

MORTGAGES (ADVICE) INSTRUMENT 2020

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137A (General rule-making power);
 - (2) section 137T (General supplementary powers); and
 - (3) section 139A (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 31 January 2020.

Amendments to the Handbook

- D. The Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) is amended in accordance with Annex A to this instrument.

Amendments to material outside the Handbook

- E. The Perimeter Guidance manual (PERG) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Mortgages (Advice) Instrument 2020.

By order of the Board
30 January 2020

Annex A

Amendments to the Mortgages and Home Finance: Conduct of Business sourcebook
(MCOB)

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

4 Advising and selling standards

4.1 Application

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What?

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- 4.1.4 R (1) *MCOB 4.4A* (Initial disclosure requirements) applies only in relation to varying the terms of a *regulated mortgage contract* entered into by the *customer* in any of the following ways:

...

...

...

4.4A Initial disclosure requirements

Description of a firm's services ~~in all cases~~

- 4.4A.1 R Using the methods and at the times specified in this section, a *firm* must provide the customer with the following information:

- (1) whether there are any limitations in the range of products that it will offer to the customer, and if so what those are;

- (1A) if there are any limitations in the range of the *firm's* products about which it will provide information during a spoken or other interactive dialogue with the customer, what those limitations are;

...

...

Range of products

...

- 4.4A.3AA G (1) *MCOB 4.4A.1R(1A)* addresses situations in which a *firm* may wish to provide information in relation to a range of products that is

narrower than the full range of products offered by it to customers. For example, if a customer visits a branch of a mortgage lender and requests information on the mortgages offered by that lender, the lender may wish to only provide information on the mortgages which can be obtained in branch, even though it offers different mortgage products through other sales channels (such as online). A firm must inform a customer where it is limiting the provision of information in this way.

- (2) MCOB 4.4A.1R(1A) builds on MCOB 4.4A.1R(1) and MCOB 4.4A.2R (which, amongst other things, have the effect that, when a firm gives advice, any limitations on the mortgages the firm will consider from within the relevant market must be disclosed). Its purpose is to make it clear that, in the case of interactions that preserve the possibility of an execution-only sale, if a dialogue with the customer permitted by MCOB 4.8A.7AR will cover only a subset of the mortgages offered by the firm, this must be disclosed.

...

- 4.4A.6 G The disclosure required by MCOB 4.4A.1R(1) and (1A), MCOB 4.4A.2R and MCOB 4.4A.4R(1) about limitations in product range and information provision, and about direct deals, should be expressed in simple, clear terms. A firm may wish to consider using a sentence (or sentences) appropriate to the circumstances, along the following lines:

- “We are not limited in the range of mortgages we will consider for you.”
- “We offer a comprehensive range of mortgages from across the market, but not deals that you can only obtain by going direct to a lender.”
- “We only offer mortgages from [number] lender(s). We can provide you with a list of these.”
- “We only offer mortgages from [name of lender(s)].”
- “We only offer some, but not all, of the mortgages from [number] lender(s). We can provide you with a list of these.”
- “We only offer some, but not all, of the mortgages from [name of lender(s)].”
- “We only sell bridging finance products from [name of lender(s)]. We do not offer products from across the mortgage market.”
- “The information provided only covers the mortgages we offer in branch, and not those available through [other sales channels through which the firm offers mortgages].”

...

4.7A Advised sales

- 4.7A.1 G ...

- (3) The *rules* at *MCOB 4.8A* also provide that advice must be given wherever the sales process involves spoken or other interactive dialogue (except for *high net worth mortgage customers*, *professional customers* and loans solely for a business purpose), unless that spoken or other interactive dialogue is of a sort described by *MCOB 4.8A.7AR*. They do not prohibit the giving of pre-contract or preliminary information which does not amount to advice to the particular *customer*, but ~~means~~ mean that advice must be given before a *firm* enters into or arranges a *regulated mortgage contract*, or variation of such contract, unless (where the dialogue is not of a sort described by *MCOB 4.8A.7AR*) the requirements there of the various exceptions in *MCOB 4.8A* are satisfied. *Firms* may wish to refer to *PERG* (particularly *PERG 4.6*) for guidance on the regulatory perimeter in relation to *advising on home finance transactions*.

...

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Cost of the mortgage

- 4.7A.23A R (1) This rule applies if the *firm's* product range includes more than one *regulated mortgage contract* that is appropriate to the needs and circumstances of the *customer* (see *MCOB 4.7A.5R* and *4.7A.6R*).
- (2) If:
- (a) the *firm* advises the *customer* to enter into a particular *regulated mortgage contract*; and
- (b) that *regulated mortgage contract* is not the cheapest of those contracts in the *firm's* product range which are appropriate to the needs and circumstances of the *customer*;
- the *firm* must explain to the *customer* why it is advising the *customer* to enter into that *regulated mortgage contract* rather than any other cheaper *regulated mortgage contract* in the *firm's* product range which is appropriate to the needs and circumstances of the *customer*.
- (3) For the purposes of this rule:
- (a) one *regulated mortgage contract* (“contract A”) is cheaper than another (“contract B”) if the total amount payable under contract A in respect of the relevant period is less than the total amount payable under contract B in respect of the relevant period;
- (b) the “total amount payable” means:
- (i) the aggregated monthly payments; and

(ii) includes any product fee or arrangement fee if the customer proposes to pay that fee directly rather than add it to the sum advanced under the contract (and such a fee must be treated in the same way for contract A and contract B when comparing the two contracts);

(c) the “relevant period” means:

(i) any discounted or introductory period under contract A; or

(ii) the term of contract A; and

(d) monthly payments should be calculated on the assumption that there is no variation to the interest rate that would apply if the regulated mortgage contract were to be entered into immediately, unless the contract expressly varies the interest rate (in which case, the monthly payments should be calculated by reference to rates specified in the contract in relation to the relevant periods).

...

Record keeping

4.7A.25 R (1) A *firm* must make and maintain a record:

...

(b) ...; ~~and~~

(c) of the *customer’s* positive choice in MCOB 4.6A.2R (Rolling up of fees or charges into loan) where applicable; and

(d) of the explanation given under MCOB 4.7A.23AR where applicable.

(2) The records in (1) must be retained for a minimum of three years from the date on which the advice or explanation was given or, in the case of (1)(c), the making of the choice.

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4.8A Execution-only sales

Scope and application of this section

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- 4.8A.2 G Subject to certain limited exceptions, where the *rules* in *MCOB* 4.8A apply to a *firm* they restrict *execution-only sales* (which term is defined to include variations of existing contracts) to cases where:
- (1) there is no spoken or other interactive dialogue between the *firm* and the *customer* during the sale; or
- ...
- (2A) if there is spoken or other interactive dialogue between the *firm* and the *customer* during the sale, the *firm's* contribution to the dialogue is limited to:
- (a) factual information about a *regulated mortgage contract* (provided that it is not personalised to the *customer*), the process of applying for one, or the processing of an application; the making of arrangements related to such matters;
- (b) the provision of an *European Standardised Information Sheet (ESIS)* or an *illustration*; or
- (c) an explanation of the information provided under *MCOB* 4.8A.14R(4) (that the *firm* has not assessed the suitability of the *regulated mortgage contract*); or
- ...

- 4.8A.3 G Interactive dialogue includes SMS, mobile instant messaging, email and communication via social media sites; this list is not exhaustive. Where a sale is carried out entirely on the internet, a *firm* merely permitting the *customer* to input details about the matters specified in *MCOB* 4.8A.14R(1), (2) or (3) in order to select from the *firm's* product range the *regulated mortgage contract* ~~he wishes they wish~~ to purchase, or the variation ~~he wishes they wish~~ to enter into, would not be engaging in interactive dialogue. ~~Firms are reminded that, if this process steers the *customer* towards any one or more of the products offered by it, so as to constitute advice, the requirements of *MCOB* 4.7A will apply.~~

The customer's best interests

...

- 4.8A.6A G *Firms* will not be treated as having breached *MCOB* 2.5A.1R or *MCOB* 4.8A.5R merely because they market *execution-only sales* or apply different pricing to *execution-only sales* from that applied to advised sales, provided that they act in a manner consistent with their obligations under the *regulatory system*, including the requirements of this section.

Cases where execution-only sales are not permitted

4.8A.7 R A *firm* must not enter into or *arrange* an *execution-only sale* for a *regulated mortgage contract* if:

...

- (3) there is spoken or other interactive dialogue between the *firm* and the *customer* at any point during the sale, except as described by MCOB 4.8A.7AR; or

...

4.8A.7A R The *firm* may carry on a spoken or other interactive dialogue with the *customer*, provided that the content of the *firm's* contribution to the dialogue is limited to:

- (1) the provision of factual information to the *customer* about:
- (a) a *regulated mortgage contract*, provided that the information about the contract is not personalised to the *customer*; or
 - (b) the process of applying for a *regulated mortgage contract*; or
 - (c) the processing of an application for a *regulated mortgage contract*; or
- (2) the making of practical arrangements related to such matters; or
- (3) the provision of an *illustration* or an *European Standardised Information Sheet (ESIS)*; or
- (4) an explanation of the information which the *firm* gives to the *customer* in accordance with MCOB 4.8A.14R(4).

4.8A.7B G (1) If the interaction with the *customer* constitutes or includes advice or a recommendation (see PERG 4.6), the sale cannot be an *execution-only sale* and the *firm* would need to comply with MCOB 4.7A (Advised sales).

(2) MCOB 4.8A.7AR allows some interaction with a *customer* without the dialogue triggering the need for the *firm* to give advice in compliance with MCOB 4.7A.

(3) MCOB 4.8A.7AR would, for example, permit a *firm* to provide generic information to a *customer* in response to a telephone query about the *firm's* products, fees and charges, about processes and timescales, about how to complete an application, or about the progress of the application. But information about a *regulated mortgage contract* which is personalised to the *customer* is not permitted, for example giving an estimate of the monthly payment due in respect of the amount that the *customer* wishes to borrow under the product they wish to take: giving such information would

mean the *firm* would need to comply with *MCOB 4.7A*. The *firm* may, however, issue an *illustration* or an *European Standardised Information Sheet (ESIS)* which contains information personalised to the *customer* without that action triggering the need for advice. The *firm* may also explain to the *customer* the information which the *firm* provides in accordance with *MCOB 4.8A.14R(4)* (in relation to the *firm* not assessing the suitability of the *regulated mortgage contract*).

- (4) Examples of spoken or other interactive dialogue which are or are not permitted under *MCOB 4.8A.7AR* include:

<p><u>Providing the <i>customer</i> with copies of product literature, or weblinks to such literature</u></p>	<p><u>This would be permitted, if the provision is in response to a request from a <i>customer</i> who has identified the main features of the mortgage they want and is accompanied by an indication that the products described in the literature all have those features (see <i>PERG 4.6.15G(6)</i>).</u></p>
<p><u>Listing the current fixed and variable rates on offer</u></p>	<p><u>This would be permitted.</u></p>
<p><u>Explaining the advantages and disadvantages of fixed rate and variable rate mortgages</u></p>	<p><u>This would be permitted if done in purely generic terms, provided that the explanation does not itself constitute advice (see <i>PERG 4.6.15G(2)</i> and <i>4.6.16G</i>) which would prevent the sale from proceeding as an <i>execution-only sale</i>.</u></p> <p><u>Where the explanation is couched in the terms of the <i>customer's</i> circumstances, it is personalised to the <i>customer</i>. As such, the interaction is not of a sort permitted by <i>MCOB 4.8A.7AR</i>, the sale cannot be an <i>execution-only sale</i> and the <i>firm</i> would need to comply with <i>MCOB 4.7A</i>.</u></p>
<p><u>Giving the <i>customer</i> an indication of the monthly cost of a <i>regulated mortgage contract</i></u></p>	<p><u>This would be permitted, if it were in the form of a generic example, including by way of comparison of two mortgages.</u></p> <p><u>But this would not be permitted if it were an indication personalised to the <i>customer</i>, for</u></p>

	<p><u>example where the indication is of the monthly cost in respect of the amount which the <i>customer</i> wishes to borrow over the term for which the <i>customer</i> wishes to borrow it; such an interaction will trigger the need for advice and the <i>firm</i> would need to comply with MCOB 4.7A.</u></p>
<p><u>Talking the <i>customer</i> through a decision tree</u></p>	<p><u>This would not be permitted. Although the question of whether decision trees constitute advice is discussed at PERG 4.6.15G, the act of talking the <i>customer</i> through such a decision-making process is likely to involve doing more than merely providing the <i>customer</i> with factual information; as that interaction is not of a sort permitted by MCOB 4.8A.7AR, the sale cannot be an <i>execution-only sale</i> and the <i>firm</i> would need to comply with MCOB 4.7A.</u></p>
<p><u>Responding to a query about how to fill out an application form (for example: telling a <i>customer</i> what supporting documents are acceptable as proof of address or identity and how to supply them, or how to calculate and report their income or expenditure)</u></p>	<p><u>This would be permitted, as it is information about the process of applying for a mortgage and the making of arrangements (how to supply supporting evidence) related to that process.</u></p>
<p><u>Discussing the use of panel solicitors</u></p>	<p><u>This would be permitted, provided such discussions are limited to factual information about, for example, whether or not a particular firm of solicitors is on the lender's panel and what legal fees are or are not included in the mortgage offer.</u></p>
<p><u>Taking credit card details by phone to cover payment of a required valuation</u></p>	<p><u>This would be permitted, as it is about the making of practical arrangements related to the processing of an application for a <i>regulated mortgage contract</i>.</u></p>

<u>Rescheduling a property valuation</u>	<u>This would be permitted because the interaction is about the making of arrangements related to the processing of the application.</u>
<u>Calling the <i>customer</i> to tell them that an application for a <i>regulated mortgage contract</i> needs to be submitted in the next <i>two days</i> if a new (higher) interest rate is not to apply</u>	<p><u>This would be permitted, if it were in the form of a generic communication about the <i>firm</i> planning to change its product offering or interest rates in the near future, and indicating the deadline for applying for the current product.</u></p> <p><u>However, a communication about a particular <i>regulated mortgage contract</i> that the <i>firm</i> knows or reasonably suspects the <i>customer</i> may wish to apply for, and the product it will be replaced with or the rate that will apply if an application for such a product is received after a particular date, would not be permitted as this is information which is personalised to the <i>customer</i>.</u></p>

...

Exception: rate switches and other variations

- 4.8A.10 R (1) *MCOB* 4.8A.7R does not apply in the case of a variation of a *regulated mortgage contract*, provided that:
- (a) ...; ~~and~~
 - (b) ...; and
 - (c) where the *firm* has added to the range of products it offers since it presented its products to the *customer* for the purpose of (b), the *firm* presents its new range of products to the *customer* in a durable medium before the *customer* submits an application.
- (2) ...
- (3) Where a *customer* informs their existing *mortgage lender* that they are considering redeeming their *regulated mortgage contract* by refinancing it with a *regulated mortgage contract* through another

mortgage lender, MCOB 4.8A.7R(3) does not apply to the existing mortgage lender provided that:

- (a) the customer specifies to the existing mortgage lender at least the following information in relation to the replacement regulated mortgage contract:
 - (i) the rate of interest;
 - (ii) the interest rate type (that is, whether fixed, variable or some other type);
 - (iii) the length of the term required by the customer;
 - (iv) the sum the customer wishes to borrow; and
 - (v) whether the customer wants an interest-only mortgage or a repayment mortgage; and
- (b) the existing mortgage lender presents to the customer, in a durable medium, those of its products for which the customer is eligible and which match the features the customer specifies.

4.8A.11 G ...

- (3) ~~Firms are reminded that, if their presentation in MCOB 4.8A.10R(1)(b) has (either explicitly or implicitly) steered the customer towards any one or more of the products offered by them such as to constitute advice, the requirements of MCOB 4.7A will apply. [deleted]~~
- (4) Where a firm's range of regulated mortgage contracts has changed, for example where a new regulated mortgage contract has been added since the firm presented its list of regulated mortgage contracts to the customer, the sale may proceed as an execution-only sale only if the firm re-presents the new list. For example, if the firm now offers a 3 year fixed deal where previously they only offered 2 year or 5 year fixed deals, the firm would need to re-present the new list. But where the firm no longer offers a particular regulated mortgage contract, the firm does not need to re-present the list for the purposes of MCOB 4.8A.10R(1).
- (5) Firms are reminded of Principles 6 and 7: that is, that they must pay due regard to the best interests of their customers and treat them fairly; and that they must pay due regard to the information needs of their clients, and communicate information to them in a way which is clear, fair and not misleading. Where features of a product have changed in such a way that the product is in effect no longer recognisable as the same product, firms should re-present the new list of products. Similarly, firms should re-present the new list of products where there is any change to interest rates, fees or other

charges which is likely to be material to the *customer's* decision as to whether or how to vary a *regulated mortgage contract*.

...

Requirements for execution-only sales

4.8A.14 R A *firm* must not enter into or arrange an *execution-only sale* for a *regulated mortgage contract* unless, except as provided in *MCOB 4.8A.15R*:

...

- (4) the *customer* has been informed, either clearly and prominently and in a *durable medium* or in an oral statement that is audio or video recorded (after providing the information in (1), (2), or (3), where that is required, and with the information required by this paragraph being separate from any other information or contractual documentation):

...

and in either case that the *customer* will not benefit from the protection of the rules (in *MCOB 4.7A*) on assessing suitability. In any case where there is spoken dialogue between the *firm* and the *customer* at any point during the sale, other than dialogue of a sort permitted by *MCOB 4.8A.7AR*, the *firm* must also provide this information orally (even if it also provides it in a *durable medium*); and

- (5) once the *customer* has been provided with the information in (4), in any case where there is spoken or other interactive dialogue between the *firm* and the *customer* at any point during the sale, ~~he~~ the *customer* has confirmed, in writing, to the *firm*, or has confirmed orally to the *firm* (and that confirmation is audio or video recorded), that ~~he is~~ they are aware of the consequences of losing the protections of the *rules* on assessing suitability and is ~~are~~ making a positive election to proceed with an *execution-only sale*. ~~The written confirmation must be in the same document as the information in *durable medium* in (4), which must be separate from any other information or contractual documentation.~~

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4.8A.16A G The confirmation required by *MCOB 4.8A.14R(5)* need not be in the same document or recording as the information required by *MCOB 4.8A.14R(4)*.

~~Managing execution-only sales~~

4.8A.17 R ~~A *firm* which intends to transact *execution-only sales* in *regulated mortgage contracts* must have in place and operate in accordance with a clearly defined policy which:~~

- (1) sets out the amount of business the *firm* reasonably expects to transact by way of *execution only sales* and the steps to be taken by the *firm* if that business exceeds the expected levels; and
- (2) sets out its processes and procedures for ensuring compliance with the rules in *MCOB 4.8A*; in particular:
 - (a) how it will ensure in every case that, before proceeding with an *execution only sale* it has obtained (where required) a voluntary and informed positive election from the *customer* in order to comply with *MCOB 4.8A.14R(5)*;
 - (b) how it will ensure in every case that it acts in compliance with *MCOB 2.5A.1R* and *MCOB 4.8A.5R* (The customer's best interests), including not encouraging a *customer* to enter into a *regulated mortgage contract* (or variation) as an *execution only sale*; and
 - (c) how it will identify whether a *customer* meets the definition of *high net worth mortgage customer* or *professional customer*, if it will offer *execution only sales* to those customers; and
- (3) includes the arrangements for monitoring and auditing compliance with the policy, processes and procedures.

[deleted]

Record keeping

- 4.8A.18 R (1) Whenever a *firm* enters into or arranges an *execution-only sale* for a *regulated mortgage contract*, it must make and maintain a record of:
- ...
- (b) the provision of the information ~~in *durable medium*~~ in *MCOB 4.8A.14R(4)*;
- ...
- ...
- (3) A *firm* must keep an adequate and up-to-date record of the policy in *MCOB 4.8A.17R*, where such policy is required by that *rule*. When the policy is changed, a record of the previous policy must be retained for one year from the date of change. [deleted]

...

TP 4 Other Transitional Provisions

(1)	(2) Material to which the transitional provisions applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provisions: coming into force
...
4	<u>MCOB 4.8A.18</u>	<u>R</u>	<p><u>Notwithstanding the deletion of MCOB 4.8A.18R(3) on 31 January 2020, a firm must retain an adequate record of:</u></p> <p><u>(1) the policy required by MCOB 4.8A.17R, in the form in which that policy had effect immediately before 31 January 2020, for one year from that date; and</u></p> <p><u>(2) any previous policy which was in force in the period of one year ending on that date, for one year from the date on which that policy came into effect.</u></p>	<u>31 January 2020 to 30 January 2021 (inclusive)</u>	<u>26 April 2014</u>
5	<u>MCOB 4.4A.1R(1A)</u>	<u>R</u>	<p><u>A firm may choose to comply with MCOB 4.4A.1R as if the changes to it made by the Mortgages (Advice) Instrument 2020 had not been made.</u></p>	<u>31 January 2020 to 30 July 2020 (inclusive)</u>	<u>21 March 2016</u>
6	<u>MCOB 4.7A.23AR</u>	<u>R</u>	<p><u>A firm may choose to comply with MCOB 4.7A as if the insertion of MCOB 4.7A.23AR had not been made.</u></p>	<u>31 January 2020 to 30 July 2020 (inclusive)</u>	<u>26 April 2014</u>

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Sch 1 Record keeping requirements

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1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
...
<u>MCOB 4.7A.25R(1)(d)</u>	<u>Suitability of regulated mortgage contracts</u>	<u>An explanation of why the firm has not recommended a cheaper regulated mortgage contract</u>	<u>When explanation given</u>	<u>Three years</u>
...
<i>MCOB 4.8A.18R(1)(b)</i>	<i>Execution-only sales of regulated mortgage contracts</i>	The warning to the customer in a durable medium regarding his <u>their</u> lack of protection of the rules on assessing suitability	The date a regulated mortgage contract was entered into or arranged	Three years
...
<i>MCOB 4.8A.18R(3)</i>	<i>Execution-only sales of regulated mortgage contracts</i>	The firm's policy for managing execution-only sales	When the policy is made	One year from when the policy is changed
...

Annex B

Amendments to the Perimeter Guidance manual (PERG)

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

4 Guidance on regulated activities connected with mortgages

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4.6 Advising on regulated mortgage contracts

Definition of ‘advising on regulated mortgage contracts’

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4.6.4 G ...

- (3) ~~PERG 8.25~~ (Advice must relate to an investment which is a security or contractually based investment) to ~~PERG 8.29~~ (Advice must relate to the merits (of buying or selling a particular investment)) PERG 8.31 (Exclusions for advising on investments) will be relevant to any *person* who may be advising on other forms of investment at the same time as ~~he advises~~ they advise on *regulated mortgage contracts*; this includes, for example, a *person* advising on the merits of using a particular endowment policy or *ISA* as the means for repaying the capital under an *interest-only mortgage*.

Advice must relate to a particular regulated mortgage contract

- 4.6.5 G Advice will come within the *regulated activity* in article 53A of the *Regulated Activities Order* only if it relates to a particular *regulated mortgage contract* (or several different *regulated mortgage contracts*). ~~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. Generic or general advice is not covered: examples of generic advice are shown in PERG 4.6.7G (but see PERG 4.6.7AG as well). Generic or general advice may, however, be a financial promotion (see PERG 8.4 (Invitation or inducement)).~~

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

- 4.6.6 G Advice relates to a particular contract if it recommends that a *person* should take out a mortgage with ABC Building Society without (expressly or by implication) specifying any particular ABC Building Society mortgage because it ~~steers the customer towards~~ is advice on the merits of specific identifiable mortgages and ~~away from~~ compared to all others. The advice is essentially saying that there is a feature of each individual ABC Building Society mortgage that makes it better than a mortgage from any other lender.

Advice may be regulated even though it relates to more than one possible mortgage. Advice also relates to a particular contract if it recommends that a *person* should not take out a mortgage with ABC Building Society.

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

This table belongs to *PERG 4.6.5G* and *PERG 4.6.6G*.

Recommendation	Regulated or not?
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 <u>on</u> 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 <u>on</u> 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 <u>on</u> more than one particular mortgage which the borrower could enter into.
...	...
I suggest you change (or do not change) your current mortgage from a variable rate to a fixed rate.	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. Yes. This is <u>advice</u> in respect of the advice about varying the terms of the particular mortgage that the borrower had already entered into.
I suggest you take out (or do not take out) a variable rate mortgage.	No. This is not advice which steers the borrower in the direction of <u>on</u> a particular mortgage which the borrower could enter into.
I recommend you take out (or do not take out) a mortgage.	No. This is not advice which steers the borrower in the direction of <u>on</u> a particular mortgage which the borrower could enter into.

<p>I would always recommend buying a house and taking out a mortgage as opposed to renting a property.</p>	<p>No. This is an example of generic advice which does not steer the borrower in the direction of <u>is not advice on a particular mortgage that he the borrower could enter into.</u></p>
<p>...</p>	<p>...</p>

- 4.6.7A G (1) Although giving generic advice is generally not a regulated activity, if it is given in the course of or in preparation for a regulated activity it can form part of that regulated activity.
- (2) For example, if a firm gives generic advice (for instance about the merits of a fixed rate mortgage rather than a variable rate mortgage) and then goes on to identify a particular fixed rate mortgage, the generic advice will form part of the regulated activity of advising on regulated mortgage contracts.
- (3) Another example is a firm that provides generic advice to a customer or a potential customer prior to or in the course of carrying on the regulated activity of arranging (bringing about) regulated mortgage contracts for the customer. That generic advice is part of that regulated activity of arranging (bringing about) deals in investments.

4.6.8 G ~~Generic or general advice will not fall under article 53A. Examples of generic advice are shown in PERG 4.6.7G. [deleted]~~

4.6.9 G ~~In the FCA'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 FCA's view, cause the person to be advising on regulated mortgage contracts; the FCA 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 PERG 4.6.22G (Scripted questioning (including decision trees)). [deleted]~~

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

...

Advice or information

4.6.13 G In the FCA'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 and figures.

- 4.6.14 G (1) 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.
- (2) The provision of purely factual information does not become regulated advice merely because it feeds into the *customer's* own decision-making process and is taken into account by them.
- (3) Regulated advice includes any communication with the *customer* which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the *customer's* decision whether or not to enter into a particular *regulated mortgage contract* or to vary an existing *regulated mortgage contract*.
- (4) A key to the giving of advice is that the information:
- (a) is either accompanied by comment or value judgement on the relevance of that information to the *customer's* decision; or
- (b) is itself the product of a process of selection involving a value judgement so that the information will tend to influence the decision.
- (5) Advice can still be regulated advice if the *person* receiving the advice:
- (a) is free to follow or disregard the advice; or
- (b) may receive further advice from another *person* before making a final decision.
- 4.6.15 G Information relating to entering into *regulated mortgage contracts* may often involve one or more of the following:
- ...
- (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 *PERG 4.6.21G* to *PERG 4.6.25G* (Scripted questioning (including decision trees)));~~ [deleted]
- ...
- 4.6.16 G In the *FCA's* opinion, however, such information is ~~likely~~ may take on the nature of advice if the circumstances in which it is provided give it the force of a recommendation as ~~described in *PERG 4.6.10G*~~. Examples of situations

where information provided by a person ('P') are likely to take the form of advice are given below. For example:

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

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

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

- 4.6.16C G
- (1) A person can give advice without saying (or implying) categorically that the customer should enter into a particular regulated mortgage contract. The adviser does not have to offer a definitive recommendation as to whether the customer should enter into that particular regulated mortgage contract.
 - (2) For example, saying the following can still be advice:
 - (a) “this regulated mortgage contract is a very good deal but it is your decision whether or not to enter into it”; or
 - (b) “this regulated mortgage contract is a very good deal but I am going to leave it to you to decide because I don’t know how important it is to you to have certainty about your monthly mortgage payments”.
 - (3) The examples in (2):
 - (a) involve advice and not just information; and
 - (b) involve advice on the merits of entering into a particular regulated mortgage contract (see PERG 4.6.17G to 4.6.20G (Advice must relate to the merits (of entering into as borrower or varying)).

- 4.6.16D G One factor in deciding whether what was said by an adviser in a particular situation did or did not amount to advice is to look at the inquiry to which the adviser was responding. If a customer asks for a recommendation, any response is likely to be regarded as advice.
- 4.6.16E G On the other hand, if a customer makes a purely factual inquiry it may be the case that a reply which simply provides the relevant factual information is no more than that. In this case it is relevant whether the adviser makes it clear that they do not give advice, or whether the adviser runs an advisory business.

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

...

- 4.6.18 G ~~A neutral and balanced~~ An explanation of the implications under a regulated mortgage contract of, for example, exercising certain rights or failing to make interest payments on time, need not, itself, involve advice on the merits of entering into that contract or varying its terms.

...

- 4.6.20 G Without an explicit or implicit advice recommendation on the merits of entering into as borrower or varying the terms of a *regulated mortgage contract*, advice will not fall under article 53A if it is advice on:
- (1) the likely meaning of uncertain provisions in a regulated mortgage contract; or
 - (2) ~~on~~ how to complete an application form; or
 - (3) the effect of contractual terms and their consequences; or
 - (4) terms which are common in the market.

~~Scripted~~ Pre-sale questioning (including decision trees)

- 4.6.21 G ~~Scripted Pre-sale~~ questioning involves ~~using any form of sequenced~~ putting a sequence of questions in order to extract information from a *person with a view to facilitating the selection by that person of to help them best select a mortgage or other product that meets his their* needs. A decision tree is an example of ~~scripted pre-sale~~ 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.~~
- 4.6.22 G (1) ~~Undertaking the process of scripted questioning gives rise to particular issues concerning advice. These mainly involve~~ There are two aspects of this regulated activity. These are the definition of *advising on regulated mortgage contracts* that are particularly relevant to whether pre-sale questioning involves *advising on regulated mortgage contracts*:

- (a) the fact that advice must relate to a particular *regulated mortgage contract* (see *PERG* 4.6.5G); and
- (b) the distinction between information and advice (see *PERG* 4.6.13G).

- (2) Whether or not ~~scripted~~ pre-sale questioning in any particular case is *advising on regulated mortgage contracts* will depend on all the circumstances.
- (3) ~~If the~~ The pre-sale questioning process may involve identifying one or more particular *regulated mortgage contracts* ~~then, in the FCA's view. If so,~~ to avoid *advising on regulated mortgage contracts*, the critical factor is likely to be whether the process is limited to, and likely to be perceived by the borrower as, assisting the borrower to make ~~his~~ their own choice of product which has particular features which the borrower regards as important. The questioner will need to avoid making any judgement on the suitability of one or more products for the borrower. See also *PERG* 4.6.4G for other matters that may be relevant.

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

4.6.23 G ~~The 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 identifying *regulated mortgage contracts* based on factual matters. (For example, the purpose may be to identify whether a borrower wishes to pay a fixed or variable rate of interest or the size of deposit available). In the FCA'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 particular *regulated mortgage contracts* which match features identified by the ~~scripted~~ pre-sale questioning; provided these are presented in a balanced and neutral way (for example, they identify all the matching *regulated mortgage contracts*, without making a recommendation as to a particular one) this need not of itself involve *advising on regulated mortgage contracts*;
- (2) the questioner may go on to advise the borrower on the merits of one particular *regulated mortgage contract* over another; this would be *advising on regulated mortgage contracts*;
- (3) the questioner may, before or during the course of the ~~scripted~~ pre-sale questioning, ~~give a recommendation or opinion which influences the choice of mortgage contract and information that considered on its own would not involve *advising on regulated*~~

mortgage contracts, but may, following the scripted pre-sale 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 PERG 4.6.22G)). The factors described in PERG 4.6.25G are relevant to deciding whether or not the questioner is advising on regulated mortgage contracts.

- 4.6.24 G The second type of scripted pre-sale 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 pre-sale questioning may not lead to the identification of any particular *regulated mortgage contract*; in this case, the questioner has provided advice, but it is generic advice and does not amount to *advising on regulated mortgage contracts*; or
 - (2) the scripted pre-sale 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 PERG 4.6.22G)~~. In principle, this is likely to involve *advising on regulated mortgage contracts* as regulated advice includes any communication with the customer which, in the particular context in which it is given, goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to enter into the regulated mortgage contract (see PERG 4.6.14G). However, the factors described in PERG 4.6.25G are still relevant to deciding whether or not the questioner is *advising on regulated mortgage contracts*.
- 4.6.25 G In the scenarios identified in When the scripted pre-sale questioning identifies particular regulated mortgage contracts (see PERG 4.6.23G(3) and PERG 4.6.24G(2)), the FCA considers that it is necessary to look at the process and outcome of scripted the pre-sale 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 FCA'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. Factors that may be relevant include:~~
- (1) any representations made by the questioner at the start of the questioning relating to the service ~~he is~~ they are to provide;
 - (2) the context in which the questioning takes place;

- (3) the stage in the questioning at which the opinion is offered and its significance;
- (4) the role played by any questioner who guides a *person* through the ~~scripted~~ pre-sale questions;
- (5) the outcome of the questioning (whether particular *regulated mortgage contracts* are highlighted, how many of them, who provides them, their relationship to the questioner and so on); and
- (6) whether the ~~scripted~~ pre-sale questions and answers have been provided by, and are clearly the responsibility of, an unconnected third party (~~for example, the FCA~~), 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~~ their particular circumstances.

4.6.25A G A firm selling regulated mortgage contracts through its website might make its list of the regulated mortgage contracts it sells easier to search by allowing the customer to filter mortgages based on factors presented by the website and selected by the customer. Only products that meet the search criteria input by the customer are displayed.

- 4.6.25B G
- (1) The filtering described in PERG 4.6.25AG might be based upon simple objective factors like price or eligibility criteria. This should not generally involve advising on regulated mortgage contracts, as explained in PERG 4.6.23G(1).
 - (2) The filtering described in PERG 4.6.25AG might, however, be based upon factors such as balancing customer preferences on price, interest rate and term. This is not a simple objective factor like price alone.
 - (3) Where all a firm is doing is listing product features of its own regulated mortgage contracts, for example by ranking objectively by the cost of any arrangement fee, that firm is unlikely to be advising on regulated mortgage contracts as long as it is clear to the customer that this objective ranking is all that the firm is doing. A description of a product's features is not advice.
 - (4) Where a firm is describing regulated mortgage contracts offered by a third party and the product features are drawn directly from information made available to the firm by that third party, the firm is also unlikely to be advising on regulated mortgage contracts as long as it is clear to the customer that all the firm is doing is describing regulated mortgage contracts offered by a third party. A description of the product features is the factual representation of the regulated mortgage contracts and therefore likely to be information and not advice.

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

Medium used to give advice

...

- 4.6.28 G 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~~ The firm will be giving advice for the purpose of advising on regulated mortgage contracts only if the service goes beyond the mere provision of information and is objectively likely to influence the customer's decision whether or not to enter into the regulated mortgage contract (see PERG 4.6.21G to PERG 4.6.25BG (Scripted Pre-sale questioning (including decision trees))).
- 4.6.28A G Some software services involve the generation of specific prompts promoting remortgaging. These prompts are liable, as a general rule, to be advice for the purposes of article 53A (as well as financial promotions) given by the person responsible for the provision of the software. The exception to this is where the user of the software is required to use enough control over the setting of parameters and inputting of information for the prompts to be regarded as having been generated by the customer rather than by the software itself.

...

Exclusion: periodical publications, broadcasts and websites

- 4.6.30 G The main exclusion from *advising on regulated mortgage contracts* relates to advice given in periodical publications, regularly updated news and

information services and broadcasts (article 54 of the *Regulated Activities Order* (Advice given in newspapers etc)). The exclusion applies to advising on regulated mortgage contracts if the principal purpose of any of these publications, news and information services or broadcasts is neither to give advice of the kind to which ~~article 53 (Advising on investments)~~ or article 53A applies nor to lead or enable persons to: enter as borrower into regulated mortgage contracts or vary the terms of regulated mortgage contracts entered into by such persons as the borrower.

- (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 *PERG 7* (Periodical publications, news services and broadcasts: applications for certification).

...

4.6.34 G Further examples of what is and is not regulated advice

This table belongs to *PERG 4.6.33G*.

Example of what the firm says and does	Regulated or not?
...	...
(2) The <i>firm</i> says “We have a wide range of mortgages, our best rates are two-year fixed rates, you might want to look at those.”	Yes. The <i>firm</i> has identified specific products that it offers and is steering the customer <u>drawing the customer’s attention</u> to those products. Identifying which products have the lowest rates is not advice on its own, only facts. However, “best” involves a value judgment <u>judgement</u> , particularly when a comparison is made with other products that have different periods for which interest is fixed or that have variable interest rates.
...	...
(5) The <i>firm</i> says “Our fixed rates start at 4.99% for two years with a £900 fee. Our variable rates start at 4.50% with a £800 fee. Depending on how much you want to borrow and your	No. The <i>firm</i> is comparing two products without recommending either, nor is the <i>firm</i> steering the customer to <u>recommending one</u> over the other.

circumstances, this may affect the rate available to you.”	
...	...