

**MORTGAGES: CONDUCT OF BUSINESS  
SOURCEBOOK (CONSEQUENTIAL AMENDMENTS TO THE HANDBOOK)  
INSTRUMENT 2003**

**Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in or under the Financial Services and Markets Act 2000 (the “Act”):
- (1) section 138 (General rule-making power);
  - (2) section 139(4) (Miscellaneous ancillary matters);
  - (3) section 145 (Financial promotion rules);
  - (4) section 146 (Money laundering rules);
  - (5) section 149 (Evidential provisions);
  - (6) section 150(2) (Actions for damages);
  - (7) section 156 (General supplementary powers);
  - (8) section 157(1) (Guidance);
  - (9) section 213 (The compensation scheme);
  - (10) section 214 (General);
  - (11) section 226 (Compulsory jurisdiction);
  - (12) section 229 (Awards);
  - (13) section 332(1) (Rules in relation to persons to whom the general prohibition does not apply);
  - (14) schedule 17 paragraph 13 (FSA’s procedural rules);
  - (15) article 15 (record-keeping and reporting requirements relating to relevant complaints) of the Ombudsman Transitional Order;
  - (16) regulation 3 of the Electronic Commerce Directive (Financial Services and Markets Act) Regulations 2002 (S.I. 2002/1775); and
  - (17) the other rule-making powers listed in Schedule 4 to the General provisions.

- B. The rule-making powers listed above are specified for the purpose of section 153(2) of the Act (Rule-making instruments).

### **Commencement**

- C. This instrument comes into force on 31 October 2004.

### **Amendments to the Handbook**

- D. The modules of the FSA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2):

(1)	(2)
Reader's Guide Reader's Short Guide	Annex A
GEN	Annex B
COB	Annex C
TC	Annex D
ML	Annex E
AUTH	Annex F
SUP	Annex G
DISP	Annex H
COMP	Annex I
ECO	Annex J
ELM	Annex K
PROF	Annex L
EMPS	Annex M
FREN	Annex N
OMPS	Annex O
SERV	Annex P
Glossary	Annex Q

### **Citation**

- E. This instrument may be cited as the Mortgages: Conduct of Business Sourcebook (Consequential Amendments to the Handbook) Instrument 2003.

By Order of the Board  
15 October 2003

Amended by Addendum  
18 October 2004

## Annex A

In this Annex, underlining indicates new text and striking through indicates deleted text.

### Amendments to the Reader's Guide

...

#### Contents of the Handbook

	Sourcebook or manual	Reference Code
Business Standards	...	
	Conduct of Business	COB
	<u>Mortgages: Conduct of Business</u>	<u>MCOB</u>
Specialist sourcebooks	...	
	Lloyd's	
	<del>Later: Mortgages</del>	<del>MORT</del>
	Recognised Investment Exchanges and Recognised Clearing Houses	REC
	...	

### Amendments to the Reader's Short Guide

...

#### Contents of the Handbook

	Sourcebook or manual	Reference Code
Business Standards	...	
	Conduct of Business	COB
	<u>Mortgages: Conduct of Business</u>	<u>MCOB</u>
Specialist sourcebooks	...	
	Lloyd's	

<del>Later: Mortgages</del>	MORT
Recognised Investment Exchanges and Recognised Clearing Houses ...	REC

## Annex B

### Amendments to GEN

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### Transitional provisions

...

GEN

3 Table: (2) Transitional provisions applying to GEN only

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
1	<u>GEN 2.2.7R</u>	R	...		
<u>2</u>	<u>GEN 4.3.1R</u>	R	<p>(1) For the purpose of <u>GEN 4.3.1R</u> (Disclosure in letters to private customers), a <u>regulated activity</u> does not include a <u>regulated mortgage activity</u>.</p> <p>(2) If a <u>firm</u> in a letter (or <u>electronic equivalent</u>) which it or its <u>employees</u> send to a <u>customer</u>, with a <u>view to or in connection with the firm carrying out a regulated mortgage activity</u>, makes a <u>statement about its statutory or regulated status under the Act for carrying on a regulated mortgage activity</u>, the <u>firm</u> must include the <u>disclosure in GEN 4 Ann 1R</u>.</p>	From <u>31 October 2004</u> until <u>15 July 2005</u>	<u>Apply in relation to regulated mortgage activities from 31 October 2004</u>

3	<u>GEN 4.3.1R</u>	<u>G</u>	<p>(1) <u>Transitional provision 2R defers the application of GEN rules so that a firm need only make one change to its statutory status disclosure to reflect the onset of mortgage regulation.</u></p> <p>(2) <u>Until 1 August 2005, a firm may continue to use stationery and similar materials which refer to its membership of self-regulatory schemes superseded by FSA regulation. However, a firm will need to ensure that any such reference is adequately qualified so that the customer is not misled as to the regulatory arrangements in place.</u></p>	<u>From 31 October 2004 until 15 July 2005</u>	<u>Apply in relation to regulated mortgage activities from 31 October 2004</u>
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4.2.2G There are other pre-contract information requirements outside this chapter, including:

- (1) ...
- (4) for *electronic commerce activities* by outgoing or domestic ECA providers, in ECO 2 (Outgoing ECA providers) and ECO 3 (Domestic (and non-EEA) ECA providers); and
- (5) for regulated mortgage contracts, in MCOB 4.4 (Initial disclosure requirements), MCOB 5.6 (Content of illustrations) and MCOB 6.4 (Content of the offer document).

## Annex C

### Amendments to COB

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.3.1R *COB* applies to *firms* with respect to the carrying on of:

(1) all *regulated activities* except:

(a) *regulated mortgage activities*; or

(b) to the extent that a provision of *COB* provides for a narrower application; and

...

1.3.2G (1) ...

...

(7) *MCOB* applies to a *firm* that carries on *regulated mortgage activities*.

...

3.1.2G This chapter applies generally to *firms* in relation to all *financial promotions*. This wide application is however cut back by *COB* 3.2 (Application: what?) and *COB* 3.3 (Application: where?) which limit the application of this chapter for:

(1) *financial promotions* for *deposits*, *general insurance contracts*, *pure protection contracts*, ~~and reinsurance contracts~~ and *regulated mortgage contracts*;

...

...

3.2.3R ...

Financial promotions for regulated mortgage contracts

3.2.3AR This chapter does not apply to a *firm* to the extent that a *financial promotion* is a *qualifying credit promotion* (but see *MCOB* 3 (Financial promotions)).

## Annex D

### Amendments to TC

In this Annex, underlining indicates new text and striking through indicates deleted text. Where an entire new section is inserted, the place it goes is indicated and it is not underlined.

Transitional provisions

TC

1 Table: Transitional provisions relating to designated investment business

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
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After Table 1, insert the following new table:

2 Table: Transitional provisions relating to regulated mortgage contracts (including regulated lifetime mortgage contracts) for individuals employed at 31 October 2004

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
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1.	TC 2	<p>Competent employees (mortgages including lifetime mortgages)</p> <p>(1) This transitional provision applies:</p> <p>(a) in relation to <i>regulated mortgage contracts</i> including <i>regulated lifetime mortgage contracts</i>; and</p> <p>(b) in respect of an individual employed by a <i>firm</i> at 31 October 2004, if that individual had before that date been assessed as competent by the <i>firm</i> in accordance with the rules of the Mortgage Code Compliance Board applying immediately before 31 October 2004.</p> <p>(2) The <i>firm</i> in 1(b) will not contravene any of the provisions in TC 2.4.5R provided that:</p> <p>(a) the activity which the individual engages in or oversees continues to be the same, or substantially the same as that immediately before 31 October 2004; and</p> <p>(b) the individual has not experienced any significant break of employment since the previous assessment.</p> <p>(3) Any other <i>firm</i> which subsequently employs the individual in 1(b) will not contravene TC 2.4.5R(2) provided that:</p> <p>(a) the conditions in 2(a) and (b) are met; and</p> <p>(b) the <i>firm</i> assesses the individual to be competent in accordance with TC 2.4.5R(1).</p>	From 31 October 2004	Apply in relation to <i>regulated mortgage contracts</i> from 31 October 2004
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...

2.1.2R (1) In relation to *designated investment business*:

(a) This chapter applies to a *UK domestic firm* in respect of its *employees* who engage in or oversee activities (to the extent indicated in TC 2.1.4R):

(a i) ... ; and

(a ii) ...

(b) This chapter applies to an *overseas firm* ...

(2) In relation to regulated mortgage activities carried on with or for a customer, this chapter applies if the customer is resident in:

(a) the United Kingdom; or

(b) another EEA State, but in this case only if the activity is carried on from an establishment maintained by the firm or its appointed representative in the United Kingdom only;

at the time that the regulated mortgage activity is carried on.

...

2.1.4R Table: Activities to which TC 2 applies

	Activity	Extent of Application
1. <i>Employees</i> engaging in:	<p>Advising (without dealing)</p> <p>(f) ...</p> <p>...</p> <p>(p) <u>advising a customer on a regulated mortgage contract (including a regulated lifetime mortgage contract) other than a regulated mortgage contract that is for a business purpose.</u></p> <p><u>Non-advised sales</u></p> <p>(q) <u>designing scripted questions for use in sales to customers of regulated lifetime mortgage contracts which do not involve personal</u></p>	<p><u>1. In relation to designated investment business:</u></p> <p>(a) <u>If the activity is carried on with or for a private customer, whole of TC 2 applies;</u></p> <p>(b) <u>If the activity is carried on with or for an intermediate customer or a market counterparty only TC 2.4, 2.5, 2.6 and 2.8 apply.</u></p> <p><u>2. In relation to regulated mortgage activities, whole of TC 2 applies.</u></p>

<p>2. <i>Employees</i> overseeing on a day-to-day basis:</p>	<p style="text-align: center;"><u>recommendations.</u></p> <p>(a) ...</p> <p>(b) <i>safeguarding and administering investments</i> or holding of <i>client money</i> (<u>unless held in the course of carrying on a mortgage mediation activity</u>);</p> <p>...</p> <p>(g) <u>the sales to customers of regulated lifetime mortgages which do not involve personal recommendations.</u></p>	
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2.4.3G In *TC 2.4.2R(2)* an adequate level of application of knowledge and skills includes:

- (1) specific knowledge of the *firm's* relevant systems and procedures, and of the kinds of *designated investment business* and *regulated mortgage activities* carried on by the *firm* and any other members of its *marketing group*; and
- (2) appropriate skills in analysing *private customers'* needs and circumstances when applying relevant knowledge.

...

2 Ann 1R

The interim approved examinations referred to in *TC 2 R*

TC

4 Table: *TC 2.1.4R(1)(d) Employees engaging in advising on regulated mortgage contracts (including regulated lifetime mortgage contracts) (other than regulated mortgage contracts that are for a business purpose).*

<b><u>Examination that must be passed within two years of starting the activity</u></b>	
<u>Certificate in Mortgage Advice and Practice (CeMAP) all three papers</u>	<u>Institute of Financial Services</u>
<u>Certificate in Mortgage Advice and Practice (MAPC) all three papers.</u>	<u>Chartered Institute of Bankers in Scotland</u>

**BRIDGE PAPERS plus entry requirements ie CeFA, FPC, CIP or equivalent**

<u>CeMAP Bridge Paper</u>	<u>Institute of Financial Services</u>
<u>MAPC Bridge Paper</u>	<u>Chartered Institute of Bankers in Scotland</u>
<u>Mortgage Advice Qualification (MAQ)</u>	<u>Chartered Insurance Institute</u>

[New examination to be developed – including requirements for *regulated lifetime mortgage contracts*.]

## Annex E

### Amendments to ML

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 1.1.3G The scope of this sourcebook is very wide. It includes all *firms* except:
- (1) those within the limited exception for *firms* concerned only with certain insurance activities and *UCITS qualifiers* (see *ML 1.1.2R*); in this respect, the chapter follows article 1 of the *Money Laundering Directive* (No. 91/308/EEC as amended by No 2001/97/EEC);
  - (2) those within the exception for *firms* carrying on any *mortgage mediation activity* (see *ML 1.1.4R(5)*); in this respect, the chapter follows [article [] of the [] [to be added when 2003 Money laundering Regulations are in final form]].

The scope extends to *incoming firms* ...

- 1.1.4R In this sourcebook, “*relevant regulated activities*” means any *regulated activity* apart from:
- (1) ...  
...
  - (3) business relating to contracts which are within the *Regulated Activities Order* only because they fall within paragraph (e) of the definition of “*contract of insurance*” in article 3 of that *Order* (see the *Glossary*);  
~~and~~
  - (4) (a) arranging, by the *Society of Lloyd’s*, of deals in *general insurance contracts* written at Lloyd’s; ~~and~~  
  
(b) *managing the underwriting capacity of a Lloyd’s syndicate as a managing agent at Lloyd’s*; and
  - (5) *mortgage mediation activity*.

## Annex F

### Amendments to AUTH

In this Annex, underlining indicates new text and striking through indicates deleted text.

1.5.3G As a general guide, all applicants for *Part IV permission* should be familiar with the *threshold conditions (COND)* and the *Principles for Businesses (PRIN)* in the High Level Standards part of the *Handbook*. To complete an application for *Part IV permission*, an applicant will also need to have regard to the following matters:

- (1) ...
- ...
- (4) Other regulatory obligations:
  - (a) the detailed regulatory obligations that apply to certain types of *firm* or *regulated activity* in *COB*, *MCOB*, the Market Conduct sourcebook (*MAR*) and *SUP*;
  - ...

...

#### **Rights under a regulated mortgage contract**

2.6.27G ~~Regulated mortgage contracts will be *specified investments* with effect from a future date. The Treasury has indicated that it expects this date to be in 2004. Regulated mortgage contracts will be *specifies investments* with effect from the date nine months following the date on which section 19 of the *Act* comes into force.~~

In accordance with article 61(3)(a) of the *Regulated Activities Order*, a *regulated mortgage contract* is a contract which, at the time it is entered into, satisfies the following conditions:

- (1) the contract is one where the lender provides credit to an individual or trustees (the “borrower”);
- (2) the obligation of the borrower to repay is secured by a first legal charge on land (other than timeshare accommodation) in the *United Kingdom*; and
- (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower (or, where trustees are the borrower, by an individual who is a beneficiary of the trust) or by a related person.

Detailed guidance on this is set out in *AUTH App 4.4 (Guidance on regulated activities connected with mortgages)*.

...

AUTH

2 Table: G

(1) Module of Handbook	(2) Potential application to an incoming EEA firm with respect to activities carried on from an establishment of the firm (or its appointed representative) in the United Kingdom	(3) Potential application to an incoming EEA firm with respect to activities carried on other than from an establishment of the firm (or its appointed representative) in the United Kingdom
... <i>LLD</i>	Does not apply.	Does not apply.
<u><i>MCOB</i></u>	<u>Applies where the activity is carried on with or for a customer resident in the United Kingdom or another EEA State at the time that the activity is carried on, but see the territorial scope in MCOB 3.3 (Application: where?).</u>	<u>Applies where the activity is carried on with or for a customer resident in the United Kingdom at the time, that the activity is carried on but see MCOB 1.3.4R (Distance contracts entered into from an establishment in another EEA State) and MCOB 3.3 (Application: where?).</u>
<i>PROF</i> ...	<i>PROF</i> applies only if the firm is an authorised professional firm.	As column (2).

...

**Appendix 4 to the Authorisation manual.****Guidance on regulated activities connected with mortgages****Contents**

- 4.1 Application and purpose
- 4.2 Introduction
- 4.3 Regulated activities related to mortgages
- 4.4 What is a regulated mortgage contract?

- 4.5 Arranging regulated mortgage contracts
- 4.6 Advising on regulated mortgage contracts
- 4.7 Entering into a regulated mortgage contract
- 4.8 Administering a regulated mortgage contract
- 4.9 Agreeing to carry on a regulated activity
- 4.10 Exclusions applying to more than one regulated activity
- 4.11 Link between activities and the United Kingdom
- 4.12 Appointed representatives
- 4.13 Other exemptions
- 4.14 Mortgage activities carried on by professional firms
- 4.15 Mortgage activities carried on by ‘packagers’
- 4.16 Mortgage activities and securitisation
- 4.17 Interaction with the Consumer Credit Act
- 4.18 Regulated activities related to mortgages: flowchart

#### **4.1 Application and purpose**

##### **Application**

- 4.1.1G This appendix applies to any *person* who needs to know whether the activities he conducts in relation to mortgages are subject to *FSA* regulation.

##### **Purpose of guidance**

- 4.1.2G With effect from 31 October 2004 certain activities relating to mortgages will be regulated by the *FSA* for the first time. The purpose of this *guidance* is to help *persons* decide whether they need *authorisation* and, if they do, to determine the scope of the *Part IV permission* for which they will need to apply.

##### **Effect of guidance**

- 4.1.3G This *guidance* is issued under section 157 of the *Act* (Guidance). It is designed to throw light on particular aspects of regulatory requirements, not to be an exhaustive description of a *person's* obligations. If a *person* acts in line with the *guidance* in the circumstances contemplated by it, then the *FSA* will proceed on the footing that the *person* has complied with aspects of the requirement to which the *guidance* relates.
- 4.1.4G Rights conferred on third parties cannot be affected by *guidance* given by the *FSA*. This *guidance* represents the *FSA's* view, and does not bind the courts,

for example, in relation to an action for damages brought by a *private person* for breach of a *rule* (see section 150 of the *Act* (Action for damages)), or in relation to the enforceability of a contract where there has been a breach of the *general prohibition* on carrying on a *regulated activity* in the *United Kingdom* without *authorisation* (see sections 26 to 29 of the *Act* (Enforceability of agreements)). A *person* may need to seek his own legal advice.

4.1.5G Anyone reading this *guidance* should refer to the *Act* and to the various Orders that are referred to in this *guidance*. These should be used to find out the precise scope and effect of any particular provision referred to in this *guidance*.

### **Guidance on other activities**

4.1.6G A *person* may be intending to carry on activities related to other forms of investment in connection with mortgages, such as advising on and arranging an endowment policy or ISA to repay an *interest-only mortgage*. Such a *person* should also consult the *guidance* in *AUTH 2* (Authorisation and regulated activities) and *AUTH App 1* (Financial promotion and related activities), and *AUTH App 5* (Mediation of general and pure protection insurance).

## **4.2 Introduction**

### **Requirement for authorisation or exemption**

4.2.1G In most cases, any *person* who carries on a *regulated activity* in the *United Kingdom* by way of business must either be an *authorised person* or an *exempt person*. Otherwise, the *person* commits a criminal offence and certain agreements may be unenforceable. *AUTH 2.2* (Introduction) contains further *guidance* on these consequences. In order to be *authorised*, a *person* must either:

- (1) hold a *Part IV permission* given by the *FSA* (see *AUTH 1.3* (The Authorisation manual) and *AUTH 3* (Applications for Part IV permission)); or
- (2) qualify for *authorisation* (see *AUTH 5* (Qualifying for authorisation under the Act)), for example if the *person* is an *EEA firm* or a *Treaty firm*.

### **Professional firms**

4.2.2G Certain *professional firms* are allowed to carry on some *regulated activities* without *authorisation* so long as they comply with specified conditions (see *AUTH App 4.14* (Mortgage activities carried on by professional firms)).

### **Questions to be considered to decide if authorisation is required**

4.2.3G A *person* who is concerned to know whether his proposed activities may require *authorisation* will need to consider the following questions (these questions are a summary of the issues to be considered and have been reproduced, in slightly fuller form, in the flowchart in *AUTH App 4.18*):

- (1) will I be carrying on my activities by way of business (see *AUTH* App 4.3.3G (The business test))?
- (2) if so, will my *activities* relate to *regulated mortgage contracts* (see *AUTH* App 4.4 (What is a regulated mortgage contract?))?
- (3) if so, will I be carrying on any of the *regulated mortgage activities* (see *AUTH* App 4.5 (Arranging regulated mortgage contracts) to *AUTH* App 4.9 (Agreeing to carry on a regulated activity))?
- (4) if so, is there the necessary link with the *United Kingdom* (see *AUTH* App 4.11 (Link between activities and the United Kingdom))?
- (5) if so, will any or all of my activities be excluded (see *AUTH* App 4.5 (Arranging regulated mortgage contracts) to *AUTH* App 4.10 (Exclusions applying to more than one regulated activity))?
- (6) if it is not the case that all of my activities are excluded, am I a *professional firm* whose activities are exempted under Part XX of the *Act* (see *AUTH* App 4.14 (Mortgage activities carried on by professional firms))?
- (7) if not, am I exempt as an *appointed representative* (see *AUTH* App 4.12 (Appointed representatives))?
- (8) if not, am I otherwise an *exempt person* (see *AUTH* App 4.13 (Other exemptions))?

If a *person* gets as far as question (8) and the answer to that question is ‘no’, that *person* requires *authorisation* and should refer to *AUTH* 3 (Applications for Part IV permission).

4.2.4G Even if the *person* does not require *authorisation*, he may still require a licence under the Consumer Credit Act 1974 to carry on the activity (see *AUTH* App 4.17 (Interaction with the Consumer Credit Act 1974)).

### **Financial promotion**

4.2.5G An *unauthorised person* who intends to carry on activities connected with mortgages will also need to comply with section 21 of the *Act* (Restrictions on financial promotion). This appendix does not cover *financial promotions* that relate to mortgages. *Persons* should refer to the general *guidance on financial promotion* in Appendix 1 to the Authorisation manual (*AUTH* App 1 (Financial promotion and related activities)) and, in particular, to *AUTH* App 1.17 (Financial promotions concerning agreements for qualifying credit).

### 4.3 Regulated activities related to mortgages

4.3.1G 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 25A(1) (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 (article 61(2) (Regulated mortgage contracts)); and
- (6) *agreeing to carry on* any of the above (article 64 (Agreeing to carry on specified kinds of activity)).

4.3.2G 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 *AUTH* App 4.5 (Arranging regulated mortgage contracts) to *AUTH* App 4.10 (Exclusions applying to more than one regulated activity).

#### The business test

4.3.3G 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 *FSA's* view, however, the difference in the business tests should have little practical effect.

4.3.4G 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 *AUTH* App 4.3.5G) 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 *AUTH* App 4.8.2G); 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’.

4.3.5G Table Summary of which variant of the business test applies to the different *regulated mortgage activities*. This table belongs to *AUTH* App 4.3.4G

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))
<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)

4.3.6G 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.

4.3.7G 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).

4.3.8G 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 or recover the cost of taking them;
- (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*).

4.3.9G 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;
- (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 *AUTH* App 4.3.8G(3) where payment is received for advice).

#### 4.4 What is a regulated mortgage contract?

##### The definition of “regulated mortgage contract”

4.4.1G Article 61(3)(a) of the *Regulated Activities Order* defines a *regulated mortgage contract* as a contract which, at the time it is entered into, satisfies the following conditions:

- (1) the contract is one where a lender provides credit to an individual or trustees (the ‘borrower’);
- (2) the obligation of the borrower to repay is secured by a first legal mortgage on land (other than timeshare accommodation) in the *United Kingdom*; and
- (3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower (or, where trustees are the borrower, by an individual who is a beneficiary of the trust) or by a related person.

*AUTH* App 4.4.2G to *AUTH* App 4.4.9G set out the *FSA*’s understanding of some key concepts contained in Article 61(3)(a).

##### Which borrowers?

- 4.4.2G The condition set out in *AUTH* App 4.4.1G(1) limits the range of borrowers to whom the protections of the mortgage regulation regime apply to individuals and trustees. If a company (which is not acting as a trustee) borrows money for the purpose of funding the company's business, and the loan is secured by a mortgage over the company's property, the mortgage contract is not a *regulated mortgage contract*. So a lender will not carry on a *regulated activity* by entering into that contract, nor will the lender carry on a *regulated activity* if it advises on, arranges or administers that contract. However, if the lender makes a loan for business purposes to an individual sole trader, or (in England and Wales) a partnership, and the loan is secured on the borrower's house or houses, the contract will be a *regulated mortgage contract*.

#### **Date the contract is entered into**

- 4.4.3G In order to meet the definition of a *regulated mortgage contract*, a mortgage contract must meet the conditions set out in *AUTH* App 4.4.1G(1) to (3) at the time it was entered into. The effect is that contracts which meet those conditions at that time remain *regulated mortgage contracts* throughout their remaining term, even if there are periods of time when some or all of the conditions are not satisfied. Conversely, contracts that do not start out as *regulated mortgage contracts* cannot subsequently become so, even if they later meet all the conditions set out in *AUTH* App 4.4.1G(1) to (3). A *person* that only administers mortgage contracts which did not meet those conditions at the time they were entered into will not, therefore, need *permission* to *administer regulated mortgage contracts*.

- 4.4.4G There may, however, be instances where an existing contract, which was not a *regulated mortgage contract* at the time it was entered into, is replaced as a result of a variation (whether the variation is initiated by the *customer* or by the lender), and the new contract qualifies as a *regulated mortgage contract*. A *person* may therefore need to consider this possibility (which could affect contracts initially entered into before 31 October 2004 as well as subsequent loans) when deciding whether he needs *permission* to carry on any of the *regulated mortgage activities*.

#### **Land in the United Kingdom**

- 4.4.5G The condition set out in *AUTH* App 4.4.1G(2) means that a *regulated mortgage contract* must be secured on land in the *United Kingdom*. Contracts which involve taking security over moveable property therefore cannot be *regulated mortgage contracts*. So a contract secured on a caravan will not be a *regulated mortgage contract*, unless the contract also involves a mortgage over the land on which the caravan stands.

#### **Occupancy requirement**

- 4.4.6G The condition set out in *AUTH* App 4.4.1G(3) means that loans secured on property which is entirely used for business purposes (such as an office block) cannot fall within the definition. However, loans secured on 'mixed use' property could be covered, provided that the borrower (or trust beneficiary, where the borrowers are trustees) or a 'related person' uses at least 40% of the total of the land as or in connection with a dwelling. Loans secured on a six-

floor property, half of which was occupied by the borrower and half let out for business purposes would therefore satisfy the definition. (Article 61(4)(b) makes it clear that ‘land’, in the context of a multi-storey building, means the aggregate of the floor area of each of the storeys.)

4.4.7G The expression ‘as or in connection with a dwelling’ set out in *AUTH* App 4.4.1G(3) means that loans to buy a small house with a large garden would in general be covered. However, if at the time of entering into the contract the intention was for the garden to be used for some other purpose – for example, if it was intended that a third party were to have the use of the garden – the contract would not constitute a *regulated mortgage contract*. Furthermore, the *FSA* would not regard a loan to purchase farmland and a farmhouse as constituting a *regulated mortgage contract* (where the farmhouse and garden amount to less than 40% of the land area), since it does not appear that the land could properly be said to be used ‘in connection with’ the farmhouse. The presence of the farmhouse is unconnected with the use to which the farmland is put (in contrast to a residential property’s garden, which would have no existence independent of the property).

4.4.8G The requirement that at least 40% of the land area be used as or in connection with a dwelling means that ‘buy to let’ loans secured on the property to be let are excluded, unless the lessee is a ‘related person’ to the borrower. Even if the borrower subsequently takes possession of the property, the loan will still not become a *regulated mortgage contract*, as the conditions set out in *AUTH* App 4.4.1G(1) to (3) were not satisfied at the outset of the contract (see *AUTH* App 4.4.3G).

4.4.9G ‘Related person’ is defined in article 61(4)(c) of the *Regulated Activities Order* as meaning the borrower’s spouse, parents, grandparents, siblings, children and grandchildren. An unmarried partner of the borrower whose relationship with the borrower has the characteristics of the relationship between a husband and wife is also included; this can include a person of the same sex as the borrower. Stepchildren, however, would seem to be excluded.

#### **Purpose of the loan is irrelevant**

4.4.10G The definition of *regulated mortgage contract* contains no reference to the purpose for which the loan is being made. So, in addition to loans made to individuals to purchase residential property, the definition is wide enough to cover other loans secured on land, such as loans to consolidate debts, or to enable the borrower to purchase other goods and services.

#### **Type of lending**

4.4.11G The definition of *regulated mortgage contract* also covers a variety of types of product. Apart from the normal mortgage loan for the purchase of property, the definition also includes other types of secured loan, such as a secured overdraft facility, a secured bridging loan, a secured credit card facility, and so-called ‘equity release loans’ (defined as *regulated lifetime mortgage contracts* in this *guidance*) under which the borrower (usually an older person) takes out a loan where repayment of the capital (and in some cases the

interest) is not required until the property is sold, usually on the death of the borrower.

4.4.12G A number of products, however, are excluded from the definition, such as:

- (1) loans secured by a second or subsequent charge (as the lender does not have a first charge);
- (2) loans secured on commercial premises (as the borrower will not be using the land as or in connection with a dwelling);
- (3) so-called 'home reversion schemes', under which a property owner (usually an older person) sells some or all of his interest in the property in return for a lump sum (usually a proportion of the value of the property sold) and a right to reside at the property for the rest of his life.

#### **Regulated mortgage contracts and contract variations**

4.4.13G The effect of the *Regulated Activities Order* is that mortgage contracts which are varied can fall into one of the following categories:

- (1) a contract that was entered into before 31 October 2004, and that is subsequently varied after that date so that it satisfies the conditions set out in *AUTH* App 4.4.1G(1) to (3), will not be a *regulated mortgage contract* (because it was not a *regulated mortgage contract* at the time it was entered into);
- (2) a contract that was originally entered into before 31 October 2004, but is subsequently changed after that date such that a new contract is entered into, will be a *regulated mortgage contract* (provided, of course, that it meets the definition in the *Regulated Activities Order*); and
- (3) a *regulated mortgage contract* that was originally entered into after 31 October 2004, and which is subsequently varied by, for example, making a further advance, will remain a *regulated mortgage contract*.

4.4.14G It is possible for more than one mortgage contract to be secured by the same (first) charge. The first contract might be entered into before 31 October 2004 (and therefore not be a *regulated mortgage contract*) and a second contract entered into after 31 October 2004 (and be a *regulated mortgage contract*).

### **4.5 Arranging regulated mortgage contracts**

#### **Definition of the regulated activities involving arranging**

4.5.1G Article 25A of the *Regulated Activities Order* describes two types of *regulated activities* concerned with *arranging regulated mortgage contracts*. These are:

- (1) making arrangements for another *person* to:
  - (a) enter into a *regulated mortgage contract* as borrower; or

- (b) vary the terms of a *regulated mortgage contract* entered into by him as borrower after 31 October 2004 in such a way as to vary his 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.

4.5.2G The first activity (article 25A(1)) 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 *AUTH App 4.5.4G*).
- (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 *AUTH App 4.5.10G*) 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 *AUTH App 4.15* (Mortgage activities carried on by ‘packagers’)).
- (4) *AUTH App 4.6.2G* contains examples of variations that are, in the *FSA’s* view, within the definition of *advising on regulated mortgage contracts* and would also be covered by article 25A(1) arrangements.

4.5.3G 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) ) 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 *AUTH App 4.5.10G* 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 *AUTH App 4.5.5G* and *AUTH App 4.5.6G*).

**Exclusion: article 25A(1) arrangements not causing a deal**

4.5.4G 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 *FSA’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.

### **Exclusion: article 25A(2) arrangements enabling parties to communicate**

4.5.5G 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 25A(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*).

4.5.6G In the *FSA'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 *AUTH App 1.32.6G to AUTH App 1.32.11G*.

### **Exclusion: article 25A(1) and (2) arranging of contracts to which the arranger is a party**

4.5.7G 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 *FSA's* rules on *arranging regulated mortgage contracts*, however, do apply to direct sales.

### **Exclusion: article 25A(1) and (2) arrangements with or through authorised persons**

4.5.8G 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) 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 *FSA's* view, means that it must be paid over to, or treated as belonging to and held to the order of, the borrower).

**Exclusion: article 25A(1) and (2) arrangements made in the course of administration by authorised person**

4.5.9G Article 29A of the *Regulated Activities Order* excludes from both article 25A(1) and (2) 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 *AUTH* App 4.8.4G).

**Exclusion: article 25A(2) arrangements and introducing**

4.5.10G 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 *AUTH* App 4.5.2G).

4.5.11G 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 *FSA*'s register at [www.fsa.gov.uk](http://www.fsa.gov.uk);
- (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 *FSA*'s register at [www.fsa.gov.uk](http://www.fsa.gov.uk); the *FSA* 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;
- (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).

4.5.12G 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 *AUTH* App 4.5.14G.

- 4.5.13G In the *FSA'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 borrower 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
- 4.5.14G 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.
- 4.5.15G In the *FSA's* view, details of fees or commission referred to in *AUTH* App. 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.
- 4.5.16G In the *FSA's* view, the information condition in *AUTH* App. 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.
- 4.5.17G The *FSA* 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.

- 4.5.18G 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 introductions are 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

4.5.19G 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 *AUTH* App 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 *AUTH* App 4.11 (Link between activities and the United Kingdom).

## 4.6 Advising on regulated mortgage contracts

### Definition of ‘advising on regulated mortgage contracts’

4.6.1G 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 in such a way as to vary the borrower’s obligations under the contract.

4.6.2G In the *FSA'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, 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 *AUTH* App 4.4.4G and *AUTH* App 4.4.13G(2)). In that case, giving the advice would be a *regulated activity*.

4.6.3G For advice to fall within article 53A as set out in *AUTH* App 4.6.1G 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.

4.6.4G Each of these aspects is considered in greater detail in *AUTH* App 4.6.5G (Advice must relate to a particular regulated mortgage contract) to *AUTH* App 4.6.17G (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 *AUTH* App 4.5);
- (2) the provision of advice or information may involve the *communication* of a *financial promotion* (see *AUTH* App 1 (Financial promotion and related activities); and
- (3) *AUTH* App 1.25 ((Advice must relate to an investment which is a security or contractually based investment) to *AUTH* App 1.29 (Advice must relate to the merits (of buying or selling a particular investment))

will be relevant to any *person* who may be advising on other forms of investment at the same time as he advises 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**

4.6.5G 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 particular *regulated mortgage contracts*). The question is whether a recommendation is made to a *customer* which either explicitly or implicitly steers the *customer* to a particular *regulated mortgage contract* because of its features, such as length or type of interest rate or any other essential feature.

4.6.6G Advice would not relate to a particular contract if it consisted of a recommendation that a *person* should take out a mortgage with ABC building society without (expressly or by implication) specifying what kind of mortgage, or if it did not identify any particular lender. *AUTH* App 4.6.7G identifies several typical recommendations and indicates whether they will be regulated as advice under article 53A.

4.6.7G Table Typical recommendations and whether they will be regulated as advice under article 53A of the Regulated Activities Order

This table belongs to *AUTH* App 4.6.5G

<b>Regulated or not?</b>	
I recommend you take out the ABC Building Society 2 year fixed rate mortgage at 5%.	Yes. This is advice which steers the borrower in the direction of 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 which steers the borrower away from 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 which steers the borrower in the direction of more than one particular mortgage which the borrower could enter into.
I recommend you take out (or do not take	This will depend on the

<p>out) an ABC Building Society fixed rate mortgage.</p>	<p>circumstances. If, for example, the society only offers one such mortgage, this would be a recommendation intended implicitly to steer the borrower in the direction of that particular mortgage which the borrower could enter into and therefore would be advice.</p>
<p>I suggest you take out (or do not take out) a mortgage with ABC Building Society.</p>	<p>No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into. However, if the society only offers one mortgage, this would be a recommendation intended implicitly to steer the borrower in the direction of that particular mortgage which the borrower could enter into and therefore would be advice.</p>
<p>I suggest you change (or do not change) your current mortgage from a variable rate to a fixed rate.</p>	<p>No in respect of the advice about rate type, as this does not steer the borrower in the direction of a particular mortgage which the borrower could enter into.</p> <p>Yes in respect of the advice about varying the terms of the particular mortgage that the borrower had already entered into.</p>
<p>I suggest you take out (or do not take out) a variable rate mortgage.</p>	<p>No. This is not advice which steers the borrower in the direction of a particular mortgage which the borrower could enter into.</p>
<p>I recommend you take out (or do not take</p>	<p>No. This is not advice which</p>

out) a mortgage.	steers the borrower in the direction of 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 does not steer the borrower in the direction of a particular mortgage that he 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 off-set mortgage. There are a growing number of lenders offering both.	No. This is an example of generic advice

4.6.8G Generic or general advice will not fall under article 53A. Examples of generic advice are shown in *AUTH* App 4.6.7G.

4.6.9G In the *FSA's* view, guiding a *person* through scripted questions or a decision tree should not, of itself, involve advice within the meaning of article 53A (it should be generic advice). But the combination of advice, which in isolation may properly be considered generic, with the identification of a particular or several particular *regulated mortgage contracts* may well, in the *FSA's* view, cause the *person* to be *advising on regulated mortgage contracts*; the *FSA* considers that it is necessary to look at the process as a whole; this is considered in more detail, in the context of scripted questioning, in *AUTH* App 4.6.22G (Scripted questioning (including decision trees)).

**Advice given to a person in his capacity as a borrower or potential borrower**

4.6.10G 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 *AUTH* App 4.4.2G (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.

4.6.11G 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.

4.6.12G 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**

4.6.13G In the *FSA's* view, advice requires an element of opinion on the part of the adviser which steers or is intended to steer a borrower or potential borrower in the direction of one or more particular mortgages. In effect, it is a recommendation as to a course of action. Information on the other hand, involves objective statements of facts or figures.

4.6.14G In general terms, simply giving balanced and neutral information without making any comment or value judgement on its relevance to decisions which a borrower may make is not advice.

4.6.15G 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) the production of scripted questions for the borrower to use in order to exclude options that would fail to meet his requirements; such questions may often go on to identify a range of *regulated mortgage contracts* with characteristics that appear to meet the borrower's requirements and to which he might wish to give detailed consideration (scripted questioning is considered in more detail in *AUTH* App 4.6.21G to *AUTH* App 4.6.25G (Scripted questioning (including decision trees)));
- (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.

4.6.16G In the *FSA*'s opinion, however, such information is likely take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation as described in *AUTH* App 4.6.10G. Examples of situations where information provided by a *person* ('P') are likely to take the form of advice are given below.

- (1) P provides information on a selected, rather than balanced and neutral, basis that would tend to influence the decision of the borrower. This may arise where P offers to provide information about mortgages that contain features specified by the borrower but then exercises discretion as to which mortgages to offer to the borrower.
- (2) P, as a result of going through the sales process, discusses the merits of one *regulated mortgage contract* over another, resulting in advice to enter into or not enter into a particular one.

**Advice must relate to the merits (of entering into as borrower or varying)**

4.6.17G Advice under article 53A must relate to the pros or cons of *entering into a regulated mortgage contract* as borrower.

4.6.18G A neutral and balanced 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.

4.6.19G Neither does advice on the merits of using a particular mortgage broker or adviser in his capacity as such amount to advice for the purpose of article 53A. It is not advice on the merits of *entering into* or varying the terms of a *regulated mortgage contract*.

4.6.20G Without explicit or implicit advice 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 the likely meaning of uncertain provisions in a *regulated mortgage contract* or on how to complete an application form.

## Scripted questioning (including decisions trees)

- 4.6.21G Scripted questioning involves using any form of sequenced questions in order to extract information from a *person* with a view to facilitating the selection by that *person* of a mortgage or other product that meet his needs. A decision tree is an example of scripted questioning. The process of going through the questions will usually narrow down the range of options that are available. Scripted questions must be prepared in advance of their actual use.
- 4.6.22G Undertaking the process of scripted questioning gives rise to particular issues concerning advice. These mainly involve two aspects of this *regulated activity*. These are that advice must relate to a particular *regulated mortgage contract* (see *AUTH* App 4.6.5G) and the distinction between information and advice (see *AUTH* App 4.6.13G). Whether or not scripted questioning in any particular case is *advising on regulated mortgage contracts* will depend on all the circumstances. If the process involves identifying one or more particular *regulated mortgage contracts* then, in the *FSA*'s view, 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 his own choice of product which has particular features which the borrower regards as important. The questioner will need to avoid providing any judgement on the suitability of one or more products for the borrower. See also *AUTH* App 4.6.4G for other matters that may be relevant.
- 4.6.23G The potential for variation in the form, content and manner of scripted questioning is considerable, but there are two broad types. The first type involves providing questions and answers which are confined to factual matters (for example, whether a borrower wishes to pay a fixed or variable rate of interest or the size of deposit available). In the *FSA*'s view, this does not of itself amount to *advising on regulated mortgage contracts*, as it involves the provision of information rather than advice. There are various possible scenarios, including the following:
- (1) the questioner may go on to identify several *regulated mortgage contracts* which match features identified by the scripted 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 scripted questioning, give a recommendation or opinion which influences the choice of mortgage contract and, following the scripted questioning, identify one or more particular *regulated mortgage contracts*; the key issue then is whether the advice can be said to relate to a particular *regulated mortgage contract* (see further *AUTH* App 4.6.22G)).

4.6.24G The second type of scripted questioning involves providing questions and answers incorporating opinion, judgement or recommendations (for example, whether a repayment mortgage or interest-only mortgage is a better option or whether interest rates are likely to rise). There are various possible scenarios, including the following:

- (1) the scripted 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*;
- (2) the scripted questioning may lead to the identification of one or more particular *regulated mortgage contracts*; the key issue then is whether the advice can be said to relate to a particular *regulated mortgage contract* (see further *AUTH* App 4.6.22G).

4.6.25G In the scenarios identified in *AUTH* 4.6.23G(3) and *AUTH* 4.6.24G(2), the *FSA* considers that it is necessary to look at the process and outcome of scripted questioning as a whole. It may be that the element of advice incorporated in the questioning may properly be viewed as generic advice if it were considered in isolation. But, although the actual advice may be generic, the process has ended in identifying one or more particular *regulated mortgage contracts*. The combination of the generic advice and the identification of a particular or several particular *regulated mortgage contracts* to which it leads may well, in the *FSA*'s view, cause the questioner to be *advising on regulated mortgage contracts*. Factors that may be relevant in deciding whether the process involves *advising on regulated mortgage contracts* may include:

- (1) any representations made by the questioner at the start of the questioning relating to the service he is 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 scripted 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 scripted questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party (for example, the *FSA*), 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 his particular circumstances.

## **Medium used to give advice**

- 4.6.26G With the exception of periodicals, broadcasts and other news or information services (see *AUTH* App 4.6.30G (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.
- 4.6.27G 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.
- 4.6.28G Taking electronic commerce as an example, the use of electronic decision trees does not present any novel problems. The same principles apply as with a paper version (see *AUTH* App 4.6.21G to *AUTH* App 4.6.25G (Scripted questioning (including decision trees))).
- 4.6.29G Advice in publications, broadcasts and websites is subject to a special regime – see *AUTH* App 4.6.30G (Exclusion: periodical publications, broadcasts and websites) and *AUTH* 7 (Periodical publications, news services and broadcasts: applications for certification).

## **Exclusion: periodical publications, broadcasts and websites**

- 4.6.30G 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 if the principal purpose of any of these is neither to give advice of the kind to which article 53 (Advising on investments) or article 53A applies nor to lead or enable *persons* to:
- (1) acquire or dispose of securities or contractually based investments; or
  - (2) 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 *AUTH* 7 (Periodical publications, news services and broadcasts: applications for certification).

## **Exclusion: advice in the course of administration by authorised person**

- 4.6.31G 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 *AUTH App 4.8.4G*).

### **Other exclusions**

- 4.6.32G 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 *AUTH App 4.10* (Exclusions applying to more than one regulated activity).

## **4.7 Entering into a regulated mortgage contract**

### **Definition of ‘entering into a regulated mortgage contract’**

- 4.7.1G Article 61(1) of the *Regulated Activities Order* makes *entering into a regulated mortgage contract* as lender a *regulated activity*.

### **Exclusions**

- 4.7.2G The *Regulated Activities Order* contains an exclusion which has the effect of preventing certain activities of trustees, nominees and personal representatives from amounting to *entering into a regulated mortgage contract*. This is referred to in *AUTH App 4.10* (Exclusions applying to more than one regulated activity). There is also an exclusion where both the lender and borrower are overseas, which is referred to in *AUTH App 4.11* (Link between activities and the United Kingdom).

### **Transfer of lending obligations**

- 4.7.3G A *person* who provides credit to a borrower under a *regulated mortgage contract* will *enter into a regulated mortgage contract*, even if the lending obligations under that contract are subsequently transferred to a third party. Consequently, a *person* who acts as a so-called ‘correspondent lender’ in the mortgage market will need to seek *authorisation*.

## **4.8 Administering a regulated mortgage contract**

### **Definition of ‘administering a regulated mortgage contract’**

- 4.8.1G 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.
- 4.8.2G The definition does not include administration of a *regulated mortgage contract* which was not entered into by way of business. See *AUTH App 4.3.3G* 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. See, however, *AUTH App 4.4.4G* and *AUTH App 4.4.13G* 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* after 31 October 2004.

4.8.3G 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**

4.8.4G 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.

4.8.5G This exclusion may be of particular interest to a *special purpose vehicle* which administers *regulated mortgage contracts* transferred to it as part of a *securitisation* transaction.

4.8.6G 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 *FSA* 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 *FSA* would consider whether a *person* has 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 *FSA* 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 *FSA’s guidance*.

#### **Exclusion: administration pursuant to agreement with authorised person**

4.8.7G 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 3.2.4G(1)*, that the *FSA* will continue to hold it responsible for the way in which the administration is carried on.

#### **Other exclusions**

4.8.8G 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*. This is referred to in *AUTH App 4.10* (Exclusions applying to more than one regulated activity). There is also an exclusion where both the administrator and borrower are overseas, which is referred to in *AUTH App 4.11* (Link between activities and the United Kingdom).

#### **4.9 Agreeing to carry on a regulated activity**

4.9.1G Under article 64 of the *Regulated Activities Order* (Agreeing to carry on specified kinds of activity), in addition to the *regulated activities* of *arranging (bringing about)*, *making arrangements with a view to*, *advising on*, *entering into* and *administering regulated mortgage contracts*, agreeing to do any of these things is itself a *regulated activity*. In the *FSA’s* opinion, this activity concerns the entering into of a legally binding agreement to provide the services that it concerns. So a *person* is not carrying on a *regulated activity* involving agreeing merely because he makes an offer to do so.

4.9.2G To the extent that an exclusion applies in relation to a *regulated activity*, then ‘agreeing’ to carry on an activity within the exclusion will not be a *regulated activity*. This is the effect of article 4(3) of the *Regulated Activities Order*.

#### 4.10 Exclusions applying to more than one regulated activity

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

4.10.1G 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*. (*AUTH* App 4.14 contains further *guidance* on mortgage activities carried on by *professional firms*.)

4.10.2G *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.

4.10.3G In the *FSA*’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.

4.10.4G Situations where this exclusion might apply, in the *FSA*’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*.

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

4.10.5G 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*.

4.10.6G 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.

4.10.7G 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.

4.10.8G 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.

## 4.11 Link between activities and the United Kingdom

### Introduction

4.11.1G Section 19 of the *Act* (The general prohibition) provides that the requirement to be *authorised* under the *Act* only applies in relation to *regulated activities* which are carried on ‘in the *United Kingdom*’. In many cases, it will be quite straightforward to identify where an activity is carried on. But when there is a cross-border element, for example because a borrower is outside the *United Kingdom* or because some other element of the activity happens outside the *United Kingdom*, the question may arise as to where the activity is carried on. This section describes the legislation that is relevant to this question and gives the *FSA*’s views on various scenarios.

4.11.2G Even if a *person* concludes that he is not carrying on a *regulated activity* in the *United Kingdom*, he will need to ensure that he does not contravene other provisions of the *Act* that apply to *unauthorised persons*. These include the controls on *financial promotion* (section 21 (Financial promotion) of the *Act*) (see *AUTH* App 1 (Financial promotion and related activities)), and on giving the impression that a *person* is *authorised* (section 24 (False claims to be authorised or exempt)).

### Legislative provisions: definition of “regulated mortgage contract”

4.11.3G A contract is only a *regulated mortgage contract* if the land is in the *United Kingdom* (see *AUTH* App 4.4.5G (Land in the United Kingdom)).

### Legislative provisions: section 418 of the Act

4.11.4G Section 418 of the *Act* deals with the carrying on of *regulated activities* in the *United Kingdom*. It extends the meaning that ‘carry on a *regulated activity* in the *United Kingdom*’ would ordinarily have by setting out additional cases. The *Act* states that in these cases a *person* who is carrying on a *regulated activity* but would not otherwise be regarded as carrying on the activity in the *United Kingdom* is, for the purposes of the *Act*, to be regarded as carrying on the activity in the *United Kingdom*.

4.11.5G For the purposes of *regulated mortgage activities*, sections 418(2), (4), (5), (5A) and (6) are relevant, as follows:

- (1) Section 418(2) refers to a case where a *UK-based person* carries on a *regulated activity* in another *EEA State* in the exercise of rights under a *Single Market Directive*. The only *Single Market Directive* which is relevant to mortgages is the *Banking Consolidation Directive*. In the *FSA*’s view, the *regulated mortgage activities* of *entering into* or *administering a regulated mortgage contract* or agreeing to carry on either of these activities may be carried on by a *credit institution* using the passport under that directive.
- (2) Section 418(4) refers to the case where a *UK-based person* carries on a *regulated activity* and the day-to-day management of the activity is the responsibility of an establishment in the *United Kingdom*.

- (3) Section 418(5) refers to the case where a *regulated activity* is carried on by a *person* who is not based in the *United Kingdom* but is carried on from an establishment maintained by him in the *United Kingdom*.
- (4) Section 418(5A) refers to the case where an *electronic commerce activity* is carried on with or for a *person* in an *EEA State* from an *establishment* in the *United Kingdom*. See further *AUTH App 4.11.21G* (E-Commerce Directive); and
- (5) Section 418(6) makes it clear that for the purposes of sections 418(2) to (5A), it is irrelevant where the *person* with whom the activity is carried on is situated.

#### **Legislative provisions: overseas persons exclusion**

4.11.6G The exclusions in article 72(5A) to (5F) of the *Regulated Activities Order* (Overseas persons) provide that an *overseas person* does not carry on the *regulated activities* of:

- (1) *arranging (bringing about) or making arrangements with view to a regulated mortgage contract;*
- (2) *entering into a regulated mortgage contract; or*
- (3) *administering a regulated mortgage contract;*

if the borrower (and each of them, if more than one) is an individual and is normally resident overseas. In the case of arranging a variation of, or administration of, an existing *regulated mortgage contract*, each borrower must be an individual who was normally resident overseas when he entered into the contract. In the *FSA's* view, normal residence for the purposes of this exclusion envisages physical presence with a degree of continuity, making allowance for occasional temporary absences (e.g. holiday). An *overseas person* under article 3 of the *Regulated Activities Order* (Interpretation) is a *person* who carries on certain *regulated activities* albeit not from a permanent place of business maintained by him in the *United Kingdom*.

4.11.7G An *overseas person* might advise a *person* in the *United Kingdom* on an *endowment assurance* at the same time as advising on a *regulated mortgage contract*. If so, whilst the *overseas person* exclusion in article 72(5) will apply in relation to the advice on the *endowment assurance*, there will be no 'overseas persons exclusion' for the advice on the *regulated mortgage contract*.

#### **Territorial scenarios: general**

4.11.8G The *FSA's* view of the effect of the *Act* and *Regulated Activities Order* in various territorial scenarios is set out in the remainder of this section. In those scenarios:

- (1) the term "service provider" is used to describe a *person* carrying on any of the *regulated mortgage activities*;

- (2) the term “borrower” refers to a borrower who is an individual and not a trustee; the position of a borrower acting as a trustee is not considered; and
- (3) it is assumed that the activity is not an *electronic commerce activity* (as to which, see AUTH App 4.11.21G (E-Commerce Directive)).

AUTH App 4.11.9G contains a simplified tabular summary of those views, which should be used only in conjunction with the more detailed analysis.

4.11.9G Table Simplified summary of the territorial scope of the *regulated mortgage activities*, to be read in conjunction with the rest of this section. This table belongs to AUTH App 4.11.8G

		Individual borrower resident and located:	
		in the UK	outside the UK
Service provider carrying on regulated activity from establishment:	in the UK	✓	✓
	outside the UK	✓	✗

✓= *authorisation* or exemption required

✗= *authorisation* or exemption not required

### Service provider in the United Kingdom

4.11.10G Where a *person* is carrying on any of the *regulated mortgage activities* from an establishment maintained by him in the *United Kingdom*, that *person* will be ‘carrying on a *regulated activity* in the *United Kingdom*’. The location and residence of the borrower is irrelevant. That is the practical effect of sections 418(4), (5) and (6) of the *Act*.

4.11.11G There may also be situations where a lender, who does not maintain an *establishment* in the *United Kingdom*, provides services in the *United Kingdom*. For instance, a lender might attend a property exhibition in the *United Kingdom* at which he sets up a loan with a borrower. A lender might also attend the offices of its UK-based lawyers, or appoint them as its agent, to enter into a contract with a borrower. In these cases, the overseas lender would only be carrying on a *regulated activity* in the *United Kingdom* if he subsequently *enters into a regulated mortgage contract* with a UK resident. This is because arrangements made with borrowers at the exhibition would be subject to the exclusion in article 28 of the *Regulated Activities Order* (Arranging transactions to which the arranger is a party) (see AUTH 4.5.7G). As regards *entering into a regulated mortgage contract* with a borrower resident overseas, this would be subject to the *overseas persons* exclusion.

### Service provider overseas: general

4.11.12G If a service provider is overseas, the question of whether that *person* is carrying on a *regulated activity* in the *United Kingdom* will depend upon:

- (1) the type of *regulated activity* being carried on;
- (2) section 418 of the *Act*;
- (3) the residence and location of the borrower;
- (4) the application of the *overseas persons* exclusion in article 72(5A) to (5F) of the *Regulated Activities Order*; and
- (5) whether the service provider is carrying on an *electronic commerce activity*.

The factors in (1), (3) and (4) are considered in relation to each *regulated activity* in *AUTH App 4.11.13G* to *AUTH App 4.11.20G*. The factor in (5) is considered in *AUTH App 4.11.21G*.

### **Service provider overseas: arranging regulated mortgage contracts**

4.11.13G When a *person* is *arranging (bringing about) regulated mortgage contracts* or *making arrangements with a view to regulated mortgage contracts* from overseas, the question of whether he will be carrying on *regulated activities* in the *United Kingdom* will depend on the relevant circumstances. In the *FSA's* view factors to consider include:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation only applies if the land is in the *United Kingdom*;
- (2) the *overseas persons* exclusion in article 72(5A) to (5C); and
- (3) where the arrangements are in fact made.

4.11.14G In the *FSA's* view:

- (1) if the borrower is *normally resident* in the *United Kingdom*, the clear territorial limitation in the definition of *regulated mortgage contract* carries most weight in determining where regulation should apply; it is likely that the arranger will be carrying on *regulated activities* in the *United Kingdom*;
- (2) if the borrower is *normally resident* overseas, the arrangements are excluded by the *overseas persons* exclusion.

In the case of *arranging (bringing about) regulated mortgage contracts*, the *normal residence* of the borrower at the time the arrangements are made is the determining factor, except in the case of *arranging (bringing about) a variation of a contract*, in which case it is the *normal residence* of the borrower at the time that the *regulated mortgage contract* was entered into. In the case of *making arrangements with a view to regulated mortgage contracts*, the *normal residence* of the borrower at the time he participates in the arrangements is the determining factor.

### **Service provider overseas: advising on regulated mortgage contracts**

4.11.15G In the *FSA's* view, *advising on regulated mortgage contracts* is carried on where the borrower receives the advice. Accordingly:

- (1) if the borrower is located in the *United Kingdom*, a *person* advising that borrower on *regulated mortgage contracts* is carrying on a *regulated activity* in the *United Kingdom*; but
- (2) if the service provider and borrower are both located overseas, the *regulated activity* is not carried on in the *United Kingdom*.

### **Service provider overseas: entering into a regulated mortgage contract**

4.11.16G The effect of article 72(5D) of the *Regulated Activities Order* is that an *overseas person* does not carry on the *regulated activity* of *entering into a regulated mortgage contract* if the borrower is resident overseas at the time the contract is entered into.

4.11.17G In the *FSA's* view, in circumstances other than those excluded by article 72(5D) of the *Regulated Activities Order*, an overseas lender is likely to carry on the *regulated activity* of *entering into regulated mortgage contracts* in the *United Kingdom*. This is because of:

- (1) the territorial limitation in the definition of *regulated mortgage contract* so that regulation applies only if the land is in the *United Kingdom*;
- (2) the general principle and practice that contracts relating to land are usually governed by the law of the place where the land is situated;
- (3) practical issues of conveyancing; a lender is likely to use the services of a solicitor or licensed conveyancer operating from the *United Kingdom*, who enters into the *regulated mortgage contract* as agent for the lender in the *United Kingdom*; and
- (4) the existence of the *overseas persons* exclusion in article 72(5D).

### **Service provider overseas: administering a regulated mortgage contract**

4.11.18G The effect of article 72(5E) and (5F) of the *Regulated Activities Order* is that an *overseas person* who administers a *regulated mortgage contract*, where the borrower was resident overseas at the time that the contract was entered into, does not carry on the *regulated activity* of *administering a regulated mortgage contract*.

4.11.19G In the *FSA's* view, in circumstances other than those excluded by article 72(5E) of the *Regulated Activities Order*, an overseas administrator is likely to carry on the *regulated activity* of *administering a regulated mortgage contract* in the *United Kingdom*. This is because:

- (1) the territorial limitation in the definition of *regulated mortgage contract* means that regulation applies only if the land is in the *United Kingdom*;
- (2) when administrators notify borrowers resident in the *United Kingdom* of matters pursuant to a *regulated mortgage contract*, such notification is likely to be carried on in the *United Kingdom*;
- (3) the steps involved in collecting or recovering payments will generally include giving notice to the borrower at his *UK* address;
- (4) legal action to recover sums due under *regulated mortgage contracts* will in many cases require proceedings before courts in the *United Kingdom*, either to enforce *regulated mortgage contracts* subject to the jurisdiction of these courts or to register and enforce judgements obtained elsewhere, in the case of contracts subject to non-*UK* jurisdictions; and
- (5) of the existence of the exclusion in article 72(5E) (Overseas persons).

**Service provider: agreeing to carry on a regulated activity**

4.11.20G In most cases, there will be no preliminary agreement to enter into a *regulated mortgage contract* in advance of entering into the contract itself. Moreover, the exclusions relevant to a *regulated activity* are taken into account to determine whether a *person* is *agreeing to carry on* that *regulated activity*. So, for example, agreeing to arrange *regulated mortgage contracts* in cases where borrower and service provider are overseas, would not be *regulated activities* because the activities themselves are outside the scope of regulation. Otherwise, in the *FSA's* view, the issue of where agreeing to carry on a *regulated activity* takes place will depend on such factors as a contractual analysis of where the agreement is entered into, including where appropriate the general position at common law (see, for example, *AUTH* App 4.11.17).

**E-Commerce Directive**

4.11.21G The *E-Commerce Directive* removes restrictions on the cross-border provision of services by electronic means, introducing a *country of origin* approach to regulation. This requires *EEA States* to impose their requirements on the outward provision of such services and to lift them from inward providers. The *E-Commerce Directive* contains only a few exceptions, termed derogations, from this principle. The *E-Commerce Directive* defines an e-commerce service (termed an *information society service*) as any service, normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the service. So, for example, it includes services provided over the internet, by solicited e-mail, and interactive digital television. Further *guidance* is contained in the *FSA's* E-Commerce Directive sourcebook (*ECO*).

## **Distance marketing directive**

- 4.11.22G The *FSA* will be responsible for implementing the *Distance Marketing Directive* for those *firms* and activities it regulates. The *FSA* and the Treasury agree that the *Distance Marketing Directive* is intended to operate on a *country of origin* basis, except where a firm is marketing into the *UK* from an establishment in an *EEA State* which has not implemented the Directive.

## **4.12 Appointed representatives**

### **What is an appointed representative?**

- 4.12.1G Section 39 of the *Act* makes provision exempting *appointed representatives* from the need to obtain *authorisation*. An *appointed representative* is a *person* who is a party to a contract with an *authorised person* which permits or requires the *appointed representative* to carry on certain regulated activities. *SUP 12* (Appointed representatives) contains *guidance* relating to *appointed representatives*.

- 4.12.2G A *person* who is an *authorised person* cannot be an *appointed representative* (see section 39(1) of the *Act* (Exemption of appointed representatives)).

### **Business for which an appointed representative is exempt**

- 4.12.3G An *appointed representative* can carry on only those *regulated activities* which are specified in the *Appointed Representatives Regulations*. *Arranging (bringing about), making arrangements with a view to and advising on regulated mortgage contracts* (as well as *agreeing to do so*) will be included in those regulations with effect from 31 October 2004.

### **Persons who are not already appointed representatives**

- 4.12.4G A *person* who is not already an *appointed representative* for *designated investment business* activities, and who may wish to become one in relation to the *regulated activities* of *arranging (bringing about), making arrangements with a view to or advising on regulated mortgage contracts*, can do so. He must be appointed under a written contract by an *authorised person*, who has *permission* to carry on those *regulated activities*, and who accepts responsibility for the *appointed representative's* actions when acting for him. *SUP 12.4* (What must a firm do when it appoints an appointed representative?) and *SUP 12.5* (Contracts: required terms) set out the detailed requirements that must be met for an appointment to be made.

### **Persons who are already appointed representatives**

- 4.12.5G Where a *person* is already an *appointed representative* (in relation to any non-mortgage activities) and he proposes to carry on, with effect from 31 October 2004, any *regulated mortgage activities*, he will need to consider the following matters.

- (1) He must become *authorised* if his proposed mortgage activities include *either entering into a regulated mortgage contract or administering a regulated mortgage contract*. These activities may not be carried on

by *appointed representatives* and the *Act* does not permit any *person* to be exempt for some activities and *authorised* for others. Once *authorised*, the *person* may only carry on the *regulated activities* that are covered by his *permission*. He will therefore need to apply for a *permission* to cover all the *regulated activities* that he proposes to carry on after 31 October 2004.

- (2) If he proposes to carry on the *regulated activities* of *arranging (bringing about), making arrangements with a view to or advising on regulated mortgage contracts*, he may be able to do so as an *appointed representative*. But this will depend on a number of issues:
  - (a) he will need to be appointed by an *authorised person* who is prepared to accept responsibility for the *appointed representative's regulated mortgage activities* when acting for him. The *authorised person* must have *permission* to carry on these *regulated mortgage activities*.
  - (b) if these *regulated mortgage activities* are to be carried on for the same *authorised person* who has already appointed him for his non-mortgage *regulated activities*, the contract between them will need to be amended to reflect the additional activities. Other amendments to the contract may be required.
  - (c) it may be that these *regulated mortgage activities* are to be carried on for a different *person*.
  - (d) if the *regulated mortgage activities* relating to *arranging* are to be limited to making introductions, he may be able to operate within the exclusion for introducers described at *AUTH App 4.5.10G*. This is different from the exclusions for introductions relating to *securities* and *contractually based investments*, which are described at *AUTH App 1.33*.

#### **4.13 Other exemptions**

4.13.1G Certain named persons are exempted by the *Exemption Order* from the need to obtain *authorisation*. The following bodies are exempt in relation to carrying on by them of any of the *regulated mortgage activities*:

- (1) local authorities (paragraph 47 of the Schedule to the *Exemption Order*) but not their *subsidiaries*;
- (2) registered social landlords in England and Wales within the meaning of Part I of the Housing Act 1996 (paragraph 48(a) of the Schedule to the *Exemption Order*) but not their *subsidiaries*;
- (3) housing associations or other bodies corporate registered by Scottish Homes (paragraph 48(b) of the Schedule to the *Exemption Order*) but not their *subsidiaries*;

- (4) The Housing Corporation (paragraph 48(c) of the Schedule to the *Exemption Order*);
- (5) Scottish Homes (paragraph 48(d) of the Schedule to the *Exemption Order*); and
- (6) The Northern Ireland Housing Executive (paragraph 48(e) of the Schedule to the *Exemption Order*).

#### **4.14 Mortgage activities carried on by professional firms**

##### **Introduction**

4.14.1G *Professional firms* (broadly, firms of solicitors, accountants and actuaries) may carry on *regulated mortgage activities* in the course of their usual professional activities. The *regulated activities* of *advising on, arranging (bringing about), making arrangements with a view to and administering regulated mortgage contracts* are those most likely to be relevant.

4.14.2G In the *FSA's* view, the following exclusions are likely, in many cases, to exclude the normal activities of *professional firms* from amounting to *regulated mortgage activities*:

- (1) article 67 of the *Regulated Activities Order* (Activities carried on in the course of a profession or non-investment business), which applies in relation to the advising and arranging activities (see *AUTH* App 4.10.1G);
- (2) article 66 of the *Regulated Activities Order* (Trustees, nominees and personal representatives) which applies in relation to each of the *regulated mortgage activities* (see *AUTH* App 4.10.5G); and
- (3) article 63 of the *Regulated Activities Order* (Administration pursuant to agreement with authorised person) which applies in relation to *administering a regulated mortgage contract* (see *AUTH* App 4.8.7G); in the *FSA's* view, this would exclude steps taken by a solicitor to recover payments due under a *regulated mortgage contract* if his instructions come from an *authorised person* with *permission to administer a regulated mortgage contract*.

4.14.3G In addition, a *professional firm* may, in certain circumstances, be able to use the *Part XX exemption* to avoid any need for *authorisation*. *PROF 2* (Status of exempt professional firm) contains general *guidance* on the *Part XX exemption*. In particular, *PROF 2.1.9G* explains that the Treasury have specified certain *regulated activities* to which the *Part XX exemption* cannot apply in the Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities Order 2001 ("the Non-Exempt Activities Order")). *AUTH* App 4.14.4G to *AUTH* 4.14.6G explain which of the *regulated activities* relating to *regulated mortgage contracts* have been so specified.

## **Part XX exemption: arranging regulated mortgage contracts**

4.14.4G *Arranging (bringing about) a regulated mortgage contract and making arrangements with a view to a regulated mortgage contract* have not been specified in the Non-Exempt Activities Order. Accordingly, a *professional firm* may carry on these *regulated activities* without *authorisation*, provided the other conditions of the *Part XX exemption* are complied with.

## **Part XX exemption: advising on regulated mortgage contracts**

4.14.5G *Advising on regulated mortgage contracts* has been specified in the Non-Exempt Activities Order. However, a *professional firm* is prevented from using the *Part XX exemption* to *advise on regulated mortgage contracts* only if the advice it gives consists of a recommendation. This will be the case if the recommendation is made to an individual to enter into a *regulated mortgage contract* with a lender who would, in entering into the contract, carry on the *regulated activity* of *entering into a regulated mortgage contract*, irrespective of whether the lender is an *authorised* or *exempt person* or would carry on the activity by way of business. However, a *professional firm* is allowed to give advice that involves a recommendation of this kind provided the advice endorses a corresponding recommendation given to the borrower by an *authorised person* who has *permission* to *advise on regulated mortgage contracts* or an *exempt person* whose exemption covers that activity.

## **Part XX exemption: entering into and administering a regulated mortgage contract**

4.14.6G *Entering into a regulated mortgage contract and administering a regulated mortgage contract* have both been specified in the Non-Exempt Activities Order. As an exception, a *professional firm* is allowed under the *Part XX exemption* to carry on these *regulated activities* if the firm is acting as a trustee or personal representative. But this is provided that the borrower is a beneficiary under the trust, will or intestacy.

## **4.15 Mortgage activities carried on by ‘packagers’**

### **Introduction**

4.15.1G The term ‘packagers’ is used variously to describe a range of intermediaries and their different activities in the mortgage process. Depending on the nature of their activities, these intermediaries may carry on *regulated mortgage activities*. The regulated activities likely to be of most relevance are *arranging (bringing about)* or *making arrangements with a view to regulated mortgage contracts* (described in more detail at *AUTH App 4.5*) and *advising on regulated mortgage contracts* (described in more detail at *AUTH App 4.6*). It is important to note that it is the nature of the relevant activities and not an entity’s own description of itself or its activities that will determine the need for *authorisation*. This section describes the activities of various types of ‘packagers’.

### **Mortgage Clubs (sometimes called mortgage wholesalers)**

4.15.2G So-called ‘mortgage clubs’ or ‘wholesalers’ essentially act as a distribution function for lenders, providing information to intermediaries about current deals available from a range of lenders. They provide information (often through an electronic sourcing system) in a way that helps intermediaries search the market effectively and, as such, do not deal directly with individual borrowers. If only engaged in these activities and without direct contact with individual borrowers, in the *FSA’s* view these entities are unlikely to carry on a *regulated mortgage activity* because they will not:

- (1) *arrange (bring about) regulated mortgage contracts*; their involvement is too indirect to bring about the contract;
- (2) *make arrangements with a view to regulated mortgage contracts*; borrowers will not be participating in the arrangements which they make; or
- (3) *advise on regulated mortgage contracts*, because they provide information not advice and the information is, in any event, directed to intermediaries rather than borrowers.

### **Mortgage packaging companies**

4.15.3G So-called ‘mortgage packaging companies’ may undertake certain parts of the mortgage process for lenders on an outsourced basis, ensuring that a complete set of documentation is collated and sent to the lender. This might include receiving application forms from intermediaries, undertaking credit reference checks and instructing a valuer. Other activities might include a product placement service for other intermediaries who provide product advice or recommendations to their clients. In the *FSA’s* view, mortgage packaging companies engaged in these activities are unlikely to be carrying on a *regulated activity* where they have no direct contact or contract with potential borrowers (for the reasons given in *AUTH* App 4.15.2G).

### **Broker packagers (sometimes called ‘intermediary brokers’)**

4.15.4G The term ‘broker packagers’ is typically used to describe intermediaries who either market their services directly to borrowers or who offer other intermediaries a complete mortgage outsourcing service. They are often involved in the sales and advice process, including helping the borrower complete application forms. In the *FSA’s* view, broker packagers carrying on these types of activity in direct contact with the borrower are likely to be carrying on the *regulated activities of arranging (bringing about) and making arrangements with a view to regulated mortgage contracts*. They may also be *advising on regulated mortgage contracts* depending on the circumstances.

## 4.16 Mortgage activities and securitisation

### Introduction

4.16.1G It is common practice in the mortgage industry for the original lender which makes the loan to pass on ownership of the loan to a third party through *securitisation*. *Securitisation* transactions take different forms, but the essence is that the original lender sells the beneficial interest (with or without the legal interest) in a mortgage portfolio to a *special purpose vehicle* ('*SPV*'), which raises finance to pay for the portfolio by selling its own *securities*. The original lender may (or may not) retain the first legal charge on each mortgage in the portfolio. There may also be other parties to the transaction, for example a security trustee to whom the *SPV* in turn charges the portfolio. Invariably, the *SPV* will also appoint either the original lender or a third party to administer the portfolio on its behalf. This section discusses whether, on a typical *securitisation* transaction, a *SPV* (and similarly a security trustee) carries on a *regulated mortgage activity*.

4.16.2G The government's intention behind the regulatory regime for mortgages was "to ensure that, at any one time, it would be possible for each mortgage to be linked to one and only one FSA authorised firm (with mortgage permission) to have the ongoing regulatory responsibility towards consumers" (HM Treasury, Regulating Mortgages, February 2002, paragraph 47). In other words, it should be possible to arrange a *securitisation* transaction so that the *SPV* and other third parties do not carry on *regulated activities*, so long as an *authorised person* (with appropriate *permission*) is involved.

### Entering into a regulated mortgage contract

4.16.3G A *SPV* does not carry on the *regulated activity* of *entering into a regulated mortgage contract* (or *agreeing* to do so), merely by acquiring the legal or beneficial interest in the contract from the original lender, or by providing funding to the original lender. If the contract is subsequently varied, a *SPV* should take care to avoid the original contract being replaced with a new *regulated mortgage contract* (see *AUTH* App 4.4.4G and *AUTH* App 4.4.13G). The original lender is, or course, likely to require *authorisation*.

### Administering, arranging and advising on a regulated mortgage contract

4.16.4G If an *unauthorised SPV* arranges for an *authorised person* with *permission* to *administer a regulated mortgage contract* to administer its *regulated mortgage contracts*, it can avoid carrying on the *regulated activities* of:

- (1) *administering a regulated mortgage contract*, because of the exclusion in article 62 of the *Regulated Activities Order* (described in *AUTH* App 4.8.4G);
- (2) *arranging (bringing about)* or *making arrangements with a view to regulated mortgage contracts*, because any arrangements that may be made by the *authorised person* in administering the contract are excluded, for the *SPV*, by article 29A of the *Regulated Activities Order* (referred to at *AUTH* App 4.5.9G); in addition, making the original

*securitisation* arrangements is unlikely to be a *regulated activity*, as it is unlikely to “bring about” the entering into of the contract and the borrower is unlikely to participate in the arrangements;

- (3) *advising on regulated mortgage contracts*, because any advice given by the *authorised person* in administering the contract is excluded, for the *SPV*, by article 54A of the *Regulated Activities Order* (referred to at *AUTH App 4.6.28G*); and
- (4) *agreeing to carry on* any of the activities in (1) to (3) because agreeing to carry on an activity is only a *regulated activity* if the activity to be carried on would itself be a *regulated activity*.

## 4.17 Interaction with the Consumer Credit Act

### Entering into and administering a regulated mortgage contract

- 4.17.1G Article 90 of the *Regulated Activities Order* essentially carves out *regulated mortgage contracts* from regulation under the Consumer Credit Act 1974 (CCA). Many loans that fall within the *regulated mortgage contract* definition are already exempt from much of the detail required under the CCA.
- 4.17.2G Some loans that will fall within the *regulated mortgage contract* definition are also currently classified as regulated agreements under the CCA. In these cases, the impact of the carve-out in article 90 of the *Regulated Activities Order* is likely to be more significant. In particular, most of the CCA controls in respect of entering into, operation and termination of agreements will not apply. Article 90 also, however, provides that section 126 of the CCA (Enforcement of land mortgages) and other provisions relating to it, apply to agreements which would otherwise be regulated agreements. In the *FSA's* view, it follows that section 126 of the CCA and related provisions including sections 129, 130, 131, 135 and 136 (dealing amongst other things with extension of time and protection of property pending proceedings) will apply to these *regulated mortgage contracts*.
- 4.17.3G *Regulated mortgage contracts* in place at 31 October 2004 which are subject to the CCA will remain subject to that regime and will not be brought within the *FSA's* remit. But there may be instances where a variation of an existing contract amounts to entering into a new *regulated mortgage contract* (see *AUTH App 4.4.4G* and *AUTH App 4.4.13G*).
- 4.17.4G Unsecured loans, as well as loans secured on second charges on property, are not subject to the article 90 carve-out. Many of these loans are currently covered by the CCA and the position will not change.
- 4.17.5G In some cases, lenders may provide a flexible mortgage product comprising both a secured first charge loan and unsecured borrowing, for example credit card facilities. In this example, in addition to considering the need for *authorisation*, the lender will also require a CCA licence in respect of the unsecured lending, even where the product is sold under a single agreement.

## Advising on and arranging a regulated mortgage contract

- 4.17.6G The CCA also regulates *persons* who carry on certain types of ancillary credit business including “credit brokerage”, “debt-adjusting” and “debt-counselling”, as defined by section 145 of the CCA. One aspect of the CCA regime is that a licence is required for these activities. Article 20 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.1) Order 2003 adds new exceptions to section 145 of the CCA in relation to these activities.
- 4.17.7G Article 20(2) amends section 146 of the CCA (Exceptions from section 145) so that it is not “credit brokerage” for a person to introduce an individual seeking to obtain credit if the introduction is made (a) to an *authorised person* who has *permission* to enter as lender into “relevant agreements”; or (b) to a “qualifying broker”, with a view to that individual obtaining credit under a “relevant agreement”.
- 4.17.8G Amended section 146 of the CCA defines “relevant agreement” as meaning a consumer credit agreement secured by a land mortgage, where entering into that agreement as lender is a *regulated activity*. “Qualifying broker” is defined in the same section as meaning a *person* who may effect introductions of the kind mentioned in *AUTH* App 4.17.7G without contravening the *general prohibition* under section 19 of the *Act*. “Credit brokerage” itself includes introducing an individual seeking to obtain credit to finance the acquisition of a dwelling to be occupied by himself or his relatives, to any *person* carrying on a business in the course of which he provides credit secured on land (for full definition see section 145(2) of the CCA).
- 4.17.9G In addition to the provisions of the exception under amended section 146 of the CCA, introducers are referred to the *guidance* in *AUTH* App 4.5.10G dealing with the provisions relating to introducing in the *Regulated Activities Order*.
- 4.17.10G Article 20(2) amends section 146 of the CCA by providing that it is not “debt adjusting” to carry on an activity which would otherwise be “debt adjusting” under section 146(5) of the CCA if (a) the debt in question is due under a “relevant agreement”; and (b) that activity constitutes a *regulated activity*. “Debt adjusting” includes in relation to debts due under consumer credit agreements (a) negotiating with the creditor, on behalf of the debtor, terms for discharge of the debt, or (b) taking over, in return for payments by the debtor, his obligation to discharge a debt, or (c) any similar activity concerned with the liquidation of the debt (see full definition in section 145(5) of the CCA).
- 4.17.11G In addition to the provisions of the exception under amended section 146 of the CCA, debt adjusters and arrangers are referred to the *guidance* in *AUTH* App 4.5 dealing with the provisions relating to arranging and, in particular, *AUTH* App 4.5.1G(1)(b) dealing with varying a *regulated mortgage contract*.
- 4.17.12G Article 20(2) amends section 146 CCA by providing that it is not “debt-counselling” for a *person* to give advice to debtors if (a) the debt in question is due under a “relevant agreement”; and (b) giving that advice constitutes a *regulated activity*. “Debt-counselling” includes the giving of advice to debtors

about the liquidation of debts due under consumer credit agreements (see the full definition in section 145(6) of the CCA).

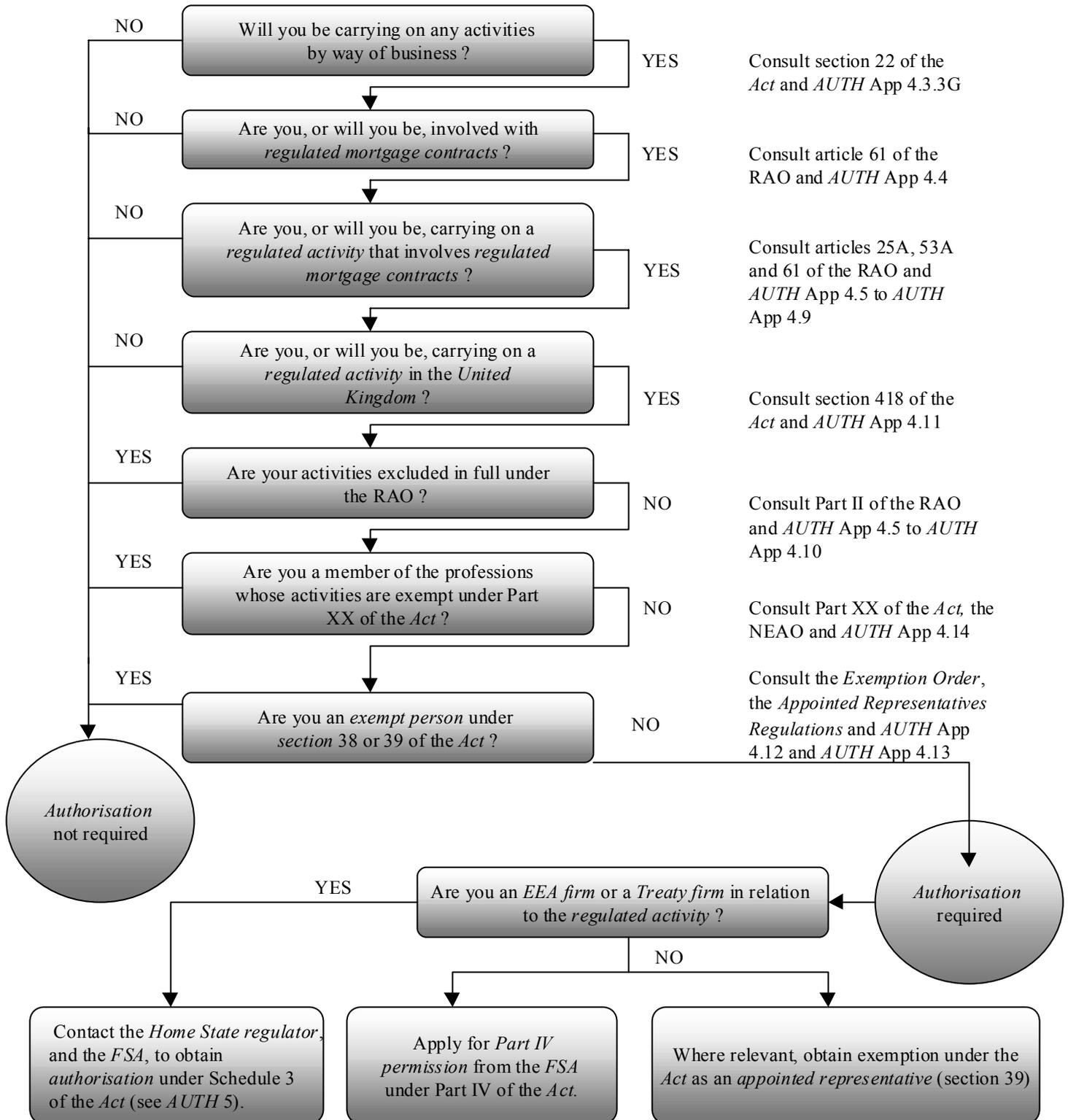
- 4.17.13G In addition to the provisions of the exception under amended section 146 of the CCA, debt counsellors and advisers are referred to the *guidance* in *AUTH* App 4.6 dealing with *advising on regulated mortgage contracts* and, in particular, *AUTH* App 4.6G (Definition of ‘advising on regulated mortgage contracts’) dealing with varying a *regulated mortgage contract*.
- 4.17.14G The CCA's licensing regime will still apply to credit brokers, debt adjusters and debt counsellors in respect of non-regulated mortgages and other loans, as well as to *authorised persons* or *appointed representatives* who carry on ancillary credit business in addition to *regulated activities*. Accordingly, *mortgage intermediaries* requiring *authorisation* may also need to retain their CCA licences.

### **Financial Promotion and advertisements**

- 4.17.15G Articles 90 and 91 of the *Regulated Activities Order* include provisions that have the effect of removing from CCA regulation *financial promotions* about *qualifying credit*. Such promotions will not therefore be subject to Part IV of the CCA, the Consumer Credit (Advertisements) Regulations 1989 and the Consumer Credit (Content of Quotations) and Consumer Credit (Advertisements) (Amendment) Regulations 1999.
- 4.17.16G For more detailed *guidance* concerning the interface between the *financial promotion* regime and the regulation of credit advertisements under the CCA, see *AUTH* App 1.17.17G.

## 4.18 Regulated activities related to mortgages: flowchart

### Do you need authorisation ?



#### Key to Abbreviations :

NEAO = The Financial Services and Markets Act 2001 (Professions) (Non Exempt Activities) Order 2001

RAO = The Financial Services and Markets Act 2001 (Regulated Activities) Order 2001.

## Annex G

### Amendments to SUP

In this Annex, underlining indicates new text and striking through indicates deleted text.

#### 8.2.7G Rules which can be waived (see *SUP* 8.2.6G)

Rules	Section of the Act or other provision under which rules are made	Chapters of the Handbook where such rules appear (Note 1)
...		
Financial promotion rules	Section 145	<i>COB 3, <u>MCOB 3</u>, PRIN and SYSC</i>

## Annex H

### Amendments to DISP

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 1.2.11G In order to comply with *DISP* 1.2.9R(1), a *firm* may include reference to its complaint handling procedures in contractual documentation, for example, (where the *firm* is subject to the requirements in *COB*) in a *terms of business letter, key features document or client agreement*, or (where the *firm* is subject to the requirements in *MCOB*) in an initial disclosure document or *offer document*.

## Annex I

### Amendments to COMP

In this Annex, underlining indicates new text and striking through indicates deleted text. Where an entire new section is inserted, the place it goes is indicated and it is not underlined.

1.3.3G Table: Areas of particular interest to claimants (see *COMP* 1.3.3G). This table belongs to *COMP* 1.3.3G.

<b><i>Q1</i></b>	<b>What do I need to do in order to receive compensation?</b>	
<b><i>A1</i></b>	In order to receive compensation:	
	(1) you must be an <i>eligible claimant</i> ;	<i>COMP</i> 4.2-3
	(2) you must have a <i>protected claim</i> ;	<i>COMP</i> 5.2- <del>56</del>
	(3) you must be claiming against a <i>relevant person</i> ;	<i>COMP</i> 6.2.1R
	...	
<b><i>Q2</i></b>	<b>How much compensation will I be offered?</b>	
<b><u><i>A2</i></u></b>	This depends on whether your <i>protected claim</i> is:	
	(1) a <i>claim</i> for a <i>protected deposit</i> ; or	<i>COMP</i> 5.3
	(2) a <i>claim</i> under a <i>protected contract of insurance</i> ; or	<i>COMP</i> 5.4
	(3) a <i>claim</i> in connection with <i>protected investment business</i> ; <u>or</u>	<i>COMP</i> 5.5
	(4) a <i>claim</i> in connection with <u><i>protected mortgage business</i></u> .	<u><i>COMP</i> 5.6</u>
	Different limits apply to different types of <i>claim</i> .	<i>COMP</i> 10.2.3R
<b><i>Q3</i></b>	<b>How will the FSCS calculate the compensation that is offered to me?</b>	
<b><i>A3</i></b>	Again, this will depend on whether your <i>protected claim</i> is a:	

	(1) a <i>claim</i> for a <i>protected deposit</i> ; or	COMP 12.2.1R, 12.3.1R and 12.4.1R
	(2) a <i>claim</i> under a <i>protected contract of insurance</i> ; or	COMP 12.2.1R, 12.3.2-4R and 12.4.9R – 12.5.2R
	(3) a <i>claim</i> in connection with <i>protected investment business</i> ; <u>or</u>	COMP 12.2.1R, 12.3.5-6R and 12.4.2-8R
	(4) <u>a <i>claim</i> in connection with <i>protected mortgage business</i>.</u>	<u>COMP 12.4.17-19R</u>
	...	

...

#### 4.3.7 G **Protected investment business and protected mortgage business**

There are no exceptions to COMP 4.2.2R for *claims* made in connection with *protected investment business* or *protected mortgage business*.

...

5.2.1R A *protected claim* is:

- (1) a *claim* for a *protected deposit* (see COMP 5.3); or
- (2) a *claim* under a *protected contract of insurance* (see COMP 5.4); or
- (3) a *claim* in connection with *protected investment business* (see COMP 5.5); or
- (4) a *claim* in connection with *protected mortgage business* (see COMP 5.6).

After COMP 5.5, insert the following new section:

#### **5.6 Protected mortgage business**

5.6.1R *Protected mortgage business* is:

- (1) *advising on regulated mortgage contracts*; or
- (2) *arranging (bringing about) regulated mortgage contracts*; or
- (3) *making arrangements with a view to regulated mortgage contracts*; or
- (4) *agreeing to carry on a regulated activity in (1) to (3)*; or

- (5) the activities of a *mortgage lender* which would be *arranging* but for article 28A of the *Regulated Activities Order* (Arranging contracts to which the arranger is a party);

provided that the condition in *COMP 5.6.2R* is satisfied.

5.6.2R *COMP 5.6.1R* applies only if the *protected mortgage business* was carried on by a *relevant person*:

- (1) with a *customer* who was resident in the *United Kingdom*; or
- (2) from an establishment maintained by the *relevant person* (or its *appointed representative*) in the *United Kingdom* with a *customer* who was resident elsewhere in the *EEA*;

at the time the *protected mortgage business* was carried on.

...

6.3.4R For claims arising in connection with *protected investment business* or *protected mortgage business*, the *FSCS* has the additional power to determine that a *relevant person* is *in default* if it is satisfied that a *protected claim* exists, and:

...

8.2.4R For claims made in connection with *protected investment business* or *protected mortgage business*, the *FSCS* may disregard a defence of limitation where the *FSCS* considers that it would be reasonable to do so.

9.2.2R The *FSCS* may postpone paying compensation if:

- (1) ...
- (2) in the case of a *claim* relating to *protected investment business* which is not an *ICD claim* or a *claim relating to protected mortgage business*, the *FSCS* considers that the claimant should first exhaust his rights against the *relevant person* or any third party, or make and pursue an application for compensation to any other *person*; or

....

Add to the table at 10.2.3R:

Type of claim	Level of cover	Maximum payment
<u>protected mortgage business</u>	<u>100% x first £30,000</u>	<u>£48,000</u>
	<u>90% x next £20,000</u>	

After *COMP* 12.3.6R, insert the following new section:

**Protected mortgage business**

12.3.7R For a *claim* made in connection with *protected mortgage business*, the *FSCS* must determine a specific date as the *quantification date*, and this date may be either on, before or after the date of determination of default.

After *COMP* 12.4.16R, insert the following new section:

**Protected mortgage business**

12.4.17R The *FSCS* may pay compensation for any *claim* made in connection with any *protected mortgage business* only to the extent that the *FSCS* considers that the payment of compensation is essential in order to provide the claimant with fair compensation.

12.4.18R The *FSCS* must not pay compensation for any *claim* in connection with *protected mortgage business* to the extent that it relates to or depends on:

- (1) a failure of investment performance to match a guarantee given or representation made; or
- (2) the mere fluctuation in the value of property.

12.4.19R The *FSCS* may decide to reduce the compensation that would otherwise be payable for a *claim* made in connection with *protected mortgage business* if it is satisfied that there is evidence of contributory negligence by the claimant and it would be inequitable for *FSCS* not to take account of that fact.

## Annex J

### Amendments to ECO

In this Annex, underlining indicates new text and striking through indicates deleted text.

- 2.1.2G (3) *ECO 2.2* also extends the territorial scope of *COB 3* (Financial promotion) and *MCOB 3* (Financial promotion) in relation to a *financial promotion* which is an *outgoing electronic commerce communication*, whether or not the recipient is a *consumer*.

#### Financial promotion

- 2.2.3R (1) In relation to a *financial promotion* which is an *outgoing electronic commerce communication*, a *firm* must comply with *COB 3* (Financial promotion) and *MCOB 3* (Financial promotion) as if the *person* to whom the communication is made or directed was in the *United Kingdom*.
- (2) Accordingly, (1) overrides *COB 3.3* (Application: where?) and *MCOB 3.3* (Application: where?).
- (3) But (1) is subject to *ECO 2.2.1R*, which disapplies certain *rules* applicable to *incoming ECA providers* when dealing with *consumers*.

- 2.2.4G The effect of *ECO 2.2.3R* is to apply the whole of *COB 3* and *MCOB 3*, where relevant, to *outgoing electronic commerce communications*, except those provisions of *COB 3* identified in *ECO 2.2.1R*. (See *ECO 2.2.2G* for an explanation of this approach.)

## Annex K

### Amendments to ELM

In this Annex, underlining indicates new text

1.5.2G Table Application of other parts of the Handbook to ELMIs

Block	Module	Application
...		
Block 2 (Business standards)	...	
	Conduct of Business sourcebook ( <i>COB</i> )	...
	...	
	<u>Mortgages: Conduct of Business sourcebook</u> ( <i>MCOB</i> )	Does not apply to an <i>ELMI</i> when <i>issuing e-money</i> .

## Annex L

### Amendments to PROF

In this Annex, underlining indicates new text and striking through indicates deleted text.

5.3.1G The parts of the *Handbook* in which provisions are disapplied or modified in relation to *authorised professional firms* when carrying on *non-mainstream regulated activities* include those described in *PROF 5.3.1AG* to *PROF 5.3.~~78G~~*.

#### Mortgages: Conduct of business sourcebook

5.3.8G *MCOB 1.2.4 R* provides that *MCOB* does not apply to an *authorised professional firm* with respect to its *non-mainstream regulated activities* except for *MCOB 2.2 (Clear, fair and not misleading communication)*, *MCOB 3 (Financial promotion)* and to a limited extent *MCOB 4.4 (Initial disclosure requirements)*.

## Annex M

### Amendments to the Special guide for energy market participants (EMPS)

In this Annex, underlining indicates new text.

1.2.3G Table: Applicability of parts of Handbook to energy market participants  
This table belongs to *EMPS* 1.2.3G

	Parts of Handbook	Applicability to energy market participants
...		
<b>Business Standards</b>	...	
	Conduct of Business sourcebook ( <i>COB</i> )	...
	<u>Mortgages: Conduct of Business sourcebook (<i>MCOB</i>)</u>	
	Market Conduct sourcebook ( <i>MAR</i> )	...
	...	
<b>Regulatory processes</b>	...	

## Annex N

### Amendments to the Special guide for small Friendly societies (FREN)

In this Annex, underlining indicates new text.

1.2.2G Table: Applicability of parts of Handbook to small Friendly societies  
This table belongs to *FREN* 1.2.2G

	Parts of Handbook	Applicability to small friendly societies
...		
<b>Business Standards</b>	...	
	Conduct of Business sourcebook ( <i>COB</i> )	...
	<u>Mortgages: Conduct of Business sourcebook (<i>MCOB</i>)</u>	
	Market conduct sourcebook ( <i>MAR</i> )	...
	...	
<b>Regulatory Processes</b>	...	

## Annex O

### Amendments to the Special guide for oil market participants (OMPS)

In this Annex, underlining indicates new text.

1.2.3G Table: Applicability of parts of Handbook to oil market participants  
This table belongs to *OMPS* 1.2.2G

	Parts of Handbook	Applicability to oil market participants
...		
<b>Business Standards</b>	...	
	Conduct of Business sourcebook ( <i>COB</i> )	...
	<u>Mortgages: Conduct of Business sourcebook (<i>MCOB</i>)</u>	
	Market Conduct sourcebook ( <i>MAR</i> )	...
	...	
<b>Regulatory processes</b>	...	

## Annex P

### Amendments to the Special guide for service companies (SERV)

In this Annex, underlining indicates new text.

1.2.3G Table: Applicability of parts of Handbook to service companies  
This table belongs to *SERV* 1.2.2G

	Parts of Handbook	Applicability to service companies
...		
<b>Business Standards</b>	...	
	Conduct of Business sourcebook ( <i>COB</i> )	...
	<u>Mortgages: Conduct of Business sourcebook (<i>MCOB</i>)</u>	
	Market Conduct sourcebook ( <i>MAR</i> )	...
	...	
<b>Regulatory processes</b>	...	

## Annex Q

### Amendment to the Glossary

Insert the following new definitions in the appropriate alphabetical position:

<i>administering a regulated lifetime mortgage contract</i>	the <i>regulated activity</i> , specified in article 61(2) of the <i>Regulated Activities Order</i> , which is in summary: administering a <i>regulated mortgage contract</i> (which is a <i>lifetime mortgage</i> ) where the contract was entered into after 31 October 2004.
<i>administering a regulated mortgage contract</i>	the <i>regulated activity</i> , specified in article 61(2) of the <i>Regulated Activities Order</i> , which is in summary: administering a <i>regulated mortgage contract</i> where the contract was entered into after 31 October 2004.
<i>advising on regulated mortgage contracts</i>	the <i>regulated activity</i> , specified in article 53A of the <i>Regulated Activities Order</i> , which is in summary: advising a <i>person</i> if the advice: <ul style="list-style-type: none"><li>(a) is given to the <i>person</i> in his capacity as a borrower or potential borrower; and</li><li>(b) is advice on the merits of his:<ul style="list-style-type: none"><li>(i) entering into a particular <i>regulated mortgage contract</i>; or</li><li>(ii) varying the terms of a <i>regulated mortgage contract</i> entered into by him after 31 October 2004 in such a way as to vary his obligations under that contract.</li></ul></li></ul>
<i>annual percentage rate</i>	the annual percentage rate of charge for a contract as calculated in accordance with <i>MCOB 10</i> (Annual percentage rate).
<i>APR</i>	<i>annual percentage rate</i> .
<i>arranging qualifying credit</i>	the <i>controlled activity</i> , specified in paragraph 10A of Schedule 1 to the <i>Financial Promotion Order</i> , of making arrangements: <ul style="list-style-type: none"><li>(a) for another <i>person</i> to enter as borrower into an agreement for the provision of <i>qualifying credit</i>, or</li><li>(b) for a borrower under a <i>regulated mortgage contract</i>, entered into after 31 October 2004, to vary the terms of that contract.</li></ul>
<i>arranging (bringing about)</i>	the <i>regulated activity</i> , specified in article 25A(1) of the

<i>regulated mortgage contracts</i>	<p><i>Regulated Activities Order</i>, which is in summary: making arrangements for another <i>person</i> to:</p> <ul style="list-style-type: none"> <li>(a) enter into a <i>regulated mortgage contract</i> as borrower; or</li> <li>(b) vary the terms of a <i>regulated mortgage contract</i> entered into by him as borrower after 31 October 2004.</li> </ul> <p>(see also <i>arranging</i> (in relation to <i>regulated mortgage contracts</i>) and <i>making arrangements with a view to regulated mortgage contracts</i>.)</p>
<i>arrears</i>	<p>(in relation to a <i>regulated mortgage contract</i>) either:</p> <ul style="list-style-type: none"> <li>(a) <b>a shortfall (equivalent to two or more regular payments) in the accumulated total payments actually made by the <i>customer</i> measured against the accumulated total amount of payments due to be received from the <i>customer</i>; or</b></li> <li>(b) remaining in breach, for more than one month, of an agreed borrowing limit or of an obligation to repay where the loan does not have a regular repayment plan.</li> </ul>
<i>borrow back</i>	a feature of a <i>regulated mortgage contract</i> under which the <i>customer</i> has the ability to re-borrow monies paid by him.
<i>business illustration</i>	an <i>illustration</i> for a <i>regulated mortgage contract</i> that is for a business purpose.
<i>business offer document</i>	an <i>offer document</i> for a <i>regulated mortgage contract</i> that is for a business purpose.
<i>cashback</i>	(in <i>MCOB</i> ) a cash amount paid by a <i>mortgage lender</i> to a <i>customer</i> (typically at the beginning of a contract) as an inducement to enter into a <i>regulated mortgage contract</i> with the <i>mortgage lender</i> .
<i>distance contract</i>	any contract concerning financial services, the making or performance of which constitutes or is part of a <i>regulated activity</i> , concluded under an organised distance sales or service provision scheme run by the contractual provider of the service who, for the purpose of that contract, makes exclusive use (directly or through an intermediary) of one or more <i>means of distance communication</i> up to and including the time at which the contract is concluded.

<i>Distance Marketing Directive</i>	the Directive of the Council and Parliament of 23 September 2002 on distance marketing of consumer financial services (No 2002/65/EC).
<i>Distance Marketing Regulations</i>	the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/[])
<i>distance mortgage mediation contract</i>	<p>a <i>distance contract</i>, the making or performance of which constitutes, or is part of:</p> <ul style="list-style-type: none"> <li>(a) <i>advising on regulated mortgage contracts</i>; or</li> <li>(b) <i>arranging (bringing about) regulated mortgage contracts</i>; or</li> <li>(c) <i>making arrangements with a view to regulated mortgage contracts</i>; or</li> <li>(d) <i>agreeing to carry on a regulated mortgage activity</i> in (a) to (c).</li> </ul>
<i>DMD</i>	<i>Distance Marketing Directive.</i>
<i>drawdown mortgage</i>	<p>a <i>lifetime mortgage</i> contract where:</p> <ul style="list-style-type: none"> <li>(a) the amount borrowed is paid by the <i>mortgage lender</i> to the <i>customer</i> in instalments during the life of the mortgage; and</li> <li>(b) the size and frequency of the instalments are: <ul style="list-style-type: none"> <li>(1) agreed between the <i>mortgage lender</i> and the <i>customer</i>; or</li> <li>(2) set by reference to an index or interest rate (such as the Bank of England repo rate).</li> </ul> </li> </ul>
<i>durable medium</i>	<p>(in accordance with article 2(f) of the <i>Distance Marketing Directive</i> and article 2(12) of the <i>Insurance Mediation Directive</i>) (in relation to information addressed personally to a recipient) in a form which:</p> <ul style="list-style-type: none"> <li>(a) is capable of being used by the recipient;</li> <li>(b) enables the recipient to store the information in a way accessible for future reference for a period of time adequate for the purposes of the information; and</li> <li>(c) allows the unchanged reproduction of the information;</li> </ul> <p>and includes paper, floppy disks, CD-ROMs, DVDs and the hard drive of the recipient's computer on which electronic mail is stored, but not Internet websites unless they fulfil the criteria</p>

in (a),(b) and (c).

<i>early repayment charge</i>	(in <i>MCOB</i> ) a charge levied by the <i>mortgage lender</i> on the <i>customer</i> in the event that the amount of the loan is repaid in full or in part before a date specified in the contract.
<i>entering into a regulated mortgage contract</i>	the <i>regulated activity</i> , specified in article 62(1) of the <i>Regulated Activities Order</i> , which is in summary: entering into a <i>regulated mortgage contract</i> as lender.
<i>fixed-sum credit</i>	(in accordance with section 10(1)(b) of the Consumer Credit Act 1974) any facility under a contract, other than <i>running-account credit</i> , by which the <i>customer</i> is enabled to receive credit (whether in one amount or by instalments).
<i>higher lending charge</i>	a fee charged by a <i>mortgage lender</i> (under a <i>regulated mortgage contract</i> ) where the amount borrowed exceeds a given percentage of the value of the property.
<i>illustration</i>	(in <i>MCOB</i> ) the illustration of the costs and features of a <i>regulated mortgage contract</i> which is required to be provided by <i>MCOB 5</i> (Pre-application disclosure), <i>MCOB 6</i> (Disclosure at the offer stage), <i>MCOB 7</i> (Disclosure at start of contract and after sale) and <i>MCOB 9</i> (Lifetime mortgages: product disclosure).
<i>interest-only mortgage</i>	a <i>regulated mortgage contract</i> other than a <i>repayment mortgage</i> .
<i>large business customer</i>	(in relation to a <i>regulated mortgage contract</i> or <i>qualifying credit</i> , and in relation to an activity to be carried on by a <i>firm</i> ) a <i>client</i> , if the credit is for the purposes of a business which has a group annual turnover of £1 million or more.
<i>lifetime mortgage</i>	a <i>regulated mortgage contract</i> under which:  (a) entry into the mortgage is restricted to older <i>customers</i> above a specified age;  and  (b) the <i>mortgage lender</i> may or may not specify a mortgage term, but will not seek full repayment of the loan (including interest, if any, outstanding) until the occurrence of one or more of the following:

- (i) the death of the *customer*; or
- (ii) the *customer* leaves the mortgaged land to live elsewhere and has no reasonable prospect of returning (for example by moving into residential care); or
- (iii) the *customer* acquires another dwelling for use as his main residence; or
- (iv) the *customer* sells the mortgaged land; or
- (v) the *mortgage lender* exercises its legal right to take possession of the mortgaged land under the terms of the contract.

and

- (c) while the *customer* continues to occupy the mortgaged land as his main residence:
  - (i) no instalment repayments of the capital and no payment of interest on the capital (other than interest charged when all or part of the capital is repaid voluntarily by the *customer*), are due or capable of becoming due; or
  - (ii) although interest payments may become due, no full or partial repayment of the capital is due or capable of becoming due; or**
  - (iii) although interest payments and partial repayment of the capital may become due, no full repayment of the capital is due or capable of becoming due.**

*limit of indemnity*

(in PRU 9.1(Professional indemnity insurance requirements for insurance and mortgage mediation activity and mortgage lending and administering)) the sum available to indemnify a *firm* in respect of each claim made under its *professional indemnity insurance*.

*linked borrowing*

additional credit facilities (which may be secured, unsecured, or both) that are integral to a *regulated mortgage contract* but which may be the subject of a separate contract.

*linked deposits*

additional facilities (which may be a current account, a savings account, or both) that are linked to a *regulated mortgage contract* but which may be the subject of a separate contract.

*making arrangements with a view to regulated*

the *regulated activity*, specified in article 25A(2) of the *Regulated Activities Order*, which is in summary: making

<i>mortgage contracts</i>	arrangements with a view to a <i>person</i> who participates in the arrangements entering into a <i>regulated mortgage contract</i> as borrower.  (see also <i>arranging</i> (in relation to <i>regulated mortgage contracts</i> ) and <i>arranging (bringing about) regulated mortgage contracts.</i> )
<i>MCOB</i>	the Mortgages: Conduct of Business sourcebook.
<i>means of distance communication</i>	(in accordance with article 2(e) of the <i>Distance Marketing Directive</i> ) any means used for the distance marketing of a service between parties which does not involve the simultaneous physical presence of those parties.
<i>mortgage administrator</i>	a <i>firm</i> with <i>permission</i> (or which ought to have <i>permission</i> ) for <i>administering a regulated mortgage contract</i> .
<i>mortgage adviser</i>	a <i>firm</i> with <i>permission</i> (or which ought to have <i>permission</i> ) for <i>advising on regulated mortgage contracts</i> .
<i>mortgage arranger</i>	a <i>firm</i> with <i>permission</i> (or which ought to have <i>permission</i> ) for <i>arranging</i> (see also <i>arranging (bringing about) regulated mortgage contracts</i> and <i>making arrangements with a view to regulated mortgage contracts</i> ).
<i>mortgage credit card</i>	a <i>plastic card</i> which is a credit card issued under a <i>regulated mortgage contract</i> and not regulated by the Consumer Credit Act 1974.
<i>mortgage intermediary</i>	a <i>firm</i> with <i>permission</i> (or which ought to have <i>permission</i> ) to carry on <i>mortgage mediation activity</i> .
<i>mortgage lender</i>	a <i>firm</i> with <i>permission</i> (or which ought to have <i>permission</i> ) for <i>entering into a regulated mortgage contract</i> .
<i>mortgage mediation activity</i>	any of the following <i>regulated activities</i> : <ul style="list-style-type: none"> <li>(a) <i>arranging (bringing about) regulated mortgage contracts</i> (article 25A(1));</li> <li>(b) <i>making arrangements with a view to regulated mortgage contracts</i> (article 25A(2));</li> <li>(c) <i>advising on regulated mortgage contracts</i> (article 53A);</li> </ul>

- (d) *agreeing to carry on a regulated activity* in (a) to (c) (article 64).

*mortgage shortfall debt* the outstanding debt, under a *regulated mortgage contract*, following the sale of the mortgaged property.

*non-real time qualifying credit promotion* (in accordance with article 7(2) of the *Financial Promotion Order*) (as more fully described in *MCOB 3.5.5R* ("Real time" and "non-real time" qualifying credit promotions)) a *qualifying credit promotion* that is not a *real time qualifying credit promotion*.

*normally resident* (in *MCOB*) normally resident;  
for the purposes of this definition:  
(a) an individual (whether or not acting as trustee) is to be treated as normally resident in the country which he indicates is his country of residence, unless the *firm* has reason to doubt this; and  
(b) a *body corporate* acting as trustee is to be treated as resident in the country in which its registered office (or, if it has no registered office, its head office) is located.

*offer document* (in *MCOB*) a document in which the *mortgage lender* offers to enter into a *regulated mortgage contract* with a *customer*.

*payment holiday* a feature of a *regulated mortgage contract* under which the *mortgage lender* permits the *customer* to make no payments for a specified period without being in *arrears*.

*price information* (in *MCOB*) information, in a *qualifying credit promotion*, that relates to:  
(a) any rate of charge; or  
(b) the presence or absence of any payments, fees or charges (other than the fees for *advising on* or *arranging a regulated mortgage contract* as required by *MCOB 3.6.27R* ); or  
(c) the amount, frequency or number of any payments, repayments, fees or charges; or  
(c) any monetary amounts.

*procurator fee* the total amount paid by a *mortgage lender* to a *mortgage intermediary*, whether directly or indirectly, in connection with

providing applications from *customers* to enter into *regulated mortgage contracts* with that *mortgage lender*.

*protected mortgage business*

activities in relation to *regulated mortgage contracts* which are covered by the *compensation scheme*, as defined in *COMP 5.6.1R*.

*providing qualifying credit*

the *controlled activity*, specified in paragraph 10 of Schedule 1 to the *Financial Promotion Order*, of providing *qualifying credit*.

*qualifying credit*

(as defined in Schedule 1 paragraph 10 (Providing qualifying credit) of the *Financial Promotion Order*) credit (including a cash loan and any other form of financial accommodation) provided in accordance with an agreement under which:

- (a) **the lender is a person who enters into or administers regulated mortgage contracts; and**
- (b) the obligation of the borrower to repay is secured (in whole or in part) on land.

*qualifying credit promotion*

an invitation or inducement that relates to *qualifying credit*; that is, an invitation or inducement to:

- (a) enter or offer to enter into an agreement the making or performance of which by either party constitutes the *controlled activity* in:
  - (i) paragraph 10 (Providing qualifying credit); or
  - (ii) paragraph 10A (Arranging qualifying credit etc.); or
  - (iii) paragraph 10B (Advising on qualifying credit etc.);of schedule 1 to the *Financial Promotion Order*; or
- (b) exercise any rights conferred by an agreement for *qualifying credit* to acquire, dispose of, underwrite or convert rights under an agreement for *qualifying credit*.

*qualifying credit promotion rules*

the *rules* in *MCOB 3* (Financial promotion).

*real time qualifying credit promotion*

(in accordance with article 7(1) of the *Financial Promotion Order*) (as more fully described in *MCOB 3.5.5R* ('Real time' and 'non-real time' qualifying credit promotions)) a *qualifying credit promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue.

*regulated lifetime mortgage contract* a regulated mortgage contract which is a lifetime mortgage.

*regulated mortgage activity* any of the following activities specified in Part II of the *Regulated Activities Order* (Specified Activities):

- (a) *arranging (bringing about) regulated mortgage contracts* (article 25A(1));
- (b) *making arrangements with a view to regulated mortgage contracts* (article 25A(2));
- (c) *advising on regulated mortgage contracts* (article 53A);
- (d) *entering into a regulated mortgage contract* (article 61(1));
- (e) *administering a regulated mortgage contract* (article 61(2));
- (f) *agreeing to carry on a regulated activity in (a) to (e)* (article 64).

*regulated mortgage contract*

- (a) (in relation to a contract) (in accordance with article 61(3) of the *Regulated Activities Order*) a contract which, at the time it is entered into, meets the following conditions:
  - (i) a lender provides credit to an individual or to trustees (the ‘borrower’); and
  - (ii) the obligation of the borrower to repay is secured by a first legal mortgage on land (other than timeshare accommodation) in the *United Kingdom*, at least 40% of which is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a person who is in relation to the borrower or (in the case of credit provided to trustees) a beneficiary of the trust:
    - (A) that person’s spouse; or
    - (B) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or
    - (C) that person’s parent, brother, sister, child, grandparent or grandchild.
- (b) (in relation to a *specified investment*) the *investment*,

specified in article 88 of the *Regulated Activities Order*, which is rights under a *regulated mortgage contract* within (a).

<i>relevant date</i>	(in <i>MCOB</i> 10 (Annual percentage rate)): <ul style="list-style-type: none"><li>(a) (where a date is specified in or determinable under an agreement at the date of its making as the date on which the debtor is entitled to require provision of anything which is the subject of the agreement) the earliest such date;</li><li>(b) (in any other case) the date of making the agreement.</li></ul>
<i>repayment mortgage</i>	<i>a regulated mortgage contract</i> under which the <i>customer</i> is obliged to make payments of interest and capital which are designed to repay the mortgage over the stated term.
<i>repayment vehicle</i>	the means by which the <i>customer</i> will repay the capital due under the <i>regulated mortgage contract</i> , where all or part of that contract is an <i>interest-only</i> mortgage.
<i>repossess</i>	(in <i>MCOB</i> ) take possession of the mortgaged property.
<i>restricted-use credit agreement</i>	(in accordance with section 11 of the Consumer Credit Act 1974) an agreement: <ul style="list-style-type: none"><li>(a) to finance a transaction between the <i>customer</i> and the <i>firm</i>, whether forming part of that agreement or not;</li><li>(b) to finance a transaction between the <i>customer</i> and a person (the ‘supplier’) other than the <i>firm</i>;</li><li>(c) to refinance any existing indebtedness of the <i>customer’s</i>, whether to the <i>firm</i> or another <i>person</i>.</li></ul>
<i>retail customer</i>	(in accordance with the meaning of ‘consumer’ in article 2(d) of the <i>Distance Marketing Directive</i> ) an individual who is acting for purposes which are outside his trade, business or profession.
<i>roll-up of interest mortgage</i>	<i>a regulated mortgage contract</i> where no payment of interest on the amount borrowed (other than interest charged when all or part of the amount borrowed is repaid voluntarily by the <i>customer</i> ), is due or capable of becoming due while the <i>customer</i> continues to occupy the mortgaged property as his main residence and fulfil his obligations under the <i>regulated mortgage contract</i> .

<i>running-account credit</i>	(in accordance with section 10(1)(a) of the Consumer Credit Act 1974) a facility under a contract by which the <i>customer</i> is enabled to receive from time to time (whether in his own person, or by another person) from the <i>firm</i> or a third party cash, goods and services (or any of them) to an amount or value such that, taking into account payments made by or to the credit of the <i>customer</i> , the credit limit (if any) is not at any time exceeded.
<i>secured lending</i>	lending where the <i>mortgage lender</i> takes security on land for the loan provided to the <i>customer</i> .
<i>securitisation</i>	a process by which assets are sold to a bankruptcy-remote <i>special purpose vehicle</i> in return for immediate cash payment and that vehicle raises the immediate cash payment through the issue of debt securities in the form of tradable notes or commercial paper.
<i>shared appreciation mortgage</i>	a <i>regulated mortgage contract</i> , a condition of which is that the <i>mortgage lender</i> will receive a share in any increase in value in the mortgaged property when the <i>customer</i> either sells the property or terminates the contract including a contract where, if there is a reduction in value, the <i>customer</i> is required to pay the <i>mortgage lender</i> all or part of the shortfall.
<i>solicited real time qualifying credit promotion</i>	(in accordance with article 8 of the <i>Financial Promotion Order</i> ) (as more fully described in MCOB 3.7.1R (Meaning of ‘solicited’ and ‘unsolicited ‘real time qualifying credit promotion’)) a <i>real time qualifying credit promotion</i> which is solicited.
<i>tariff of charges</i>	a list of all the charges (including amounts) that are payable on a <i>regulated mortgage contract</i> , including the reason for, and amount of, each charge.
<i>tied product</i>	a product, other than <i>linked borrowing</i> or a <i>linked deposit</i> , that a <i>customer</i> is obliged to purchase through a <i>mortgage lender</i> as a condition of taking out a <i>regulated mortgage contract</i> with that <i>mortgage lender</i> .
<i>total amount payable</i>	the <i>total charge for credit</i> plus the total amount of credit advanced.
<i>total charge for credit</i>	the total of the charges (determined as at the date of making the contract) specified in MCOB 10.4.2R as applying in relation to

the *secured lending* but excluding the charges specified in *MCOB 10.4.4R*.

*unsecured lending* lending where the *mortgage lender* does not take a mortgage or other form of security in respect of the credit provided to the *customer*.

*unsolicited real time qualifying credit promotion* (in accordance with article 8 of the *Financial Promotion Order*) (as more fully described in *MCOB 3.7.1R* (Meaning of ‘solicited’ and ‘unsolicited ‘real time qualifying credit promotion’)) a *real time qualifying credit promotion* which is not a *solicited real time qualifying credit promotion*.

Amend the following definitions as shown (underlining indicates new text, striking through indicates deleted text):

*arranging* (a) (except in relation to a *regulated mortgage contract*) *arranging (bringing about) deals in investments, making arrangements with a view to transactions in investments or agreeing to carry on ~~any~~ either of those regulated activities.*

(b) (in relation to a *regulated mortgage contract*) arranging (bringing about) regulated mortgage contracts, making arrangements with a view to regulated mortgage contracts or agreeing to carry on either of those regulated activities;

*client* (1) (except in *ML*; ~~and in *PROF*~~; in relation to a *regulated mortgage contract*) any person with or for whom a firm conducts or intends to conduct *designated investment business* or any other *regulated activity*; and:

...

...

(4) (in relation to a *regulated mortgage contract*, except in *ML* and *PROF*) the individual or trustee who is the borrower or potential borrower under that contract.

*customer* (1) (except in *COB 3* and *MCOB 3*) a *client* who is not a *market counterparty*.

(2) (in *COB 3* and *MCOB 3*) a *person* in (1) or a *person* who would be such a *person* if he were a *client*.

*overseas person*

(in accordance with article 3(1) of the *Regulated Activities Order* (Interpretation)) a person who:

- (a) carries on any of the following *regulated activities*:
- (i) *dealing in investments as principal*;
  - (ii) *dealing in investments as agent*;
  - (iii) *arranging (bringing about) deals in investments*;
  - (iv) *arranging (bringing about) regulated mortgage contracts*;
  - (v) *making arrangements with a view to regulated mortgage contracts*;
  - (~~vi~~) *making arrangements with a view to transactions in investments*;
  - (~~vii~~) *managing investments*;
  - (~~viii~~) *safe custody and administering investments*;
  - (~~ix~~) *sending dematerialised instructions*;
  - (~~x~~) *causing dematerialised instructions to be sent*;
  - (~~xi~~) *establishing, operating or winding up a collective investment scheme*;
  - (~~xii~~) *acting as trustee of an authorised unit trust scheme*;
  - (~~xiii~~) *acting as the depositary or sole director of an open-ended investment company*;
  - (~~xiv~~) *establishing, operating or winding up a stakeholder pension scheme*;
  - (~~xv~~) *advising on investments*;
  - (~~xvi~~) *advising on regulated mortgage contracts*;
  - (~~xvii~~) *entering into a regulated mortgage contract*;
  - (~~xviii~~) *administering a regulated mortgage contract*;
  - (~~ixiv~~) *agreeing to carry on those regulated activities, disregarding the exclusion in article 72 of the Regulated Activities Order (Overseas persons);*  
but
- (b) does not carry on any such activity, or offer to do so, from a permanent place of business maintained by him in the *United Kingdom*.

*regulated activity*

(in accordance with section 22 of the *Act* (The classes of activity and categories of investment)) any of the following activities specified in Part II of the *Regulated Activities Order* (Specified Activities):

- (a) *accepting deposits* (article 5);

- (b) *effecting contracts of insurance* (article 10(1));
- (c) *carrying out contracts of insurance* (article 10(2));
- (d) *dealing in investments as principal* (article 14);
- (e) *dealing in investments as agent* (article 21);
- (f) *arranging (bringing about) deals in investments* (article 25(1));
- (g) *making arrangements with a view to transactions in investments* (article 25(2));
- (ga) *arranging (bringing about) regulated mortgage contracts* (article 25A(1));
- (gb) *making arrangements with a view to regulated mortgage contracts* (article 25A(2));
- (h) *managing investments* (article 37);
- (i) *safeguarding and administering investments* (article 40); (for the purposes of the *permission* regime, this is sub-divided into:
  - (i) *safeguarding and administration of assets (without arranging)*;
  - (ii) *arranging safeguarding and administration of assets*);
- (j) *sending dematerialised instructions* (article 45(1));
- (k) *causing dematerialised instructions to be sent* (article 45(2));
- (l) *establishing, operating or winding up a collective investment scheme* (article 51(1)(a)); (for the purposes of the *permission* regime, this is sub-divided into:
  - (i) *establishing, operating or winding up a regulated collective investment scheme*;
  - (ii) *establishing, operating or winding up an unregulated collective investment scheme*);
- (m) *acting as trustee of an authorised unit trust scheme* (article 51(1)(b));
- (n) *acting as the depository or sole director of an open-ended investment company* (article 51(1)(c));
- (o) *establishing, operating or winding up a stakeholder pension scheme* (article 52);
- (p) *advising on investments* (article 53); (for the purposes of the *permission* regime, this is sub-divided into:
  - (i) *advising on investments (except pension transfers and pension opt-outs)*;

- (ii) *advising on pension transfers and pension opt-outs*);
  - (pa) *advising on regulated mortgage contracts (article 53A)*;
  - (q) *advising on syndicate participation at Lloyd's (article 56)*;
  - (r) *managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's (article 53)*;
  - (s) *arranging deals in contracts of insurance written at Lloyd's (article 58)*;
  - (sa) *entering into a regulated mortgage contract (article 61(1))*;
  - (sb) *administering a regulated mortgage contract (article 61(2))*;
  - (t) *agreeing to carry on a regulated activity (article 64)*;
- which is carried on by way of business and relating to a *specified investment* or, in the case of (l), (m), (n) and (o), is carried on in relation to property of any kind.

*specified investment*

any of the following *investments* specified in Part III of the *Regulated Activities Order* (Specified Investments):

...

- (o) *funeral plan contract (article 87)*;
- (oa) *regulated mortgage contract (article 61(3))*;

...

## ADDENDUM

### MORTGAGES: CONDUCT OF BUSINESS SOURCEBOOK (CONSEQUENTIAL AMENDMENTS TO THE HANDBOOK) INSTRUMENT 2003

In this Addendum, underlining indicates new text and striking through indicates deleted text.

Annex B of this instrument is amended as follows:

#### Transitional Provisions

...

(1)	(2)	(3)	(4)	(5)	(6)
1	<i>GEN</i> 2.2.7R	R	...		
<del>...</del>					
<u>26</u>	<i>GEN</i> 4.3.1R	R	(1) For the purpose ...	From 31 October ...	Apply in relation to ...
<u>37</u>	<i>GEN</i> 4.3.1R	G	(1) Transitional provision <del>26</del> R defers ...	From 31 October ...	Apply in relation to ...

...

Annex D of this instrument is amended as follows:

2.1.4R Table: Activities to which *TC 2* applies

	Activity	Extent of application
1. <i>Employees</i> engaging in:	... Non-advised sales ( <del>qr</del> ) designing scripted questions...	...

...