

Chapter 4

Guidance on regulated activities connected with mortgages



4.10 Exclusions applying to more than one regulated activity

Exclusion: Activities carried on in the course of a profession or non-investment business

- 4.10.1 **G** The exclusion in article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business) applies to the *regulated activities* of *arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts*. ■ PERG 4.14 contains further *guidance* on mortgage activities carried on by *professional firms*.)
- 4.10.2 **G** *Arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts* are excluded if they are carried on by a *person* in the course of carrying on a profession or business (other than a *regulated activity*). This is the case if it may reasonably be regarded as necessary for him to make the arrangements or give the advice in order to provide his professional or other services and he is not separately paid for making the arrangements or giving the advice.
- 4.10.3 **G** In the *FCA's* view, for arranging or advice to be a necessary part of other services it must, as a general rule, be the case that it is not possible for the other services to be provided unless the arranging or advising are also provided.
- 4.10.4 **G** Situations where this exclusion might apply, in the *FCA's* view, are set out below:
 - (1) Advice by solicitors: the provision of legal services may involve a solicitor advising his client on the legal effects and consequences of entering into a particular *regulated mortgage contract*. To the extent that this may involve advice on the merits of entering into the contract it is likely to be a necessary part of the legal advice. But it would not be necessary for the solicitor to go on to recommend that his client would be better to enter into a different particular *regulated mortgage contract*.
 - (2) Advice by licensed conveyancers: as a necessary part of conveyancing work and under their duty of care to the client, a licensed conveyancer may state that the mortgage the client has applied for is right for them or not. If the client has already applied for a mortgage and the conveyancer just says that their choice is right or wrong but does not recommend alternatives, then that advice is likely to be

excluded. But if the conveyancer recommends an alternative then that advice is unlikely to be excluded.

- (3) Conveyancing as arranging: the provision of pure conveyancing services (whether performed by a solicitor or a licensed conveyancer) will, themselves, be arrangements within the scope of article 25A. So they will be excluded under article 67. But if the client does not yet have a mortgage, an introduction to or other arrangement involving a lender is unlikely to be a necessary part of conveyancing services.
- (4) Debt counselling services: The provision of debt counselling services may involve the counsellor advising his client on the merits of varying the terms of an existing *regulated mortgage contract* and, in certain cases, assisting a distressed borrower in corresponding with a lender. Such advice and arrangements are likely to be a necessary part of the debt counselling services. But it would not be a necessary part of those services for the counsellor to offer advice on the merits of his client entering into a new particular *regulated mortgage contract*.

- 4.10.4A** G
- (1) The exclusion in article 67 of the Regulated Activities Order (Activities carried on in the course of a profession or non-investment business) does not apply if applying the exclusion would take activities covered by the *MCD* outside the definition of certain *regulated mortgage activities*.
 - (2) Please see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive) for more details.

Exclusion: Trustees, nominees and personal representatives.....

- 4.10.5** G There are exclusions that apply, in certain circumstances, in relation to each of the *regulated mortgage activities* if the *person* carrying on the activity is acting in the capacity of trustee or personal representative. Article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) sets out the circumstances in which the exclusions apply. The terms of these differ slightly depending on the *regulated activity*.

- 4.10.6** G For each of the *regulated activities of arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts*, the exclusions apply if the trustee or personal representative is acting in that capacity and:
- (1) the arrangements he makes concern the entering into or variation of *regulated mortgage contracts* and the contracts are to be entered into or varied either by himself and a fellow trustee or personal representative or by the beneficiary under the trust, will or estate on behalf of which he is acting; or
 - (2) the advice is given to such trustees or personal representatives or beneficiaries.

- 4.10.7** G For each of the *regulated activities of entering into a regulated mortgage contract and administering a regulated mortgage contract*, the exclusions apply if the trustee or personal representative is acting in that capacity and

the borrower is a beneficiary under the trust, will or estate on behalf of which he is acting.

4.10.8 G In every case, the trustee or personal representative must not receive any remuneration that is additional to any he receives for acting in his capacity as trustee or personal representative. But a *person* is not to be regarded as receiving additional remuneration merely because his remuneration as trustee or personal representative is calculated by reference to time spent.

4.10.8A G (1) The exclusion in article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) does not apply if applying the exclusion would take activities covered by the *MCD* outside the definition of certain *regulated mortgage activities*.

(2) Please see ■ PERG 4.10A (Activities regulated under the Mortgage Credit Directive) for more details.

Exclusion: Managers of UCITS and AIFs

4.10.9 G Article 72AA of the *Regulated Activities Order* (Managers of UCITS and AIFs) contains an exclusion relating to *firms* with a *Part 4A permission* to *manage a UCITS* or *manage an AIF* (see ■ PERG 2.9.22 G)

Exclusion: Local authorities

4.10.10 G There are exclusions that apply, in relation to each of the *regulated mortgage activities* and to *advising on regulated credit agreements for the acquisition of land*, if the *person* carrying on the activity is a *local authority* or a wholly owned subsidiary of a *local authority*. They can be found in article 72G of the *Regulated Activities Order*, but only apply where:

(a) the relevant agreement was entered into before 21 March 2016; or

(b) the relevant agreement is entered into on or after 21 March 2016 and:

(i) the agreement is of a kind to which the *MCD* does not apply by virtue of article 3(2) of the *MCD* (in other words, it is an agreement listed in ■ PERG 4.10A.5G(1) to (6); or it is a *credit agreement* which relates to the deferred payment, free of charge, of an existing debt and is not secured by a *legal or equitable mortgage*); or

(ii) it is a *bridging loan* described in ■ PERG 4.13.6G; or

(iii) it is a restricted public loan described in ■ PERG 4.13.7G.

Exclusion: Buy to let

4.10.11 G There is an exclusion for *CBTL business*. It is described in ■ PERG 4.10B (Regulation of buy to let lending).