meet that criteria (and not giving a view on the merits of entering into that particular mortgage), the *firm* is unlikely to be advising on *regulated mortgage contracts*.
- (6) If the input from the *customer* is much more extensive, and the way that those inputs interact on the website is much more complicated, than the processes described in (3) and (4), the website is not simply displaying factual information about the design of the product. In that case the production of a list of results uses an element of opinion and skill (albeit automated) in translating the *customer's* input into a display of a particular product or products. Either explicitly or implicitly this is presented as meeting the *customer's* requirements and wishes as input into the system. The result is that the filtering process is closer to the one in (2) than the one in (3) and so it is more likely that the *firm* is *advising on regulated mortgage contracts*.

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 *firm* will be giving advice for the purpose of *advising on regulated mortgage contracts* only if the service goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into the *regulated mortgage contract* (see ■ PERG 4.6.21G to ■ PERG 4.6.25BG (Pre-sale questioning (including decision trees))).

4.6.28A **G** Some software services involve the generation of specific prompts promoting remortgaging. These prompts are liable, as a general rule, to be advice for the purposes of article 53A (as well as financial promotions) given by the *person* responsible for the provision of the software. The exception to this is where the user of the software is required to use enough control over the setting of parameters and inputting of information for the prompts to be regarded as having been generated by the *customer* rather than by the software itself.

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 to *advising on regulated mortgage contracts* if the principal purpose of any of these publications, news and information services or broadcasts is neither to give advice of the kind to which article 53A applies nor to lead or enable persons to: 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 drawing the <i>customer’s</i> attention to those products. Identifying which products have the lowest rates is not advice on its own, only facts. However, “best” involves a value judgement, 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 <i>firm</i> 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 <i>firm</i> is collecting factual information to provide the customer with an illustration of costs.
(4) The <i>firm</i> 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 <i>firm</i> 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 <i>firm</i> 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 <i>firm</i> is comparing two products without recommending either, nor is the <i>firm</i> recommending 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 <i>FCA’s</i> view this is still regulated advice. For advice to be regulated it must be advice on the merits of entering into a particular <i>regulated mortgage contract</i> (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*.