Mortgage advice and selling standards: feedback to CP19/17 and final rules

Policy Statement
PS20/1

January 2020

This relates to

Consultation Paper 19/17
which is available on our website at
www.fca.org.uk/publications

Email:
cp19-17@fca.org.uk

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Contents

1 Summary

1.1 The Mortgages Market Study (MMS) identified three potential harms relating to our mortgage advice and selling standards:

- our rules and guidance may be a barrier to developing tools that help consumers choose a mortgage
- consumers looking to buy an execution-only mortgage (ie without advice) are diverted to advice; execution-only sales channels are not always easy to use
- many consumers are overpaying for their mortgages, even when they get advice

1.2 To address these harms, we consulted on changes to our mortgage advice and selling standards, in Consultation Paper (CP) 19/17. This Policy Statement (PS) summarises the feedback we received and sets out our final rules.

1.3 There was support for our proposals and we are implementing them as proposed. However, we have made some small changes, where feedback suggested this would make our rules clearer or more effective.

Who this affects

1.4 This PS will be of interest to:

- consumers and consumer groups
- banks, building societies and credit unions
- mortgage firms
- trade bodies representing these firms

The wider context

1.5 The MMS evaluated some of the changes brought in by the Mortgage Market Review (MMR) in 2014. As part of the MMS, we considered whether consumers could make effective choices using the mortgage tools available on the market.

1.6 We also set out our vision for the market as one in which:

- borrowers who can afford a mortgage can choose suitable and good value products and services
- firms have a culture of treating all consumers fairly
- competition and proportionate regulation empower consumers to make effective decisions when choosing a mortgage, and throughout its duration

1.7 To achieve this vision, we said we wanted:

- consumers to find it easier to choose the right mortgage

- a wider range of tools providing consumers with more choice about the support (including advice) they receive
- consumers to be able to choose an intermediary on an informed basis
- consumers to switch freely to new deals without undue barriers

1.8 Our changes make it easier for firms to present options to consumers without giving regulated advice. They help firms make execution-only sales channels easier to use. Similarly, recent changes to our responsible lending rules reduce regulatory barriers and help consumers get a mortgage that is right for them. These two changes complement each other to deliver the outcomes we want to see.

How it links to our objectives

1.9 CP19/17 sets out how these changes help to meet our objectives:

- protecting consumers
- promoting competition

and how the changes address the harm we found.

What we are changing

1.10 We are finalising our rules and guidance in the following ways:

- changing our Perimeter Guidance (PERG) on mortgage advice to:
  - make clear that tools that allow search and filtering based on objective criteria are not necessarily giving advice
  - more closely align our approach with the recently updated guidance on advising on retail investments
- permitting more customer interaction before firms are required to give advice
- making other changes that may help firms make execution-only sales channels easier to use
- requiring advisers to explain why they have not recommended a cheaper mortgage, where other products meet the customer's needs and circumstances
- making minor amendments to correct a cross-reference or use a gender-neutral drafting approach in our Handbook text

Outcome we are seeking

1.11 We want to give consumers more choice in how they buy a mortgage.

1.12 One way we want to achieve this is through removing barriers to the development of search and filter tools from mortgage lenders and intermediaries. We believe our changes will help firms develop these tools.

1.13 In addition, we think these changes will:

- prevent consumers being diverted to advice where the interaction does not influence purchasing decisions
- encourage firms to make execution-only sales channels easier to use

1.14 Advisers will need to explain why they have not recommended the cheapest of the suitable mortgages they have available. This should mean more consumers understand how price and other factors are considered in the recommendation they receive and give them an opportunity to challenge the recommendation.

Measuring success

1.15 We will evaluate the success of our changes through firm supervision and monitoring of regulatory returns. We may also carry out research or work with firms to assess the impact of these changes, including consumer outcomes.

Summary of feedback and our response

1.16 We received 66 responses from firms, trade bodies and consumer groups. Most responses were supportive of our proposals. Intermediary firms and their trade body had some concerns about the proposal to make execution-only sales channels more accessible, particularly the proposal to remove prescriptive detail from execution-only sales policy.

1.17 Some firms suggested new examples to include in our PERG or to illustrate which type of interactions trigger the need to give advice.

1.18 We are implementing the proposed changes to our mortgage advice and selling standards as consulted on, subject to small changes.

1.19 Feedback and our responses are set out in detail in Chapter 2.

Equality and diversity considerations

1.20 42 respondents commented on our equality impact assessment. Almost all agreed with our assessment. Several respondents questioned why we had not included the impact of our proposal on vulnerable consumers. We have considered the impact of these changes on vulnerable consumers, and our wider draft guidance on vulnerability requires firms to support vulnerable customers. However, vulnerability itself is not a protected characteristic under the Equality Act 2010. Our assessment of the impact of these changes on groups with protected characteristics remains unchanged from Consultation Paper CP19/17.

Next steps

1.21 Subject to transitional rules, these changes to rules and guidance will come in to force on 31 January 2020.

1.22 To allow firms time to adapt their processes to accommodate the changes made in MCOB 4.4A.1R(1A) and MCOB 4.7A.23AR, we have included transitional provisions that run to 30 July 2020.

2 Feedback to CP19/17: consultation on mortgage advice and selling standards

2.1 In this chapter, we summarise the feedback received on the proposed changes to our mortgage advice and selling standards.

Changes to our Perimeter Guidance on mortgage advice

Search and filtering based on objective criteria

2.2 Following feedback to the interim report of the MMS, we consulted on changes to our PERG to remove a regulatory barrier to firms presenting options to consumers. PERG currently says that giving generic information or advice may amount to giving regulated advice if it steers the customer towards one or more mortgages. This was said to be preventing firms from allowing customers to search and filter for mortgages online. We asked:

> **Q1:** ***Do you agree with the proposed changes to our Perimeter Guidance to show that a tool allowing a consumer to search and filter based on objective factors is not necessarily giving advice?***

Feedback received

2.3 Most respondents supported this proposal. The responses included some questions and suggestions, which we address below.

2.4 Several respondents questioned the relationship between the proposed PERG and the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB) changes to interactions that trigger advice.

2.5 One respondent questioned whether the example "I suggest you take out (or do not take out) a variable rate mortgage" is an example of regulated advice.

2.6 Some respondents suggested we give further examples of whether something is generic or regulated advice, with PERG to include a view on the following issues:

- whether a customer should take a mortgage with a certain fixed interest rate period
- the cost of mortgage A compared to mortgage B

2.7 Some respondents asked for the guidance to include further detail on how much judgement a tool could employ before it could be considered advice.

2.8 Some intermediaries suggested:

- this was a move away from the MMR approach and that we should not proceed
- filtering down to a single mortgage product would be advice

- consumers should be made aware that execution-only sales do not come with advice.

Our response

We welcome the support for this proposal and are going ahead as proposed. We respond to the feedback above in order.

PERG provides our view on the Regulated Activities Order and whether a person is likely to be carrying out the regulated activity of mortgage advising. It is distinct from MCOB. MCOB intentionally requires advice to be given in some situations where, were it not for MCOB, the interaction between the firm and the consumer would not amount to regulated advice.

The PERG example "I suggest you take out (or do not take out) a variable rate mortgage", by itself, is not regulated advice. Instead, it is an example of generic advice rather than advice on whether to enter into a regulated mortgage contract.

There is a balance between the benefit of adding more examples for clarity and making PERG longer. In our view, the suggested new examples did not give sufficient extra clarity to warrant inclusion.

The proposed changes to the PERG on online tools "using an element of judgement" mirrors the text in PERG on advising on investments. We do not agree that adding further guidance here would justify introducing an inconsistency with PERG on investment advice given that we are trying to align the two pieces of guidance.

Our rules (MCOB 4.8A.14R(4)) already require firms to inform customers that the firm will not assess suitability and the customer will not benefit from the associated protections. The consumer research we published alongside CP19/17 showed that consumers generally understood they were buying without advice.

Aligning with Perimeter Guidance on advising on investments

2.9 The drafting of our PERG on advising on mortgages and investments has diverged even though the regulated activities are very similar. We see the benefit of greater consistency in our Handbook across markets and we consulted on changes to align the PERG on mortgage advice with the PERG on advising on retail investments. We asked:

Q2: ***Do you agree that we should more closely align our Perimeter Guidance on mortgage advice with the Perimeter Guidance on advising on investments?***

Feedback received

2.10 Most respondents agreed that the PERG on mortgage advice should be more closely aligned with the PERG on advising on investments.

2.11 Intermediaries tended to be opposed, arguing the two markets are fundamentally different and PERG on each regulated activity should reflect this.

Our response

We welcome the support for this proposal and are going ahead as proposed. We respond to the feedback above in order.

The statutory language which specifies the scope of the regulated activities is the same for advising on both mortgages and investments. The activity is providing 'advice on the merits of' entering into a regulated mortgage contract or buying or selling investments. PERG on these two activities was initially aligned and we think it is appropriate to restore this alignment.

Tools in the mortgage market

2.12 We consulted on adding examples to our guidance to clarify the position for developers of online tools that give advice, and to more closely align the retail investments guidance with the mortgage guidance. We asked:

Q3: ***Do you agree with the way we have characterised the types of tools that already exist or could be developed in the mortgage market?***

Feedback received

2.13 Around half of respondents replied to this question and almost all agreed with the examples we had proposed.

2.14 One respondent suggested that we should introduce an example of a tool that shows a consumer which mortgages they are likely to be eligible for.

Our response

We agree with the suggestion, and we have clarified in PERG that the provision of a tool which shows a consumer which mortgages they are may be eligible for may not be giving advice.

Modifying the interaction trigger for advice

Permitting more interaction with customers before firms are required to give advice

2.15 We consulted on allowing more interaction with customers before firms are required to give advice. This followed feedback to the MMS that showed customers were being diverted to advice even though their interactions were not likely to be confused with advice. We proposed to allow interactive dialogue in execution-only sales so long as this was limited to factual information that was not personalised or was about the application process and other practical matters. We asked:

Q4: ***Do you agree that we should permit more interaction with customers before firms are required to give advice?***

Feedback received

2.16 Most respondents agreed with this proposal. The responses included some questions and suggestions, which we address below.

2.17 Two trade bodies asked whether a firm could issue a European Standardised Information Sheet (ESIS) or illustration in an execution-only sale under these rules, as the illustration is personalised to the customer.

2.18 Some lenders and trade bodies suggested that we should go further and remove the interaction trigger for advice.

2.19 Several lenders asked whether we could give further guidance on what constitutes generic as opposed to personalised information.

2.20 Some intermediaries suggested we require a risk warning ahead of execution-only purchases and asked us to measure consumer capability before making this change.

Our response

We welcome the support for this proposal and are going ahead as proposed with one addition. We respond to the feedback above in order.

We do not want to stop firms from issuing an ESIS or illustration in execution-only sales. We are changing the relevant rules to clarify that issuing an ESIS or illustration does not in itself trigger the need for the firm to give advice.

Broadly, if an interaction results in the customer receiving personalised information it is likely to trigger the need to give advice. A consumer receiving personalised information may incorrectly believe they had been advised, and therefore we do not agree that we should remove this interaction trigger.

We believe our current guidance is sufficiently detailed and we do not think adding further guidance on what constitutes generic rather than personalised information is necessary or justified.

In an execution-only sale firms must already disclose to customers that they are not assessing suitability and that the customer will not benefit from the associated protections. Our consumer research showed that most consumers understand from these disclosures that they are buying without advice. While consumer capability is difficult to measure, Occasional Paper 34 did not find evidence that consumers who receive advice because of the MMR make choices that meaningfully differ from what they would have chosen without advice.

Examples of interactions that should not trigger the need to give advice

2.21 We consulted on guidance which gave examples of interactions that should not trigger the need to give advice. This included support with an application and giving generic information about products. We asked:

> **Q5:** ***Do you agree with the examples of interactions that should not trigger the need to give advice?***

Feedback received

2.22 Most respondents agreed that the examples we included did not trigger the need to give advice.

2.23 Several lenders and their trade bodies suggested an additional example of an interaction that should not trigger the need to give advice. This was giving the monthly cost of a potential mortgage. One respondent suggested that telling a consumer whether they were eligible for a particular mortgage should be a permitted interaction in execution-only sales.

2.24 One respondent suggested that we include answering questions about, or explaining, the execution-only disclosure as an example of an interaction that should not trigger the need to give advice. This was because, at present, some consumers phone the firm to better understand the disclosure but the firm will direct the consumer to advice, or end the interaction so that an execution-only sale can continue.

Our response

We welcome the support for this proposal and are going ahead as proposed with one addition.

Giving the monthly cost of a mortgage or saying whether a customer is eligible for a particular mortgage involves personalised rather than generic information. We think that maintaining the distinction between personalised and generic information helps firms to judge whether an interaction triggers the need for advice. Generic information is also less likely to be confused with advice. Therefore, we have not added these two examples.

Our research showed consumers sometimes think they are giving up more protections than they really are when they receive the disclosure before execution-only sales. We agree that a verbal explanation might help consumers better understand the disclosure and which protections they are giving up. We have therefore added this as an example of an interaction that does not trigger advice.

Changes that may remove barriers to firms making their execution-only sales channels more accessible

Removing prescriptive detail on firms' execution-only policies

2.25 We consulted on removing the prescriptive detail required in firms' execution-only policies to bring our requirements in line with advised sales and to avoid implying we consider execution-only sales inherently riskier. We asked:

> **Q6:** ***Do you agree that we should remove the prescriptive detail in firms' execution-only policies?***

Feedback received

2.26 While most respondents agreed with this change, intermediaries were strongly opposed but they did not provide reasons for this other than stating there was no need to replace the MMR approach. Some of these respondents thought we were removing the requirement for firms to have an execution-only policy altogether and disagreed with this.

2.27 One consumer group suggested that we mandate a prompt to buy protection during execution-only sales.

Our response

We welcome the support for this proposal and are going ahead as proposed.

Firms will still need to have an execution-only sales policy. Following this change, the nature of this policy is governed by high-level rules in our Senior Management Arrangements, Systems and Controls (SYSC) sourcebook rather than being prescribed in MCOB.

We have not added a prompt to buy protection in execution-only sales. We do not have such a prompt in advised sales. We believe execution-only sellers have similar incentives to advisers in raising protection issues with mortgage customers.

Clarify firms can market execution-only channels and adopt different pricing between channels

2.28 We consulted on giving guidance to say that our rule preventing a firm from encouraging a consumer to opt out of advice does not prevent firms from marketing their execution-only channels or adopting different pricing between advised and execution-only channels. This change to guidance aims to clarify that marketing of execution-only mortgages is permitted. We asked:

> **Q7:** ***Do you agree that we should give guidance to clarify that MCOB 4.8A.5R does not prevent a firm marketing their execution-only channel or pricing advised and execution-only sales differently?***

Feedback received

2.29 Most respondents agreed with this new guidance. Those who agreed, including consumer groups, said that it was fair that savings from cheaper distribution were passed on to consumers. Intermediaries tended to be opposed to the change. The responses included some questions and suggestions, which we address below.

2.30 Those arguing against this guidance were concerned that it may drive price-sensitive consumers towards execution-only deals. They said that we had not made the case for more execution-only sales.

2.31 Some intermediaries were concerned that consumers might 'steal' advice. For example, they would speak to an adviser to get a recommendation and then buy the product execution-only, avoiding any advice fee.

2.32 Some intermediaries said that this change would skew the market towards online intermediaries with small panels.

2.33 Some lenders asked how they should communicate the price difference to consumers, for example, by referring to the higher price for advised sales as including an advice fee.

Our response

We welcome the support for this proposal and will go ahead as proposed.

The potential risk of price-sensitive consumers taking cheaper execution-only deals exists currently, as some firms already price differently.

The MMS found that some consumers who were confident to choose a mortgage themselves found it difficult to do so because:

- they were diverted to advice
- execution-only sale channels were not easy to use

We hope this change, alongside others in this PS, will encourage firms to invest in marketing their execution-only sales and making these channels more accessible.

The risk of consumers using the advice from an intermediary to make an execution-only purchase already exists. Firms can choose to manage this risk, for example through their charging structure.

Online intermediaries need to comply with our initial disclosure requirements including their scope of service. We think the same commercial incentives for having wide panels will apply to online intermediaries as they do for traditional intermediaries.

Firms must ensure the way they communicate the price difference to consumers is clear, fair and not misleading. We don't consider there is a need for further guidance on how this is done.

Minor change of process for the internal rate switch exception (1)

2.34 Firms can have an interactive sale without triggering the need to give advice if:

- it is for a rate switch, and
- the firm has first presented a list of all eligible mortgages

2.35 Following feedback to the MMS that 'business as usual' rate changes made it difficult to use this exception, we consulted on a minor change to the process, as set out in bold below.

2.36 If a firm adds new products to its range or makes changes to interest rates or fees **and these changes are material to the customer's decision**, they must present the options again to the consumer before they can use the rate switch exception. We asked:

Q8: ***Do you agree that we should change the process for using the internal rate switch exception so the list need only be re-sent if new products are added or interest rates or fees change in a way likely to be material to the customer's decision?***

Feedback received

2.37 Almost all respondents supported the proposed requirement to resend lists of products if the new products would materially impact a customer's decision.

2.38 Some respondents asked us for further guidance on what we felt constituted a change material to the customer's decision.

2.39 One respondent identified an incorrect cross-reference, in draft MCOB 4.8A.11G.

Our response

We welcome the support for this change and are going ahead as proposed. We have corrected the typographical error.

There can be a number of factors that will dictate whether or not a change is material to the customer's decision. Therefore, we do not agree that further guidance on what constitutes a change likely to be material to a customer's decision is helpful.

Minor change of process for the internal rate switch exception (2)

2.40 The current rate switch exception primarily addresses circumstances where the firm is contacting an existing customer. We proposed in cases where the customer approaches their existing lender to ask to match an offer from a competitor, the firm need only present the relevant product to use the internal rate switch exception. We asked:

Q9: ***Do you agree that in cases where the customer approaches their existing lender to ask whether they can match an offer from a competitor, the firm need only present the relevant product to use the internal switch exception?***

Feedback received

2.41 Most respondents supported the change.

2.42 Some respondents said this change would introduce a risk that the existing lender could have better products than the one the customer was enquiring about, but that these would not be presented.

2.43 Some lenders suggested there could be a challenge in matching the product beyond the factors we specified, for example overpayment limits or early repayment charges.

Our response

We welcome the support for this change and will go ahead as proposed.

It is true that the existing lender could have a better product than the one the customer was enquiring about. However, in this scenario, the customer has already decided the features of the mortgage they wish to buy and is merely checking whether the existing lender has a cheaper deal for a similar product. This mirrors some of our requirements in MCOB 4.8A.14R(1) for execution-only customers to identify the key features of the mortgage they wish to apply for.

We have decided not to mandate the full list of key features from MCOB 4.8A.14R(1). We think it more appropriate for the existing lender to get sufficient information about the competitor's offer, before putting forward their alternative.

Allow execution-only disclosure to be given and recorded by audio or video

2.44 Before an execution-only sale, firms must disclose that they are not assessing suitability and the consumer will not benefit from associated protections. We consulted on allowing this disclosure to be given and recorded by audio or video. We asked:

Q10: ***Do you agree that we should allow the execution-only disclosure to be given and recorded by audio or video?***

Feedback received

2.45 Almost all respondents to the consultation agreed with the proposal to allow execution only disclosure to be given by recorded audio or video.

2.46 Some respondents asked whether we could mandate audio or video disclosure to avoid data protection compliance issues.

2.47 Several respondents asked us how long the recording needed to be retained and one asked whether the firm would be required to give the consumer a copy.

Our response

We welcome the support for this change and will go ahead as proposed.

We are not mandating audio or video disclosure. It is up to firms which medium they wish to use for this disclosure.

The recording must be retained for 3 years. Firms can give a copy of the disclosure to the consumer but we don't think it would be proportionate to mandate this.

Allow execution-only disclosure and positive election to be in separate documents or recordings

2.48 We consulted on allowing the execution-only disclosure and the customer's subsequent positive election to proceed to be in separate documents or recordings. This was because requiring these to be in the same document or recording could be a barrier to designing good online journeys for consumers. We asked:

> **Q11:** ***Do you agree that we should allow the disclosure and positive election to be in separate documents or recordings?***

Feedback received

2.49 Most respondents agreed with this change. The responses included some questions and suggestions, which we address below.

2.50 One trade body suggested that this change might be costly for firms because they would need to store separate recordings.

2.51 Another trade body said that this would not aid customer understanding of the disclosure and went against the findings of our consumer research.

2.52 Two compliance consultants said that it might be more difficult for firms to store two documents in a way that was easy to monitor compliance.

Our response

We welcomed the support for this change and are going ahead as proposed.

As this is an enabling change, firms do not need to separate the disclosure and positive election and so will not incur costs unless they make a business decision to do so. Ease of monitoring compliance may be one factor firms consider in making this decision.

We disagree that allowing the separation of the disclosure and positive election will lead to worse consumer understanding. This change may help firms to design journeys with more touch points to disclose and gain consent. Our consumer research showed consumers would value customer journeys where this occurs.

Taking account of price when choosing between suitable mortgages in advised sales

2.53 We consulted on requiring that where advisers do not recommend the cheapest suitable mortgage from their product range, that they explain why to the customer and record the reason. This was following the MMS finding that 30% of consumers could have found an identical or better and cheaper mortgage elsewhere. Whether they received advice made little difference to the likelihood that they overpaid. We asked:

Q12: ***Do you agree that we should require advisers, if they do not recommend the cheapest suitable mortgage, to explain why they have not recommended a cheaper mortgage?***

Feedback received

2.54 Most respondents agreed with the change but several had questions on how it would work in practice. Many respondents said that this change codified what already happened in practice. The responses included some questions and suggestions, which we address below.

2.55 Several lenders asked whether the firm's product range for the comparison included execution-only deals.

2.56 Some respondents were concerned that this change might make advisers focus on price at the expense of suitability.

2.57 One trade body said it desired further detail on the specific information advisers would be required to put into sourcing systems. They raised concerns about the cost implications this work, and storing of evidence of compliance, would have on advisers.

2.58 Respondents asked various questions relating to the method used to identify the cheapest mortgage, including the impact of upfront fees and length of fixed deal periods.

2.59 One respondent asked which mortgages needed to be considered for comparison if a customer has only a weak preference for a given factor, in MCOB 4.7A.5R or MCOB 4.7A.6R, which set out the factors a firm must consider when assessing the suitability of a given mortgage.

Our response

We welcome the support for this change and are going ahead as proposed with one change.

Whether a lender's in-house advisers need to include execution-only deals in their comparison depends on the range of mortgages that the adviser says they are considering. For example, if the scope of products the adviser is advising on is limited to mortgages available through the in-branch sales channel, they don't need to compare to online-only deals. Therefore, it's important that consumers understand which mortgages the adviser will consider. Firms must already tell the customer in their initial disclosure any limitations to the range of products under consideration. We want to make it clear that this includes limits on the products firms are providing information on and have made changes to achieve this.

We don't agree that this change will make advisers focus on price as opposed to suitability. Advisers must first consider the needs and circumstances of the customer and base their recommendation on suitability. It is only if there are other mortgages with the same features that are cheaper that the adviser will need to explain to the customer why they have not recommended the cheaper mortgages.

We do not agree that we need to be prescriptive about the data advisers put into sourcing systems to generate evidence for the record. We expect most firms to record any new information on the reasoning on the choice of an existing mortgage within existing systems. We do not expect firms will create new datasets on the speed of service of providers to avoid complaints. There are relatively few complaints about mortgage advice and we do not expect complaints levels to materially change under these new requirements. In the first half of 2019, there were fewer than 8,000 complaints about the advising, selling and arranging of home finance (including equity release and second charge mortgages complaints).

The approach to identifying the cheapest mortgage can be found in MCOB 4.7A.23AR. It compares the total amount payable over the relevant period including any fees paid directly by the customer where this is the case. The relevant period is any discounted or introductory period, or the full mortgage term in cases where there is no discounted or introductory period.

When comparing two mortgages with differing lengths of relevant period (eg introductory period), the relevant period for the comparison is that of the recommended mortgage.

Where a customer has only a weak preference for the factors related to suitability in MCOB 4.7A.5R or MCOB 4.7A.6R the adviser should continue to discuss with the customer until they are confident to make a specific recommendation. After making the recommendation the adviser will need to consider whether the product they have recommended is the cheapest based on those features.

The calculation only includes product or arrangement fees and does not include other fees such as valuation fees.

Minor amendments

2.60 We proposed minor amendments to correct an incorrect cross-reference in MCOB 4.1.4R(1) and to adopt a gender-neutral drafting approach in our Handbook text. We asked:

Q13: ***Do you agree that we should make these minor amendments?***

Feedback received

2.61 Almost all of those who responded to this question agreed with these changes.

Our response

We will go ahead as proposed.

Equalities Impact Assessment

2.62 We published our Equalities Impact Assessment, setting out our initial assessment of the impact of our proposals on the protected groups.

Feedback received

2.63 Almost all respondents agreed with our initial assessment of the impact of our proposals on the protected groups. Some respondents asked us to include the impact of our proposals on vulnerable consumers.

Our response

We have considered the impact of these changes on vulnerable consumers, and our wider draft guidance on vulnerability requires firms to support vulnerable customers. However, vulnerability is not a protected characteristic under the Equality Act 2010 and so it has not been included in the Equalities Impact Assessment.

Commencement

2.64 Subject to transitional rules, these changes to rules and guidance will come in to force on 31 January 2020.

2.65 To allow firms time to adapt their processes to accommodate the changes made in MCOB 4.4A.1R(1A) and MCOB 4.7A.23AR, we have included transitional provisions that run to 30 July 2020.

Cost Benefit Analysis

2.66 We did not get any substantive feedback on our cost benefit analysis.

Annex 1
List of non-confidential respondents

Association of Mortgage Intermediaries

Andrews Financial

Association of Short Term Lenders

Bank of Ireland

Building Societies Association

Capital Credit Union

Chartered Banker Institute

Community Mortgage Services

BGL Group

Connells Limited

Equity Release Council

Experian

Finance Planning Group

Finance and Leasing Association

Financial Services Consumer Panel

Furness Building Society

HL Partnership

Intermediary Mortgage Lenders Association

Investment and Life Assurance Group

Jackson Cohen

L&C Mortgages

Moneysupermarket

Mortgage Advice Bureau

Nationwide Building Society

Openwork

Perenna

PRIMIS Mortgage Network

Principality Building Society

RTM Mortgage Services

SACM Ltd

Sesame Bankhall Group

SimplyBiz

Stepchange Debt Charity

T&M Financial Services

Tenet Group

Think Mortgages

Trussle

UK Credit Unions

UK Finance

Wyse Services

Youngstone Financial Services Ltd

Annex 2
Abbreviations used in this paper

CP	Consultation Paper
ESIS	European Standardised Information Sheet
FCA	Financial Conduct Authority
MCOB	Mortgages and Home Finance: Conduct of Business Sourcebook
MMR	Mortgage Market Review
MMS	Mortgages Market Study
PERG	Perimeter Guidance
PS	Policy Statement
SYSC	Senior Management Arrangements, Systems and Controls

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Appendix 1
Made rules (legal instrument)

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**

…

What?

…

4.1.4 R (1) *MCOB* 4.4<u>A</u> (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;

<u>(1A)</u> <u>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;</u>

…

…

Range of products

…

<u>4.4A.3AA</u> <u>G</u> (1) <u>*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</u>

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 sub-set 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*.

…

…

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.

…

4.8A Execution-only sales

Scope and application of this section

…

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:

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

	example where the indication is of the monthly cost in respect of the amount which the *customer* wishes to borrow over the term for which the *customer* wishes to borrow it; such an interaction will trigger the need for advice and the *firm* would need to comply with *MCOB* 4.7A.
Talking the *customer* through a decision tree	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 *customer* through such a decision-making process is likely to involve doing more than merely providing the *customer* with factual information; as that interaction is not of a sort permitted by *MCOB* 4.8A.7AR, the sale cannot be an *execution-only sale* and the *firm* would need to comply with *MCOB* 4.7A.
Responding to a query about how to fill out an application form (for example: telling a *customer* 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)	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.
Discussing the use of panel solicitors	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.
Taking credit card details by phone to cover payment of a required valuation	This would be permitted, as it is about the making of practical arrangements related to the processing of an application for a *regulated mortgage contract*.

Rescheduling a property valuation	This would be permitted because the interaction is about the making of arrangements related to the processing of the application.
Calling the *customer* to tell them that an application for a *regulated mortgage contract* needs to be submitted in the next two *days* if a new (higher) interest rate is not to apply	This would be permitted, if it were in the form of a generic communication about the *firm* planning to change its product offering or interest rates in the near future, and indicating the deadline for applying for the current product. However, a communication about a particular *regulated mortgage contract* that the *firm* knows or reasonably suspects the *customer* 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 *customer*.

…

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.~~

…

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.~~

<u>[deleted]</u>

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 <u>provision of the</u> 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.~~ <u>[deleted]</u>

…

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	*MCOB* 4.8A.18	R	Nothwithstanding the deletion of *MCOB* 4.8A.18R(3) on 31 January 2020, a *firm* must retain an adequate record of: (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 (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.	31 January 2020 to 30 January 2021 (inclusive)	26 April 2014
5	*MCOB* 4.4A.1R(1A)	R	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.	31 January 2020 to 30 July 2020 (inclusive)	21 March 2016
6	*MCOB* 4.7A.23AR	R	A *firm* may choose to comply with *MCOB* 4.7A as if the insertion of *MCOB* 4.7A.23AR had not been made.	31 January 2020 to 30 July 2020 (inclusive)	26 April 2014

…

Sch 1 Record keeping requirements

…

1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
…	…	…	…	…
MCOB 4.7A.25R(1)(d)	Suitability of *regulated mortgage contracts*	An explanation of why the *firm* has not recommended a cheaper *regulated mortgage contract*	When explanation given	Three years
…	…	…	…	…
MCOB 4.8A.18R(1)(b)	*Execution-only sales* of *regulated mortgage contracts*	The warning to the *customer* ~~in a *durable medium*~~ regarding ~~his~~ their lack of protection of the rules on assessing suitability	The date a *regulated mortgage contract* was entered into or *arranged*	Three years
…	…	…	…	…
~~*MCOB* 4.8A.18R(3)~~	~~*Execution-only sales* of *regulated mortgage contracts*~~	~~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

…

4.6 Advising on regulated mortgage contracts

Definition of 'advising on regulated mortgage contracts'

…

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)~~ <u>*PERG* 8.31 (Exclusions for advising on investments</u>) will be relevant to any *person* who may be advising on other forms of investment at the same time as ~~he advises~~ <u>they advise</u> 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.~~ <u>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)).</u>

<u>4.6.5A</u> <u>G</u> <u>*PERG* 4.6.21G to 4.6.25BG includes material about guiding a *person* through a decision tree.</u>

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~~ <u>is advice on the merits of</u> specific identifiable mortgages and ~~away from~~ <u>compared to</u> 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~~ on a particular mortgage which the borrower could enter into.
I recommend you do not take out the ABC Building Society 2 year fixed rate mortgage at 5%.	Yes. This is advice ~~which steers the borrower away from~~ on a particular mortgage which the borrower could have entered into.
I recommend that you take out either the ABC Building Society 2 year fixed rate mortgage at 5% or the XYZ Bank standard variable rate mortgage.	Yes. This is advice ~~which steers the borrower in the direction of~~ on 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 advice in respect of the advice about varying the terms of the particular mortgage that the borrower had already entered into.
I suggest you take out (or do not take out) a variable rate mortgage.	No. This is not advice ~~which steers the borrower in the direction of~~ on a particular mortgage which the borrower could enter into.
I recommend you take out (or do not take out) a mortgage.	No. This is not advice ~~which steers the borrower in the direction of~~ on a particular mortgage which the borrower could enter into.

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

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 ~~discusses~~ 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 ~~involves~~ 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~~ 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 *firm* 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 *firm* has identified specific products that it offers and is ~~steering the customer~~ drawing the *customer's* attention to those products. Identifying which products have the lowest rates is not advice on its own, only facts. However, "best" involves a value ~~judgment~~ judgement, particularly when a comparison is made with other products that have different periods for which interest is fixed or that have variable interest rates.
…	…
(5) The *firm* 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 *firm* is comparing two products without recommending either, nor is the *firm* ~~steering the customer to~~ recommending one over the other.

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

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FINANCIAL
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AUTHORITY

12 Endeavour Square London E20 1JN
Telephone: +44 (0)20 7066 1000
Website: www.fca.org.uk