

Chapter 4

Guidance on regulated activities connected with mortgages

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.

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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.

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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

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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

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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.