



**LAW SOCIETY OF NORTHERN IRELAND
GUIDELINES TO FINANCIAL SERVICES BUSINESS AND TO
THE SOLICITORS' FINANCIAL SERVICES REGULATIONS 2012**

The Financial Services & Markets Act 2000 (the Act) came into force on 30th November 2001. Thereafter, professional firms (Designated Professional Firms) carrying on “regulated activities” under the Act were to be regulated by the Financial Services Authority (FSA) now the Financial Conduct Authority (FCA) under Part XX of the Act. This is the “exemption” regime which operates to allow the Society as a Designated Professional Body (DPB) to regulate solicitors in Northern Ireland (subject to oversight by the FCA) in relation to business which would otherwise be directly regulated by the FCA provided that such activities are limited in scope and form an integral part of their core professional services or business and provided they arise out of or are complementary to those professional services or businesses. As such, Northern Ireland solicitors are exempt professional firms (EPFs).

To put it simply, you are regulated for business which if it did not arise incidental to your mainstream business activities, would be otherwise directly regulated. The Society’s regulation is carried out pursuant to the Financial Services Regulations 2012 which have repealed, replaced and extended all previous Financial Services Regulations, to include Financial Services per se; Insurance Mediation; Regulated Mortgage activities; and Home Reversion and Home Purchase Plans.

The Society’s Accounts Monitors carry out monitoring for Financial Services Regulations compliance contemporaneous with their Solicitors Accounts Regulations inspections.

With effect from 1st April 2013, the FCA’s responsibilities for monitoring the DPBs have passed to the newly created FCA. From a practical point of view, it will not affect you or the way you undertake business.

We have, however, taken the opportunity to revise, consolidate and update our Regulations.

The Financial Services & Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001 No. 554) (the Regulated Activities Order) and the Financial Services & Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001 (SI 2001 No. 1227) (the Non-Exempt Activities Order) set out in full the types of activity which fall under the Act.

Any firm carrying on mainstream investment business involving regulated activities, pursuant to the Act, may and should seek to be directly regulated by the FCA.

These Guidelines do not have any statutory or regulatory effect, but we hope they will be of some background assistance to you.

The main prohibited activities which a firm must not carry on, or agree to carry on as part of its practice are: -

- (a) accepting deposits and market making in investments (meaning any of the investments specified in Part III of the Regulated Activities Order);
- (b) buying, selling, subscribing for or underwriting investments as principal where the firm holds itself out as engaging in the business of buying such investments with a view to selling them;
- (c) buying or selling investments with a view to stabilising or maintaining the market price of the investments;
- (d) acting as a stakeholder pension scheme manager;
- (e) entering into a broker funds arrangement;
- (f) effecting and carrying out contracts of insurance as principal;
- (g) establishing, operating or winding up a collective investment scheme;
- (h) establishing, operating or winding up a stakeholder pension scheme or (Art 52B ROA) providing basic advice on stakeholder products;
- (i) managing the underwriting capacity of a Lloyds syndicate as a managing agent at Lloyds;
- (j) advising a person to become a member of a particular Lloyd's syndicate;
- (k) entering as provider into a funeral plan contract;
- (l) entering into a regulated mortgage contract as lender or administering a regulated mortgage contract;
- (m) issuing electronic money;
- (n) bidding in emissions auctions;
- (o) regulated activities arising from insurance mediation; or
- (p) arranging or advising on regulated mortgage contracts.

Other restrictions are as follows:

- (1) **Packaged products** (i.e. a life policy, a unit or share in a regulated collective investment scheme, or an investment trust savings scheme, whether or not held within an ISA or PEP, or a stakeholder pension scheme) except a personal pension scheme (see (2) below).

A firm must not recommend, or make arrangements for, a client to buy a packaged product except where:

- (a) in some circumstances, recommending, or arranging, for a client to buy a packaged product by means of an assignment;
- (b) the arrangements are made as a result of a firm managing assets within the exception mentioned at (4) below, or;
- (c) arranging a transaction for a client where the firm assumes on reasonable grounds that the client is not relying on the firm as to the merits or suitability of that transaction.

- (2) **Personal Pension Schemes** (i.e. schemes of investment in accordance with section 630 of the Income and Corporation Taxes Act 1988 "ICTA 1988")

- (a) A firm must not recommend a client to buy or dispose of any rights or interests in a personal pension scheme.
- (b) A firm must not make arrangements for a client to buy any rights or interests in a personal pension scheme except where the firm assumes on reasonable grounds that the client is not relying on the firm as to the merits or suitability of that transaction but this exception does not apply where the transaction involves:
 - (i) a pension transfer (a scheme of investment in accordance with section 630 of ICTA 1988); or
 - (ii) an opt-out; (a transfer resulting from a decision by an individual to opt out of or decline to join a final salary or money-purchase occupational pension scheme of which he or she is a current member, or which he or she is, or at the end of a waiting period will become, eligible to join, in favour of an individual pension contract or contracts).

- (3) **Securities and Contractually Based Investments** (as defined in Article 3(1) of the Regulated Activities Order) (except packaged products)

- (a) A firm must not recommend a client to buy or subscribe for a security or a contractually based investment where the transaction would be made:

- (i) with a person acting in the course of carrying on the business of buying, selling, subscribing for or underwriting the investment, whether as principal or agent;
 - (ii) on an investment exchange or any other market to which that investment is admitted for dealing; or
 - (iii) in response to an invitation to subscribe for an investment which is, or is to be, admitted for dealing on an investment exchange or any other market.
- (b) This prohibition does not apply where the client is:
- (i) not an individual;
 - (ii) an individual who acts in connection with the carrying on of a business of any kind by himself or by an undertaking of which the client is, or would become as a result of the transaction to which the recommendation relates, a controller; or
 - (iii) acting in his capacity as a trustee of an occupational pension scheme.

(4) Discretionary Management

A firm must not manage assets (i.e. investments) belonging to another person in circumstances which involve the exercise of discretion except where the firm or a partner or employee of the firm or an officer or employee (in the case of a company), or a member or employee (in the case of a limited liability partnership) is a trustee, personal representative, donee of a power of attorney or controller appointed by the Office of Care and Protection, and either:

- (a) all routine or day to day decisions, so far as relating to that activity, are taken by an authorised person or an exempt person; or
- (b) any decision to enter into a transaction, which involves buying or subscribing for an investment, is undertaken in accordance with the advice of an authorised person or an exempt person.

(5) Corporate Finance

A firm must not act as any of the following:

- (a) Sponsor to an issue in respect of securities to be admitted for dealing on the London Stock Exchange;
- (b) Nominated adviser to an issue in respect of securities to be admitted for dealing on the Alternative Investment Market of the London Stock Exchange; or

- (c) Corporate adviser to an application on behalf of a company to join OFEX.

The following comments on some of the prohibited activities may be helpful:

1. **Deposits.** It is provided in Article 7 of the Regulated Activities Order that "a sum is not a deposit if it is received by a practising solicitor acting in the course of his profession".

2. **Dealing in investments as agent.** (Article 21 of the Regulated Activities Order). This might seem alarming in the context of professional practice, but Article 22 (1) of the Regulated Activities Order provides that -

"a person who is not an authorised person does not carry on an activity of the kind specified by Article 21 by entering into a transaction as agent for another person (the client) with or through an authorised person if -

- (a) the transaction is entered into on advice given to the client by an authorised person; or
- (b) it is clear, in all the circumstances, that the client, in his capacity as an investor, is not seeking and has not sought advice from the agent as to the merit of the client entering into the transaction (or, if the client has sought such advice, the agent has declined to give it but has recommended that the client seeks such advice from an authorised person)".

However this exclusion does not apply if the agent receives from any person other than the client any pecuniary reward or other advantage, for which he does not account to the client, arising out of his entering into the transaction (Article 22 (2)).

3. **Arranging deals in investments.** Again this might appear alarming to practitioners, but there is a similar exclusion as in Article 22 (see above). Article 33, which deals with "**introducing**" provides an exclusion for arrangements in respect of investments in general (but not for a particular investment) where -

"(a) they are arrangements under which persons (clients) will be introduced to another person;

(b) the person to whom introductions are to be made or the person to whom introductions are to be made is -

- (i) an authorised person;

(ii) an exempt person acting in the course of a business comprising a regulated activity in relation to which he is exempt; or

(iii) a person who is not unlawfully carrying on regulated activities in the United Kingdom and whose ordinary business involves him in engaging in an activity of the kind specified by any of (various Articles of the Regulated Activities Order); and

(c) the introduction is made with a view to the provision of independent advice or the independent exercise of discretion in relation to investments generally or in relation to any class of investments to which the arrangements relate.

4. **Managing investments.** Again the Regulated Activities Order contains exemptions which should be read carefully but which would appear to exclude incidental work carried out by solicitors.
5. Article 66 of the Regulated Activities Order is particularly important as it provides exclusions for persons acting as **trustees or personal representatives**. Equally, Article 67 is important in that it excludes from some of the other provisions of the Regulated Activities Order "any activity which -

(a) is carried on in the course of carrying on any profession or business which does not otherwise consist of regulated activities; and

(b) may reasonably be regarded as a necessary part of other services provided in the course of that profession or business".

However this exclusion does not apply "if the activity in question is remunerated separately from the other services" (Article 67 (2)).

Activities excluded from the ambit of the regulations

The Regulated Activities Order provides a number of exclusions and such excluded activities will not count as investment business, whether mainstream or incidental.

These include:

- (1) The taking of a deposit if it is received by a practising solicitor acting in the course of his/her profession.
- (2) The provision of advice or the making of arrangements in relation to breakdown insurance for cars.
- (3) Making arrangements whose sole purpose is the provision of finance to enable a person to buy, sell, subscribe for or underwrite investments.

- (4) Managing investments under a power of attorney where all routine and day to day investment decisions are taken by an authorised person.
- (5) Arrangements made by a person acting as a trustee or personal representative.
- (6) Introductions: a firm may introduce a client to an independent adviser and the firm may retain any payment received from the organisation to whom the introduction was made. The firm making the introduction must do no more than bring together the investor and the independent adviser to whom the introduction is made. Furthermore, this "introductory" option does not allow a firm to market the services of an independent adviser or other authorised person.

It should be noted that the Regulations deal only with regulated activities and not with financial promotions. Firms who are regulated by the Society will be subject to the restriction on financial promotion in Section 21 of the Act. They will be unable, in the course of business, to communicate or cause the communication of an invitation or inducement to engage in investment activity unless the content of the communication is approved for the purposes of Section 21 of the Act by an authorised person or is exempt from the restriction on financial promotion under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001.

There is no substitute for a careful reading of the Act and the Orders made pursuant to it, but in general it may be assumed by members that if they adhere to the Society's Regulations, they will not fall foul of the Act. Breaches of the Act and of any direction made by the FCA under section 328 are criminal offences subject to fines and/or custodial sentences. Breaches of the Society's regulations may lead to disciplinary action by the Society.

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| Regulation 2.2 | The regulations do not apply to solicitors who choose to be authorised by the FCA. |
| Regulation 3 | "Regulated activity" is defined by the Act as meaning "an activity of a specified kind which is carried on by way of business".
"Specified" means specified in an Order made by the Treasury (see above for examples). |
| Regulation 4 | Solicitors regulated by the Society may carry on only regulated activities which "arise out of or are complementary to" the provision by the solicitor of a particular service to a client. |
| Regulation 5 | This regulation reflects Section 327 (3) of the Act, which prohibits the receipt by a solicitor "from a person other than his client of any pecuniary reward or other advantage for which he does not account to his client, arising out of his carrying on of any of the activities". It is worth here setting out in full the FSA's note on this subject: |

"The FSA considers that, in order for a *professional firm* to be accounting to his client for the purposes of section 327(3) of the *Act*, the firm must treat any commission or other pecuniary benefit received from third parties and which results from *regulated activities* carried on by the firm, as held to the order of the client. A *professional firm* will not be accounting to his client simply by telling the client that the firm will receive commission. Unless the client agrees to the firm keeping the commission it belongs to the client and must be paid to the client. There is no *de minimis* below which the *professional firm* may retain the sum. In the FCA's opinion, the condition would be satisfied by the *professional firm* paying over to the client any third party payment it receives. Otherwise it would be satisfied by the *professional firm* informing the client of the sum and that he has the right to require the firm to pay the sum concerned to the client, thus allowing the sum to be used to offset fees due from the client in respect of professional services provided to him or in recognition of other services provided by the firm. However, it does not permit a *professional firm* to retain third party payments by seeking its client's agreement through standard terms and conditions. Similarly, a mere notification to the client that a particular sum has been received coupled with the *professional firm's* request to retain it does not satisfy the condition."

Accounting to the client does not mean simply telling the client that the firm will receive commission. It means that the commission or reward must be held to the order of the client ... the Society believes that solicitors will still account to the client if they have the client's **informed consent** to keep the commission. If a firm is charging the client on a fee basis, the firm can off-set the commission against the firm's fees. The firm must send the client a bill or some other written notification of costs ...

The requirement for informed consent would not be met if a firm were to

- seek blanket consent in terms of business to the keeping of all unspecified commissions, or
- seek negative consent.

The firm must be able to demonstrate that the client has given informed consent to any retention of the commission having had full disclosure of the amount. The FCA perimeter guidance (Section 1.9) indicates that the firm should also inform the client, in effect, that the commission belongs to the client.

There is no *de minimis* provision, as mentioned above, so that whether commission is £5 or £500, the same rules apply.

Some examples may help:

A. In the course of carrying out legal services for the client, the client is referred to an independent financial adviser and takes out a life policy. Subsequently, commission of £500 is paid to the firm. The firm tells the client at the outset that it will be paid commission (and, as soon as it can, what the amount will be) and that the commission will belong to the client and will be set off against the firm's fee. At the end of the matter the firm draws a bill of £750 plus V AT in respect of all its work on the matter and sets off the £500 against that bill.

The firm **has** complied with the statutory requirements and the requirements of the Regulations.

B. Same situation as A above, but the firm's bill is £400 plus VAT and it returns the balance of the commission to the client. Again, the firm **has** complied with the statutory and Society requirements.

C. In the course of providing legal services, the firm refers the client to an independent financial adviser. At the outset of the matter it sends the client standard terms and conditions which include a statement that "any commission which the firm receives will be retained by us". The firm subsequently receives commission of £500 and keeps it. The firm has **not** complied with the statutory and Society requirements.

D. Same situation as C but the firm's standard engagement letter says "unless we hear from you to the contrary, we shall assume that we have your permission to keep such commission". The client does not give any indication to the contrary and the firm keeps the commission. The firm has **not** complied with the statutory and Society requirements.

E. In the course of providing legal services, the firm refers the client to an independent financial adviser. It advises the client that it will receive commission on any financial business transacted by the client with the IFA (and, when known, the amount) and that the commission will belong to the client (subject to set off, etc as above). Commission of £750 is subsequently received and the firm writes to the client informing the client of the amount of commission, furnishes a bill for £500 plus V AT and asks if it may keep the balance. The client writes to confirm that he is happy that the firm should keep the balance, and the firm does so. The firm **has** complied with all statutory and Society requirements.

"Claw-back"

You should be aware that if a client terminates a policy early (this can be as long as 48 months after taking it out) a financial adviser which has paid you commission may, depending on its terms of business, seek repayment from you. As you will have accounted to the client for the commission, as outlined above, this could put you in a difficult position. To protect yourself you should make sure that you inform your client in your engagement letter that he will have to repay commission in such circumstances.

- Regulation 6 This regulation reflects Section 327 (4) of the Act. The FSC considered that, to satisfy the condition in Section 327 (4), regulated activities cannot be a major part of the practice of the firm in question. It also considers the following further factors to be among those that are relevant:
- (i) the scale of regulated activity in proportion to other professional services provided;
 - (ii) whether and to what extent activities that are regulated activities are held out as separate services;
 - (iii) the impression given as to how the firm provides regulated activities, for example through its advertising or other promotions of its services.

We do not believe this position has changed since the Act was introduced.

Regulation 7 This regulation reflects Section 327 (5) of the Act.

Regulation 8 The Treasury has power under Section 327(6) of the Act to specify by Order activities which do not come within the exemption and has already done so in The Financial Services and Markets Act 2000 (Professions) (Non-Exempt Activities) Order 2001 (S.I. 2001, No. 1227).

Regulation 9 The FCA has power to issue directions and orders which prevent a member of a profession regulated by its DPB from carrying on certain activities. Directions under section 328 of the Act cover a class of person or type of regulated activity; orders under section 329 of the Act relate to a particular firm.

Regulation 10 This regulation is important in terms of, inter alia, what members must now tell their clients. First, they must not suggest that they are regulated by the FCA. Secondly, they must indicate the nature of regulated activities carried on by them and the fact that they are limited in scope. Thirdly, they must disclose that they are regulated by the Society. Finally, they must explain the nature of the complaints and redress mechanisms available to clients in respect of regulated activities carried on by them. At the outset of any transaction for a client, members will have to provide sufficient information to the client to satisfy the provisions of the Act. In this connection, the Society has prepared, and there is annexed, a specimen information sheet which may be issued by members to clients; it should be sent to the client at the outset of every case or alternatively, the same information should be provided to the client in your engagement letter pursuant to the Solicitors' (Client Communication) Practice

Regulations 2008. It is considered that, as the legislation now stands, this will satisfy these particular requirements of the Act and the FCA. You must avoid any representation that you are regulated by the FCA.

- Regulation 11 Section 39 of the Act provides exemption for a person who is not an authorised person, but who is a party to a contract with an authorised person ("his principal") which permits or requires him to carry on business of a prescribed description, and who complies with such requirements as may be prescribed, and who is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing.
- Regulation 12 There is an exclusion in Article 13 of the Regulated Activities Order for members and former underwriting members of Lloyds.
- Regulation 13 As stated, the regulations apply to regulated activities carried on in, into or from the United Kingdom.
- Regulation 14 For the purpose of this regulation, members shall keep exactly the same records of financial services as at present, namely a Central Register with the following six sections:
- (1) Rules and regulations
 - (2) Introductions
 - (3) Client letters/profiles/record sheets
 - (4) Execution only forms
 - (5) Complaints (details of complaints in relation to financial services matters)
 - (6) Discipline (details of any disciplinary action in relation to financial services matters)

The prescribed records will be monitored by the Society's monitoring officers in the course of their accounts inspections of firms.

INSURANCE MEDIATION – PART 2

Article 2(3) of the IMD defines “insurance mediation” as meaning “the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts or of soliciting in the administration and performance of such contracts, in particular in the event of a claim”. There is a parallel and similar definition of “re-insurance mediation”. These definitions are accepted as encompassing the business of insurance brokers and insurance companies, but especially in relation to assisting in the administration and performance of such contract, bring solicitors within their ambit.

The extension to the FSMA 2000 to encompass these activities was brought about by the FSMA 2000 (Regulated Activities) (Amendment No. 2) Order 2003 with respect to insurance mediation activities with effect from 14th January 2005.

The regulated activities arising from insurance mediation are:-

- > Dealing as an agent in Contracts of Insurance;
- > Arranging or making arrangements with a view to a person entering into a Contract of Insurance;
- > Assisting in the administration and performance of a Contract of Insurance;
- > Advising on the merits of buying or selling a Contract of Insurance.
- > Government has decided that Exempt Professional Firms (EPFs) can advise on and recommend both commercial and retail non-investment Contracts of Insurance. This is in contrast to the more limited scope under which you can give advice in investment business; and
- > Agreeing to carry on any of the above activities.

Firms are likely to carry on a number of activities which fall within the definition of insurance mediation, including introducing , arranging and advising on the following types of insurance – after-the-event legal expenses insurance, defective title indemnity insurance , buildings insurance, term assurance, missing beneficiary indemnity insurance and unoccupied property insurance.

Work of Defence solicitors on behalf of insurance companies is not included in the regulated area.

The exclusions contained in Articles 66 and 67 of the FSMA 2000 (carrying on regulated activities by way of business) Order 2001 (the RAO) which broadly relate to investment business carried on by Exempt Professional Firms in the profession have been dis-applied and consequently not available to solicitors who would take up or pursue insurance mediation activity. However, a new exclusion contained in Article 72C (the provision of information about contracts of insurance on an incidental basis) of the RAO may be of some limited assistance to professional firms. The Society has taken the view that this exclusion is potentially of such limited

application that it would be imprudent to consider that our members would wish to operate solely within the confines of the exclusion.

The FCA Register

The FCA is obliged by the IMD to maintain an up to date record of inter alia every exempt professional firm which carries on or is proposing to carry on insurance mediation activity pursuant to the Part XX Regime regulated by the Society.

The Society is obliged, as a Designated Professional Body, to provide the FCA with the information it needs to maintain the register relating to Exempt Professional Firms within our membership. This is our responsibility and Regulation 14.2 sets out the information which each firm is required to give the Society before the commencement of the Regulations. Unless otherwise informed, it shall be assumed that sole practitioners are the responsible persons for IMD work within their practice. Where changes occur in a firm's circumstances or arrangements within, the Society should be informed immediately as we are required to provide updated information to the FCA on a regular basis.

If a firm does not provide the information to the Society we will not be in a position to provide same to the FCA and this firm's name will not appear on the IMD Register. If such firm proposes to carry on insurance mediation activity, they are likely to be breaching the general prohibition within the Financial Services and Markets Act and committing a criminal offence under Section 23 thereof. A firm must therefore ensure that it is included in the FCA Register before undertaking any insurance mediation activity.

Broadly, Exempt Professional Firms may not carry on regulated activities which relate to a contract of insurance in reliance on the Part XX exemption unless the Exempt Professional Firm is included in the record of unauthorised persons carrying on insurance mediation activity to be maintained by the FCA under Article 93 of the Regulated Activities Order.

We would draw your attention in particular to the demands and needs criteria required by Regulation 16.1 – 16.5; the basis upon which insurance mediation is conducted – Regulation 16.6; the maintenance of records – Regulation 16.7. These and Article 15 reflect the requirements of Articles 12 and 13 of the Directive and provide different regulatory requirements vis-à-vis insurance mediation activities and other financial services.

In this connection, solicitors are reminded that in the albeit unlikely event of your providing insurance mediation activities through the medium of telephone selling, prior information to the customers shall be in accordance with the Distance Marketing of Consumer Financial Services Directive (2002/65/EC). Information as required by Regulation 16.7 must be provided to the customer on paper or other durable medium immediately after the conclusion of the insurance contract.

Passporting

Exempt Professional Firms on the FCA's register are entitled to exercise the EEA right inferred by Article 6 of the IMD to establish a branch or provide services relating to insurance mediation activity in another EEA state. These rights may be of particular interest to solicitors in Northern Ireland who either have branch offices in the Republic of Ireland or who hold Practising Certificates in that jurisdiction. Any firm contemplating the exercise of rights under Article 6 to establish a branch or provide services relating to insurance mediation activity in another EEA state are referred to the relevant extracts from SUP 13 of the FCA handbook (exercise of passport rights by UK firms).

Notice of intention to establish a branch or to provide cross-border services in relation to the IMD must be given to the FCA in the required form set out in SUP 13 – such notice is required even if the practice has already been established or is already providing services other than insurance mediation activities.

PART 3

MORTGAGES

FSMA 2000 was extended by the FSA 2000 (Regulated Activities) (Amendment No. 1) Order 2003, to mortgage activities with effect from 31st October 2004.

The Order sets out six regulated mortgage activities:-:

- “(1) Arranging (bringing about) regulated mortgage contracts;
- (2) Making arrangements with a view to regulated mortgage contracts;
- (3) Advising on a regulated mortgage contracts;
- (4) Entering into a regulated mortgage contract as a lender;
- (5) Administrating a regulated mortgage contract;
- (6) Agreeing to carry on any of the above.”

The regulated activities of advising on, arranging (bringing about) and making arrangements with a view to an administering mortgage contracts are those likely to be relevant to solicitors.

The FCA’s own Policy Statement on these matters reads:-

“Part XX exemption: arranging regulated mortgage contracts

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

Part XX exemption: advising on regulated mortgage contracts

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

to the borrower by an *authorised person* who has *permission to advise on regulated mortgage contracts* or an *exempt person* whose exemption covers that activity.

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

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

The Financial Conduct Authority confirmed that the majority of activities conducted by solicitors in Northern Ireland are likely to fall within the exclusions. However, members should be careful to avoid attracting the requirements of Chapter 5 of the Mortgage Conduct of Business Source Book (MCOB5 – Pre application Disclosure) which requires the provision or the ensuring of the provision of a “key facts illustration “to the client. MCOB5 is attracted if a firm:-

- “(a) makes a personal recommendation about a particular regulated mortgage contract to a customer; or
- (b) provides information to a customer that is specific to the amount that the customer wants to borrow on a particular regulated mortgage contract, including information provided in response to a request from a customer; or
- (c) provides the means for a customer to make an application to it;

In connection with entering into a regulated mortgage contract provided by a mortgage lender, other than a regulated lifetime mortgage contract or a variation to an existing regulated mortgage contract.”

These circumstances can arise e.g. where a firm carried on the permitted activity of arranging (4.14.9 above) but is also asked for advice, (4.15.9 above) or where there is confusion between the provision of advice and the provision of financial information. It is suggested that arranging a mortgage with a lender which has only one loan product may be construed as extending into the area of advice – so necessitating compliance with MCOB5

“Regulated mortgage contracts” are those which satisfy the following conditions at the time in which they are entered, namely:-

- (1) the contract is one where a lender provide credit to an individual or trustee (the borrower);
- (2) the obligations of the borrower to repay is secured by a first legal mortgage on land (other than timeshare accommodation) in the United Kingdom; and

(3) at least 40% of that land is used, or is intended to be used, as or in connection with a dwelling by the borrower (or, where trustees are the borrower by an individual who is a beneficiary of the trust) or by a related person.

Nothing in the regulatory regime precludes solicitors from giving advice on the legal implications of a mortgage contract or the giving of negative generic advice to the effect that a client should shop around for another mortgage product.

It is appreciated that the regime is extremely complicated, but it is hoped that members who do not carry on any mainstream investment business, and who adhere carefully to the regulations, as explained in this Guidance, will find that compliance is in fact relatively straightforward.

FINANCIAL SERVICES

INFORMATION SHEET FOR CLIENTS

This firm is not authorised under the Financial Services and Markets Act 2000, but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society of Northern Ireland. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

We are required to draw your attention to the following matters:

1. If we do provide you with any investment services and you wish to complain about those services, you should write in the first instance to [senior partner/other designated person in firm/sole principal].
2. If, after that, you are still dissatisfied, you should write to the Law Society of Northern Ireland, Law Society House, 96 Victoria Street, Belfast, BT1 3GN, setting out the details of your complaint. The Society, which is the designated professional body for solicitors in Northern Ireland for the purposes of the Financial Services and Markets Act 2000, will deal with your complaint in accordance with its statutory powers. Broadly, this means that the Society may:
 - (1) issue a reprimand;
 - (2) direct that appropriate remedial action be taken;
 - (3) order that fees be reduced or waived; or
 - (4) in serious cases, refer the matter to the Disciplinary Tribunal.

The Disciplinary Tribunal, which is a statutory body independent of the Law Society, may, if it finds a complaint justified (in addition to the remedies mentioned at (1), (2) and (3) above):

- (a) impose a fine;
- (b) suspend a solicitor from practice, or order that he or she may not practise alone; or
- (c) in very serious cases, strike a solicitor off the Roll of Solicitors.