

## Chapter 4

# Communicating with clients, including financial promotions

## 4.1 Application

### Who? What?

#### 4.1.1

**R**

This chapter applies to a *firm*:

- (1) communicating with a *client* in relation to its *designated investment business* (other than *MiFID, equivalent third country or optional exemption business*);
- (1A) communicating with a *client* in relation to its *MiFID, equivalent third country or optional exemption business*;
- (2) *communicating or approving a financial promotion* other than:
  - (a) a *financial promotion of qualifying credit, a home purchase plan or a home reversion plan*; or
  - (b) a *financial promotion* in respect of a *non-investment insurance contract*; or
  - (c) a promotion of an *unregulated collective investment scheme* that would breach section 238(1) of the Act if made by an *authorised person* (*firms* may not *communicate or approve* such promotions); or
  - (d) a *financial promotion* in relation to a *credit agreement, a consumer hire agreement or a credit-related regulated activity*.
- (3) when a *MiFID investment firm* or a *credit institution* is communicating in connection with selling, or advising *clients* in relation to, *structured deposits* as specified by **■ COBS 1.1.1AAR**.

#### 4.1.1A

**R**

**■ COBS 4.4.3 R** applies to a *firm* with respect to the activity of *issuing electronic money*.

#### 4.1.2

**G**

- (1) This chapter applies in relation to an *authorised professional firm* in accordance with **■ COBS 18** (Specialist regimes).
- (2) This chapter applies, to a limited extent, in relation to *communicating or approving a financial promotion* that relates to a *deposit* if the *deposit* is a *structured deposit, cash deposit ISA or cash deposit CTF*.

#### 4.1.3

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A *firm* is required to comply with the *financial promotion rules* in relation to a *financial promotion communicated* by its *appointed representative* even

where the *financial promotion* does not require *approval* because of the exemption in article 16 of the *Financial Promotion Order* (Exempt persons).

[Note: see section 39 of the Act]

- 4.1.4 G (1) In ■ COBS 4.3.1 R, the defined term "*financial promotion*" includes:
  - (a) in relation to *MiFID, equivalent third country or optional exemption business*, all communications that are marketing communications within the meaning of *MiFID*; and
  - (b) in relation to *insurance distribution*, all communications that are marketing communications within the meaning of *IDD*.
- (2) In the case of *MiFID, equivalent third country or optional exemption business*, certain requirements in this chapter are subject to an exemption for the communication of a *third party prospectus* in certain circumstances (see recital 73 of the *MiFID Org Regulation*). This has a similar effect to the exemption in article 70(1)(c) of the *Financial Promotion Order*, which is referred to in the definition of an *excluded communication*.
- (3) In this chapter "*financial promotion*" and "*direct offer financial promotion*" include communications that are marketing communications for the purposes of the *UCITS Directive*.

4.1.5 G A *firm* communicating with an *eligible counterparty* should have regard to the application of *COBS* to *eligible counterparty business* (■ COBS 1 Annex 1 Part 1).

4.1.6 G *Approving a financial promotion* without *communicating* it (which includes causing it to be communicated) is not *MiFID, equivalent third country or optional exemption business*. *Communicating a financial promotion* to a *person*, such as a *corporate finance contact* or a *venture capital contact*, who is not a *client* within the meaning of ■ COBS 3.2.1 R (1), ■ COBS 3.2.1 R (2) or ■ COBS 3.2.1 R (4) in respect of the *MiFID, equivalent third country or optional exemption business* to which the *financial promotion* relates, is also not *MiFID, equivalent third country or optional exemption business*. Further *guidance* on what amounts to *MiFID business* may be found in ■ PERG 13.

4.1.7 G A reference in this chapter to *MiFID, equivalent third country or optional exemption business* includes a reference to communications that occur before an agreement to perform services in relation to *MiFID, equivalent third country or optional exemption business*.

[Note: see recital 16 to the *MiFID Org Regulation*]

**What? Modification relating to the KII Regulation**

4.1.7A R The *rules* in this chapter do not apply in relation to the form or content of a *key investor information document*, an *EEA key investor information document* or a *NURS-KII document*.

4.1.7B

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- (1) The *KII Regulation* specifies in an exhaustive manner the form and content of the *key investor information document* for a *UCITS scheme*.
- (2) The form and content of a *NURS-KII document* is specified by
  - COLL 4.7.3AR (Form and content of a NURS-KII document) and in
  - COLL Appendix 2R (Modifications to the KII Regulation for KII-compliant NURS).

[Note: see article 3(1) of the *KII Regulation*]

### Where? General position

4.1.8

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- (1) In relation to communications by a *firm* to a *client* in relation to its *designated investment business* this chapter applies in accordance with the *general application rule* and the *rule on business with UK clients* from an overseas establishment (■ COBS 1 Annex 1 Part 2 paragraph 2.1R).
- (2) In addition, the *financial promotion rules* apply to a *firm* in relation to:
  - (a) the *communication of a financial promotion* to a *person* inside the *United Kingdom*;
  - (b) the *communication of a cold call* to a *person* outside the *United Kingdom*, unless:
    - (i) it is made from a place outside the *United Kingdom*; and
    - (ii) it is made for the purposes of a business which is carried on outside the *United Kingdom* and which is not carried on in the *United Kingdom*; and
  - (c) the *approval of a financial promotion for communication* to a *person* inside the *United Kingdom*.

### Where? Modifications to comply with EU law

4.1.9

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- (1) The *EEA territorial scope rule* modifies the general territorial scope of the *rules* in this chapter to the extent necessary to be compatible with European law. This means that in a number of cases, the *rules* in this chapter will apply to *communications* made by *UK firms* to *persons* located outside the *United Kingdom* and will not apply to *communications* made to *persons* inside the *United Kingdom* by *EEA firms*. Further *guidance* on this is located in ■ COBS 1 Annex 1.
- (2) One effect of the *EEA territorial scope rule* is that the *rules* in this chapter will not generally apply to an *EEA key investor information document* but will, for example, apply to a *firm* (including an *EEA UCITS management company*) when *marketing* in the *United Kingdom* the *units* of an *EEA UCITS scheme* that is a *recognised scheme*.
- (3) The *financial promotion rules* do not apply to incoming communications in relation to the *MiFID business* of an *investment firm* from another *EEA State* that are, in its *home member state*, regulated under *MiFID* other than to the extent ■ COBS 4.12

(Restrictions on the promotion of *non-mainstream pooled investments*) applies.

**4.1.10**

**G**

*Firms* should note the territorial scope of this chapter is also affected by:

- (1) the disapplication for *financial promotions* originating outside the *United Kingdom* that are not capable of having an effect within the *United Kingdom* (section 21(3) of the Act (Restrictions on financial promotion)) (see the defined term "*excluded communication*");
- (2) the exemptions for overseas communicators (see the defined term "*excluded communication*"); and
- (3) the *rules on financial promotions* with an overseas element (see ■ COBS 4.9).

## 4.2 Fair, clear and not misleading communications

### The fair, clear and not misleading rule

4.2.1

**R**

- (1) A *firm* must ensure that a communication or a *financial promotion* is fair, clear and not misleading.
- (2) This *rule* applies in relation to:
  - (a) a communication by the *firm* to a *customer* in relation to *designated investment business* which is not *MiFID*, *equivalent third country or optional exemption business*, other than a *third party prospectus*;
  - (aa) a communication to an *eligible counterparty* that is in relation to:
    - (i) *MiFID or equivalent third country business* other than a *third party prospectus*; or
    - (ii) *insurance distribution*;
  - (ab) a communication by the *firm* to a *customer* in relation to *MiFID*, *equivalent third country or optional exemption business*, other than a *third party prospectus*;
  - (b) a *financial promotion* communicated by the *firm* that is not:
    - (i) an *excluded communication*;
    - (ii) a *non-retail communication*;
    - (iii) a *third party prospectus*; and
  - (c) a *financial promotion* approved by the *firm*.
- (3) As part of complying with (1), a *firm* must take into account the nature of the *client*.

[**Note:** ,article 24(3) and article 30(1) of *MiFID*, article 17(2) of the *IDD* and article 77 of the *UCITS Directive*]

4.2.2

**G**

- (1) The *fair, clear and not misleading rule* applies in a way that is appropriate and proportionate taking into account the means of communication, the information the communication is intended to convey and the nature of the *client* and of its business, if any. So a communication addressed to a *professional client* or an *eligible counterparty* may not need to include the same information, or be presented in the same way, as a communication addressed to a *retail client*.

(2) ■ COBS 4.2.1R(2)(b) does not limit the application of the *fair, clear and not misleading rule* under ■ COBS 4.2.1R (2) (a). So, for example, a communication in relation to *designated investment business* that is both a communication to a *professional client* and a *financial promotion*, will still be subject to the *fair, clear and not misleading rule*.

[Note: article 30(1) of *MiFID* and recital 65 to the *MiFID Org Regulation*, article 17(2) of the *IDD*]

4.2.3 **G** Part 7 (Offences relating to Financial Services) of the Financial Services Act 2012 creates criminal offences relating to certain misleading statements and practices.

**Fair, clear and not misleading financial promotions**.....

4.2.4 **G** A *firm* should ensure that a *financial promotion*:

- (1) for a product or service that places a *client's* capital at risk makes this clear;
- (2) that quotes a yield figure gives a balanced impression of both the short and long term prospects for the *investment*;
- (3) that promotes an *investment* or service whose charging structure is complex, or in relation to which the *firm* will receive more than one element of remuneration, includes the information necessary to ensure that it is fair, clear and not misleading and contains sufficient information taking into account the needs of the recipients;
- (4) that names the *FCA, PRA* or both as its regulator and refers to matters not regulated by either the *FCA, PRA* or both makes clear that those matters are not regulated by the *FCA, PRA* or either;
- (5) that offers *packaged products* or *stakeholder products* not produced by the *firm*, gives a fair, clear and not misleading impression of the producer of the product or the manager of the underlying investments.

4.2.5 **G** A communication or a *financial promotion* should not describe a feature of a product or service as "guaranteed", "protected" or "secure", or use a similar term unless:

- (1) that term is capable of being a fair, clear and not misleading description of it; and
- (2) the *firm* communicates all of the information necessary, and presents that information with sufficient clarity and prominence, to make the use of that term fair, clear and not misleading.

**The reasonable steps defence to an action for damages**.....

4.2.6 **R** If, in relation to a particular communication or *financial promotion*, a *firm* takes reasonable steps to ensure it complies with the *fair, clear and not*

*misleading rule*, a contravention of that *rule* does not give rise to a right of action under section 138D of the Act.





### 4.3 Financial promotions to be identifiable as such

#### 4.3.1

**R**

(1) A *firm* must ensure that a *financial promotion* addressed to a *client* is clearly identifiable as such.

[**Note:** article 24(3) of *MiFID*, article 17(2) of the *IDD* and article 77 of the *UCITS Directive*]

(2) If a *financial promotion* relates to a *firm's MiFID, equivalent third country or optional exemption business*, this rule does not apply to the extent that the *financial promotion* is a *third party prospectus*.

(3) If a *financial promotion* relates to a *firm's business* that is not *MiFID or equivalent third country business*, this rule applies to *communicating or approving the financial promotion* but does not apply:

- (a) to the extent that it is an *excluded communication*;
- (b) to the extent that it is a prospectus advertisement to which article 22 of the *Prospectus Regulation* applies;
- (c) if it is *image advertising*;
- (d) if it is a *non-retail communication*;
- (e) [deleted]

(4) In the case of a marketing communication that relates to:

- (a) a *UCITS scheme* or an *EEA UCITS scheme*, or
- (b) *insurance distribution*,

(2) and (3) do not limit the application of this *rule*.

## 4.4 Compensation information

- 4.4.1 **R** A *firm* must ensure that any reference in advertising to an investor compensation scheme established under the *Investor Compensation Directive* is limited to a factual reference to the scheme.  
[Note: article 10(3) of the *Investor Compensation Directive*]
- 4.4.2 **G** [deleted]
- 4.4.3 **R** To ensure that a *firm* pays due regard to the information needs of its *clients*, and communicates information to them in a way which is clear, fair and not misleading with respect to the activity of *issuing electronic money*, a *firm* must ensure that, in good time before the *firm* issues *electronic money* to a *person*, it has been communicated to that *person* on paper or in another *durable medium* that the *compensation scheme* does not cover claims made in connection with *issuing electronic money*.



## 4.5 Communicating with retail clients (non-MiFID provisions)

### Application

4.5.1

**R**

- (1) Subject to (2) and (3), this section applies to a *firm* in relation to:
  - (a) the provision of information in relation to its *designated investment business*; and
  - (b) the *communication* or *approval* of a *financial promotion*; where such information or *financial promotion* is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client*.
- (2) This section does not apply to a *firm* communicating in relation to its *MiFID, equivalent third country or optional exemption business*.
- (3) This section does not apply in relation to a communication:
  - (a) to the extent that it is an *excluded communication*;
  - (b) to the extent that it is a prospectus advertisement to which article 22 of the *Prospectus Regulation* applies;
  - (c) if it is *image advertising*.

### General rule

4.5.2

**R**

A *firm* must ensure that information:

- (1) includes the name of the *firm*;
- (2) is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of *relevant business* or a *relevant investment*;
- (3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;
- (4) does not disguise, diminish or obscure important items, statements or warnings.
- (5) uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout that ensures that such indication is prominent;

(6) is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each *client*, unless the *client* has agreed to receive information in more than one language; and

(7) is up-to-date and relevant to the means of communication used.

**4.5.3** **G** The name of the *firm* may be a trading name or shortened version of the legal name of the *firm*, provided the *retail client* can identify the *firm* communicating the information.

**4.5.4** **G** In deciding whether, and how, to communicate information to a particular target audience, a *firm* should take into account the nature of the product or business, the risks involved, the *client's* commitment, the likely information needs of the average recipient, and the role of the information in the sales process.

**4.5.5** **G** When communicating information, a *firm* should consider whether omission of any relevant fact will result in the information being insufficient, unclear, unfair or misleading. When considering whether a fact should be included in the communication or omitted from it, a *firm* should bear in the mind the *guidance* in ■ COBS 4.2.2G to provide information which is appropriate and proportionate.

**Comparative information**

**4.5.6** **R** If information compares *relevant business*, *relevant investments*, or persons who carry on *relevant business*, a *firm* must ensure that the comparison is meaningful and presented in a fair and balanced way

**Referring to tax**

**4.5.7** **R**

(1) If any information refers to a particular tax treatment, a *firm* must ensure that it prominently states that the tax treatment depends on the individual circumstances of each *client* and may be subject to change in future.

(2) This *rule* applies in relation to a *financial promotion* except to the extent that it relates to a *pure protection contract* that is a *long-term care insurance contract*.

**Consistent financial promotions**

**4.5.8** **R**

(1) A *firm* must ensure that information contained in a *financial promotion* is consistent with any information the *firm* provides to a *retail client* in the course of carrying on *designated investment business*.

(2) This *rule* does not apply to a *financial promotion* to the extent that it relates a *pure protection contract* that is a *long-term care insurance contract*.

**Innovative finance ISA**

- 4.5.9 **G** Examples of information about relevant risks (■ COBS 4.5.2R) that a *firm* should give a *retail client* in relation to an *innovative finance ISA* include:
- (1) an explanation of the tax consequences if:
    - (a) the *innovative finance component* is a *P2P agreement* that is not repaid; and
    - (b) an *operator of an electronic system in relation to lending* which facilitates a *P2P agreement* fails;
  - (2) the procedure for, timing and tax consequences of:
    - (a) withdrawing a *P2P agreement* from the *innovative finance ISA*; and
    - (b) a request for transfer of all or part of the *innovative finance components* in the *innovative finance ISA*; and
  - (3) a warning, as relevant, that it may, or will, not be possible to sell or trade *P2P agreements* at market value on a secondary market.

- 4.5.10 **G** *Operators of electronic systems in relation to lending* and *firms* which advise on *P2P agreements* should also have regard to the guidance in ■ COBS 14.3.7AG and ■ COBS 14.3.7BG regarding the types of information they should provide to *clients* to explain the specific nature and risks of *P2P agreements*.

**Lifetime ISA**

- 4.5.11 **G** Information about relevant risks (■ COBS 4.5.2R) that a *firm* should give a *retail client* in relation to a *lifetime ISA* may include:
- (1) an explanation of:
    - a *retail client's* eligibility to subscribe to a *lifetime ISA* (including annual subscription limits) and to claim the *lifetime ISA government bonus*;
    - (b) the *lifetime ISA government withdrawal charge* and the circumstances in which it might arise; and
    - (c) the process by which a *retail client* can transfer a *lifetime ISA*; and
  - (2) warnings that, if the *retail client*:
    - (a) incurs a *lifetime ISA government withdrawal charge*, the *retail client* may get back less than they paid in to a *lifetime ISA*;
    - (b) saves in a *lifetime ISA* instead of enrolling in, or contributing to a *qualifying scheme, occupational pension scheme, or personal pension scheme*:
      - (i) the *retail client* may lose the benefit of contributions by an employer (if any) to that scheme; and
      - (ii) the *retail client's* current and future entitlement to means tested benefits (if any) may be affected.

**Authorised fund managers' communications in relation to benchmarks**

- 4.5.12** **R** Subject to **■ COBS 4.5.13R**, an *authorised fund manager* must include in any communication about an *authorised fund* to which this section applies:
- (1) a short explanation, in terms consistent with the relevant *prospectus*, of the choice and use of every *target benchmark*, *constraining benchmark* or *comparator benchmark* used in relation to the *scheme*; or
  - (2) where no *target benchmark*, *constraining benchmark* or *comparator benchmark* is referred to in the *prospectus*, a statement to that effect and a short explanation of how investors can assess the performance of the *scheme*.
- 4.5.13** **R** Where an *authorised fund manager* includes, in any communication about an *authorised fund* to which this section applies, an indication of past performance for any *authorised fund* it manages, it must (in addition to complying with **■ COBS 4.6.2R** where applicable):
- (1) include the corresponding past performance record of any *target benchmark* or *constraining benchmark* referred to in the *prospectus* of the *scheme*; and
  - (2) not include an indication of past performance for any index, indices or similar factor that is not referred to in the *prospectus* of the *scheme*.
- 4.5.14** **R**
- (1) Subject to paragraph (2), if a communication to which **■ COBS 4.5.13R** applies includes information comparing past performance of the *scheme* against one or more *comparator benchmarks*, the *authorised fund manager* must, for the period specified in paragraph (3) and in every subsequent communication it makes that is also subject to **■ COBS 4.5.13R**:
    - (a) include a comparison against the same *comparator benchmark* or *comparator benchmarks*; and
    - (b) not include a comparison against any other benchmark.
  - (2) Paragraph (1) does not apply if such a comparison would not be compliant with **■ COBS 4.5.13R** as a result of a change to the *prospectus* of the *scheme*.
  - (3) The period specified for the purposes of paragraph (1) is:
    - (a) twelve *months* after a one-off communication is made; or
    - (b) for as long as the communication remains available to the public in a *durable medium* and has not been superseded by a revised version.
- 4.5.15** **R** **■ COBS 4.5.12R** to **■ COBS 4.5.14R** do not apply in respect of any reference to a *comparator benchmark* that is not identified in the *prospectus* of the relevant *scheme* when that reference appears in a communication that is:

- (1) used exclusively in the course of a personal visit, telephone conversation or other interactive dialogue; or
- (2) in response to a specific unsolicited request by a *client* for past performance to be compared with a particular *comparator benchmark*.

## 4.5A Communicating with clients (including past, simulated past and future performance) (MiFID provisions)

### Application

- 4.5A.1 **R** (1) This section applies to a *firm* in relation to:
- (a) the provision of information; or
  - (b) the *communication of a financial promotion*, which relates to the *firm's MiFID, equivalent third country or optional exemption business*.
- (2) This section does not apply to a communication:
- (a) to the extent that it is a *third party prospectus*; or
  - (b) if it is *image advertising*.

[Note: article 24(3) of *MiFID*]

- 4.5A.2 **R** Provisions in this section marked "EU" apply in relation to *MiFID optional exemption business* as if they were *rules* (see ■ COBS 1.2.2G).

- 4.5A.2A **G** The effect of ■ GEN 2.2.22AR is that provisions in this section marked "EU" also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

### General requirements

- 4.5A.3 **EU** 44(1) Investment firms shall ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail or professional clients or potential retail or professional clients, including marketing communications, satisfies the conditions laid down in paragraphs 2 to 8.
- 44(2) Investment firm shall ensure that the information referred to in paragraph 1 complies with the following conditions:



- (a) the information includes the name of the investment firm,
- (b) the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument,
- (c) the information uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent,
- (d) the information is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received,
- (e) the information does not disguise, diminish or obscure important items, statements or warnings,
- (f) the information is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has accepted to receive information in more than one language,
- (g) the information is up-to-date and relevant to the means of communication used.

[Note: article 44(1) and (2) of the *MiFID Org Regulation*]

**4.5A.4** G The name of the *firm* may be a trading name or shortened version of the legal name of the *firm*, provided the *client* can identify the *firm* communicating the information.

**4.5A.5** G In deciding whether, and how, to communicate information to a particular target audience, a *firm* should take into account the nature of the product or business, the risks involved, the *client's* commitment, the likely information needs of the average recipient, and the role of the information in the sales process.

**4.5A.6** G When communicating information, a *firm* should consider whether omission of any relevant fact will result in the information being insufficient, unclear, unfair or misleading.

**Comparative information**.....

**4.5A.7** EU 44(3) Where the information compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, investment firms shall ensure that the following conditions are satisfied:

- (a) the comparison is meaningful and presented in a fair and balanced way;
- (b) the sources of the information used for the comparison are specified;
- (c) the key facts and assumptions used to make the comparison are included.

[Note: article 44(3) of the *MiFID Org Regulation*]

**Referring to tax**

**4.5A.8** **EU** 44(7) Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.  
[Note: article 44(7) of the *MiFID Org Regulation*]

**Consistent financial promotions**

**4.5A.9** **EU** 46(5) Investment firms shall ensure that information contained in a marketing communication is consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services.  
[Note: article 46(5) of the *MiFID Org Regulation*]

**Past performance**

**4.5A.10** **EU** 44(4) Where the information contains an indication of past performance of a financial instrument, a financial index or an investment service, investment firms shall ensure that the following conditions are satisfied:

- (a) that indication is not the most prominent feature of the communication;
- (b) the information must include appropriate performance information which covers the preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided where less than five years, or such longer period as the firm may decide, and in every case that performance information is based on complete 12-month periods;
- (c) the reference period and the source of information is clearly stated;
- (d) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- (e) where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- (f) where the indication is based on gross performance, the effect of commissions, fees or other charges are disclosed.

[Note: article 44(4) of the *MiFID Org Regulation*]

**4.5A.11** **G** The obligations relating to describing performance should be interpreted in the light of their purpose and in a way that is appropriate and proportionate taking into account the means of communication and the information the communication is intended to convey. For example, a *periodic statement* in relation to *managing investments* that is sent in accordance with the *rules* on reporting information to *clients* (see ■ COBS 16 and ■ COBS 16A) may include past performance as its most prominent feature.  
[Note: recital 65 to the *MiFID Org Regulation*]

**Simulated past performance**

- 4.5A.12** EU 44(5) Where the information includes or refers to simulated past performance, investment firms shall ensure that the information relates to a financial instrument or a financial index, and the following conditions are satisfied:
- 44(5)(a) the simulated past performance is based on the actual past performance of one or more financial instruments or financial indices which are the same as, or substantially the same as, or underlie, the financial instrument concerned;
- 44(5)(b) in respect of the actual past performance referred to in point (a), the conditions set out in points (a) to (c), (e) and (f) of paragraph 4 are satisfied;
- 44(5)(c) the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.
- [Note: article 44(5) of the *MiFID Org Regulation*]

- 4.5A.13** G For the purposes of ■ COBS 4.5A.12EU, the conditions referred to in article 44(5)(b) can be found reproduced in ■ COBS 4.5A.10EU.

**Future performance**

- 4.5A.14** EU 44(6) Where the information contains information on future performance, investment firms shall ensure that the following conditions are satisfied:
- (a) the information is not based on or refer to simulated past performance;
- (b) the information is based on reasonable assumptions supported by objective data;
- (c) where the information is based on gross performance, the effect of commissions, fees or other charges is disclosed;
- (d) the information is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specific types of instruments included in the analysis;
- (e) the information contains a prominent warning that such forecasts are not a reliable indicator of future performance.
- [Note: article 44(6) of the *MiFID Org Regulation*]

- 4.5A.15** G A firm should not provide information on future performance if it is not able to obtain the objective data needed to comply with the requirements regarding information on future performance in ■ COBS 4.5A.14EU. For example, objective data in relation to *EIS shares* may be difficult to obtain.

**Information that uses the name of any competent authority**

- 4.5A.16** EU 44(8) The information shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the investment firm.
- [Note: article 44(8) of the *MiFID Org Regulation*]

## 4.6 Past, simulated past and future performance (non-MiFID provisions)

### Application

4.6.1

R

(1) Subject to (2) and (3), this section applies to a *firm* in relation to:

- (a) [deleted]
- (b) the *communication* or *approval* of a *financial promotion*,

where such information or *financial promotion* is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client*.

(2) This section does not apply to a *firm* communicating in relation to its *MiFID*, *equivalent third country* or *optional exemption business*

(3) This section does not apply in relation to a communication:

- (a) to the extent that it is an *excluded communication*;
- (b) to the extent that it is a prospectus advertisement to which article 22 of the *Prospectus Regulation* applies;
- (c) if it is *image advertising*;
- (d) to the extent that it relates to a *deposit* that is not a *structured deposit* (see also ■ COBS 4.1.1R(3));
- (e) to the extent that it relates to a *pure protection contract* that is a *long-term care insurance contract*.

### Past performance

4.6.2

R

A *firm* must ensure that information that contains an indication of past performance of *relevant business*, a *relevant investment* or a financial index, satisfies the following conditions:

- (1) that indication is not the most prominent feature of the communication;
- (2) the information includes appropriate performance information which covers the preceding five years, or the whole period for which the investment has been offered, the financial index has been established, or the service has been provided (where less than five years, or such longer period as the *firm* may decide), and in every case that performance information must be based on complete 12-month periods;
- (3) the reference period and the source of information are clearly stated;

- (4) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- (5) if the indication relies on figures denominated in a currency other than that of the *EEA State* in which the *retail client* is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- (6) if the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed.

**4.6.3** G The obligations relating to describing performance should be interpreted in the light of their purpose and in a way that is appropriate and proportionate taking into account the means of communication and the information the communication is intended to convey. For example, a periodic statement in relation to *managing investments* that is sent in accordance with the *rules* on reporting information to *clients* (see ■ **COBS 16**) may include past performance as its most prominent feature.

**4.6.4** G If a *financial promotion* includes information referring to the past performance of a *packaged product* that is not a *financial instrument*, a *firm* will comply with the *rule* on appropriate performance information (■ **COBS 4.6.2R (2)**) if the *financial promotion* includes, in the case of a *scheme*, unit-linked *life policy*, unit-linked *personal pension scheme* or unit-linked *stakeholder pension scheme* (other than a unitised with-profits *life policy* or *stakeholder pension scheme*) past performance information calculated and presented in accordance with the table in ■ **COBS 4.6.4A G**.

**4.6.4A** G This Table belongs to ■ **COBS 4.6.4 G**

Percentage growth					
[Fund name]	Quarter/ Year - Quarter/ Year	Quarter/ Year - Quarter/ Year	Quarter/ Year - Quarter/ Year	Quarter/ Year - Quarter/ Year	Quarter/ Year - Quarter/ Year
	pgr%	pgr%	pgr%	pgr%	pgr%

Notes:

1. The table should show performance information for five (or if performance information for fewer than five is available, all) complete 12-month periods, the most recent of which ends with the last full quarter preceding the date on which the *firm* first *communicates* or *approves* the *financial promotion*.
2. For products with performance data for fewer than five 12-month periods, *firms* should clearly indicate that performance data does not exist for the relevant periods.
3. No allowance should be made for tax recoveries on income for *pension contracts*, *ISAs* or *PEPs*.
4. pgr is the percentage growth rate for the year, where:  $pgr = ((P1 - P0) / P0) * 100$  and rounded to the nearest 0.1%, with exact 0.05% rounded to the nearest even 0.1%; and where P0 is the price at the start of the 12-month period and P1 is the price on the same day in the following 12-month period.
5. The prices should allow for any net distributions to be reinvested.

6. The price at P1 must be adjusted for any charges since the date of P0 which are based on a proportion of the fund and are levied by the cancellation of units.

7. The *firm* should use single pricing, or (if this is not available) bid to bid prices, unless the *firm* has reasonable grounds to be satisfied that another basis would better reflect the past performance of the fund.

4.6.4B

G

- (1) The *firm* should present the information referred to in ■ COBS 4.6.4 G no less prominently than any other past performance information.
- (2) This *guidance* does not apply to a *prospectus*, *key investor information document* or *NURS-KII document* drawn up in accordance with *COLL*.

4.6.5

G

- (1) In relation to a *packaged product* (other than a *scheme*, a *unit-linked life policy*, *unit-linked personal pension scheme* or a *unit-linked stakeholder pension scheme* (that is not a *unitised with-profits life policy* or *stakeholder pension scheme*)), the information should be given on:
  - (a) an offer to bid basis (which should be stated) if there is an actual return or comparison of performance with other *investments*; or
  - (b) an offer to offer, bid to bid or offer to bid basis (which should be stated) if there is a comparison of performance with an index or with movements in the price of *units*; or
  - (c) a single pricing basis with allowance for charges.
- (2) If the pricing policy of the *investment* has changed, the prices used should include such adjustments as are necessary to remove any distortions resulting from the pricing method.

### Simulated past performance

4.6.6

R

A *firm* must ensure that information that contains an indication of simulated past performance of *relevant business*, a *relevant investment* or a financial index, satisfies the following conditions:

- (1) it relates to an investment or a financial index;
- (2) the simulated past performance is based on the actual past performance of one or more investments or financial indices which are the same as, substantially the same as, or underlie, the investment concerned;
- (3) in respect of the actual past performance referred to in (2), the conditions set out in paragraphs (1) to (3), (5) and (6) of the *rule* on past performance (■ COBS 4.6.2 R) are complied with; and
- (4) the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

**Future performance**

- 4.6.7 **R** (1) A *firm* must ensure that information that contains an indication of future performance of *relevant business*, a *relevant investment*, a *structured deposit* or a financial index, satisfies the following conditions:
- (a) it is not based on and does not refer to simulated past performance;
  - (b) it is based on reasonable assumptions supported by objective data;
  - (c) where the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed;
  - (ca) it is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specified types of investments included in the analysis; and
  - (d) it contains a prominent warning that such forecasts are not a reliable indicator of future performance.
- (2) This *rule* only applies in relation to *financial promotions* that relate to a *financial instrument* (or a financial index that relates exclusively to *financial instruments*) or a *structured deposit*.
- 4.6.8 **G** A *firm* should not provide information on future performance if it is not able to obtain the objective data needed to comply with the *rule* on future performance. For example, objective data in relation to *EIS shares* may be difficult to obtain.
- 4.6.9 **R** (1) A *firm* that communicates to a *client* a *projection* for a *packaged product* which is not a *financial instrument* must ensure that the *projection* complies with the *projections rules* in ■ COBS 13.4, ■ COBS 13.5 and ■ COBS 13 Annex 2.
- (2) A *firm* must not communicate a *projection* for a highly volatile product to a *client* unless the product is a *financial instrument*.

## 4.7 Direct offer financial promotions

### Application

4.7.-2

**R**

This section (other than ■ COBS 4.7.-1AEU to ■ COBS 4.7.-1DG) does not apply in relation to a communication:

- (1) to the extent that it is an *excluded communication*;
- (2) to the extent that it is a prospectus advertisement to which article 22 of the *Prospectus Regulation* applies;
- (3) if it is *image advertising*;
- (4) to the extent that it relates to a *deposit* that is not a *cash deposit ISA*, *cash-only lifetime ISA* or *cash deposit CTF*;
- (5) to the extent that it relates to a *pure protection contract* that is a *long-term care insurance contract*.

4.7.-1

**G**

- (1) ■ COBS 4.7.-1AEU to ■ COBS 4.7.1R contain provisions on the communication of *direct offer financial promotions*.
- (2) In broad terms:
  - (a) ■ COBS 4.7.-1AEU is relevant to a *firm* communicating a *direct offer financial promotion* in relation to its *MiFID*, *equivalent third country* or *optional exemption business*;
  - (b) ■ COBS 4.7.1R is relevant to a *firm* communicating a *direct offer financial promotion* that does not relate to its *MiFID*, *equivalent third country* or *optional exemption business*; and
  - (c) the application of the other operative provisions in this section is not affected by reference to *MiFID*, *equivalent third country* or *optional exemption business*.
- (3) However, a *MiFID investment firm*, *third country investment firm* or *MiFID optional exemption firm* which is subject to the requirements in ■ COBS 4.7.-1AEU may be subject to the rule in ■ COBS 4.7.1R to the extent that it communicates a *direct offer financial promotion*:
  - (a) which is not a marketing communication; or
  - (b) which does not relate to its *MiFID*, *equivalent third country* or *optional exemption business*.



**Direct offer financial promotions relating to MiFID, equivalent third country or optional exemption business**

**4.7.-1A** EU 46(6) Marketing communications containing an offer or invitation of the following nature and specifying the manner of response or including a form by which any response may be made, shall include such of the information referred to in Articles 47 to 50 as is relevant to that offer or invitation:

(a) an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service with any person who responds to the communication;

(b) an invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service.

However, the first subparagraph shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the potential client must refer to another document or documents, which, alone or in combination, contain that information.

[Note: article 46(6) of the *MiFID Org Regulation*]

**Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms**

**4.7.-1B** R Provisions in this section marked “EU” apply in relation to *MiFID optional exemption business* as if they were *rules* (see ■ COBS 1.2.2G).

**4.7.-1C** G The effect of ■ GEN 2.2.22AR is that provisions in this section marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

**4.7.-1D** G For the purposes of ■ COBS 4.7.-1AEU, the provisions of articles 47 to 50 of the *MiFID Org Regulation* can be found reproduced in ■ COBS 6.1ZA and ■ COBS 14.3A.

**Other direct offer financial promotions**

**4.7.1** R

(1) Subject to (3) and (4), a *firm* must ensure that a *direct offer financial promotion* that is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client* contains:

(a) the information referred to in the *rules* on information disclosure (■ COBS 6.1.4 R, ■ COBS 6.1.6 R, ■ COBS 6.1.7 R, ■ COBS 6.1.9 R, ■ COBS 14.3.2 R, ■ COBS 14.3.3 R, ■ COBS 14.3.4 R and ■ COBS 14.3.5 R) as is relevant to that offer or invitation; and

(b) additional appropriate information about the *relevant business* and *relevant investments* so that the *client* is reasonably able to understand the nature and risks of the *relevant business* and *relevant investments* and consequently to take investment decisions on an informed basis.

(2) This *rule* does not require the information in (1) to be included in a *direct offer financial promotion* if, in order to respond to an offer or invitation contained in it, the *retail client* must refer to another

document or documents, which, alone or in combination, contain that information.

(3) This *rule* does not apply in relation to a marketing communication that relates to a *firm's MiFID, equivalent third country or optional exemption business*

(4) [deleted]

(5) [deleted]

**Guidance**

**4.7.2** G Although ■ COBS 4.7.1R (1)(b) does not apply in relation to *MiFID, equivalent third country or optional exemption business*, similar requirements may apply under ■ COBS 2.2A.

**4.7.2A** G

(1) ■ BCBS 2A contains *rules and guidance* about the inclusion of a summary box in a *direct offer financial promotion* relating to a *cash deposit ISA or cash deposit CTF* provided by a *firm* other than a *credit union*.

(2) Where ■ BCBS 2A applies, ■ COBS 4.7.1R(1)(b) does not require a *firm* to include information outside a summary box in a *direct offer financial promotion* to the extent that this would simply repeat information included in a summary box in the same *financial promotion*.

**4.7.3** G

(1) ■ COBS 4.7.1R (2) allows a *firm* to *communicate a direct offer financial promotion* that does not contain all the information required by ■ COBS 4.7.1R (1), if the *firm* can demonstrate that the *client* has referred to the required information before the *client* makes or accepts an offer in response to the *direct offer financial promotion*.

(2) A *firm communicating or approving a direct offer financial promotion* may also be subject to:

(a) the *rules* on providing product information in ■ COBS 14.2, including the exceptions in ■ COBS 14.2.5R to ■ 14.2.9R; and

(b) the requirement in the *PRIPs Regulation* to provide a *key information document*.

**4.7.4** G In order to enable a *client* to make an informed assessment of a *relevant investment or relevant business*, a *firm* may wish to include in a *direct offer financial promotion*:

(1) a summary of the taxation of any *investment* to which it relates and the taxation consequences for the average member of the group to whom it is directed or by whom it is likely to be received;

(2) a statement that the recipient should seek a *personal recommendation* if he has any doubt about the suitability of the *investments* or services being promoted; and

(3) (in relation to a promotion for a *non-PRIP packaged product* that is not a *financial instrument*) a *key features illustration*, in which a *generic projection* may generally be used.

4.7.5 **G** [deleted]

4.7.5A **G** ■ COBS 4.13.2 R (Marketing communications relating to UCITS schemes or EEA UCITS schemes) and ■ COBS 4.13.3 R (Marketing communications relating to feeder UCITS) contain additional disclosure requirements for *firms* in relation to marketing communications (other than *key investor information*) that concern particular investment strategies of a *UCITS scheme* or *EEA UCITS scheme*.

**Warrants and derivatives**

4.7.6 **R**

(1) A *firm* must not *communicate* or *approve* a *direct offer financial promotion*:

- (a) relating to a *warrant* or *derivative*;
- (b) to or for *communication* to a *retail client*; and
- (c) where the *firm* will not itself be required to comply with the *rules* on appropriateness (see ■ COBS 10 and ■ 10A);

unless the *firm* has adequate evidence that the condition in (2) is satisfied.

(2) The condition is that the *person* who will *arrange* or *deal* in relation to the *derivative* or *warrant* will comply with the *rules* on appropriateness or equivalent requirements for any application or order that the *person* is aware, or ought reasonably to be aware, is in response to the *direct offer financial promotion*.

4.7.6A **G** *Firms* are reminded of their obligations in relation to the marketing, distribution and sale of *restricted speculative investments* in ■ COBS 22.5.

**Non-readily realisable securities**

4.7.7 **R**

(1) Unless permitted by ■ COBS 4.7.8 R, a *firm* must not *communicate* or *approve* a *direct-offer financial promotion* relating to a *non-readily realisable security* to or for *communication* to a *retail client* without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the *retail client* recipient of the *direct-offer financial promotion* is one of the following:

- (a) certified as a ‘high net worth investor’ in accordance with ■ COBS 4.7.9 R;
- (b) certified as a ‘sophisticated investor’ in accordance with ■ COBS 4.7.9 R;
- (c) self-certified as a ‘sophisticated investor’ in accordance with ■ COBS 4.7.9 R;
- (d) certified as a ‘restricted investor’ in accordance with ■ COBS 4.7.10 R.

(3) The second condition is that the *firm* itself or the *person* who will *arrange or deal* in relation to the *non-readily realisable security* will comply with the *rules* on appropriateness (see ■ COBS 10 and ■ 10A) or equivalent requirements for any application or order that the *person* is aware, or ought reasonably to be aware, is in response to the *direct offer financial promotion*.

4.7.8

R

A *firm* may communicate or approve a *direct-offer financial promotion* relating to a *non-readily realisable security* to or for communication to a *retail client* if:

- (1) the *firm* itself will comply with the *suitability rules* (■ COBS 9 and ■ 9A) in relation to the *investment* promoted; or
- (2) the *retail client* has confirmed before the promotion is made that they are a *retail client* of another *firm* that will comply with the *suitability rules* (■ COBS 9 and ■ 9A) in relation to the *investment* promoted; or
- (3) the *retail client* is a *corporate finance contact* or a *venture capital contact*.

4.7.9

R

A certified high net worth investor, a certified sophisticated investor or a self-certified sophisticated investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the terms set out in the applicable rule listed below, substituting “non-readily realisable securities” for “non-mainstream pooled investments”:

- (1) certified high net worth investor: ■ COBS 4.12.6 R;
- (2) certified sophisticated investor: ■ COBS 4.12.7 R;
- (3) self-certified sophisticated investor: ■ COBS 4.12.8 R.

4.7.10

R

A certified restricted investor is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

**“RESTRICTED INVESTOR STATEMENT**

I make this statement so that I can receive promotional communications relating to non-readily realisable securities as a restricted investor. I declare that I qualify as a restricted investor because:

- (a) in the twelve months preceding the date below, I have not invested more than 10% of my net assets in non-readily realisable securities; and
- (b) I undertake that in the twelve months following the date below, I will not invest more than 10% of my net assets in non-readily realisable securities.

Net assets for these purposes do not include:

- (a) the property which is my primary residence or any money raised through a loan secured on that property;
- (b) any rights of mine under a qualifying contract of insurance; or

- (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependants are), or may be entitled; or
- (d) any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).

I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested. I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-readily realisable securities.

Signature:

Date:"

**4.7.11**

**G**

- COBS 4.7.7R does not apply in relation to *credit union subordinated debt* or to deferred shares issued by a *credit union*. *Firms* are reminded that
- CREDS 3A contains requirements regarding the retail distribution and *financial promotion* of these instruments.

## 4.8 Cold calls and other promotions that are not in writing

### Application

4.8.1

**R**

This section applies to a *firm* in relation to the communication of a *financial promotion* that is not in writing, but it does not apply:

- (1) to the extent that the *financial promotion* is an *excluded communication*;
- (2) if the *financial promotion* is *image advertising*;
- (3) if the financial promotion is a *non-retail communication*;
- (4) [deleted]
- (5) to the extent that the *financial promotion* relates to a *pure protection contract* that is a *long-term care insurance contract*.

### Restriction on cold calling

4.8.2

**R**

A *firm* must not make a *cold call* unless:

- (1) the recipient has an established existing client relationship with the *firm* and the relationship is such that the recipient envisages receiving *cold calls*; or
- (2) the *cold call* relates to a generally marketable *packaged product* which is not:
  - (a) a *higher volatility fund*; or
  - (b) a *life policy* with a link (including a potential link) to a *higher volatility fund*; or
- (3) the *cold call* relates to a *controlled activity* to be carried on by an *authorised person* or *exempt person* and the only *controlled investments* involved or which reasonably could be involved are:
  - (a) *readily realisable securities* (other than warrants); and
  - (b) generally marketable non-g geared *packaged products*.

**Promotions that are not in writing**.....

4.8.3

**R**

A firm must not communicate a solicited or unsolicited *financial promotion* that is not in writing, to a *client* outside the *firm's* premises, unless the *person communicating* it:

- (1) only does so at an appropriate time of the day;
- (2) identifies himself and the *firm* he represents at the outset and makes clear the purpose of the communication;
- (3) clarifies if the *client* would like to continue with or terminate the communication, and terminates the communication at any time that the *client* requests it; and
- (4) gives a contact point to any *client* with whom he arranges an appointment.

## 4.9 Financial promotions with an overseas element

### Application

4.9.1

**R**

- (1) Subject to (2) and (3), this section applies to a *firm* in relation to the *communication or approval* of a *financial promotion* that relates to the business of an *overseas person*.
- (2) This section does not apply to a *firm* in relation to its *MiFID or equivalent third country business*.
- (3) If a communication relates to a *firm's* business that is not *MiFID or equivalent third country business*, this section does not apply:
  - (a) to the extent that it is an *excluded communication*;
  - (b) to the extent that it is a prospectus advertisement to which article 22 of the *Prospectus Regulation* applies;
  - (c) if it is *image advertising*;
  - (d) if it is a *non-retail communication*;
  - (e) [deleted]
  - (f) to the extent that it relates to a *pure protection contract* that is a *long-term care insurance contract*.

4.9.2

**G**

*Approving a financial promotion for communication by an unauthorised person is not MiFID or equivalent third country business.*

### Financial promotions for the business of an overseas person

4.9.3

**R**

A *firm* must not *communicate or approve* a *financial promotion* which relates to a particular *relevant investment or relevant business* of an *overseas person*, unless:

- (1) the *financial promotion* makes clear which *firm* has *approved or communicated* it and, where relevant, explains:
  - (a) that the *rules* made under the *Act* for the protection of *retail clients* do not apply;
  - (b) the extent and level to which the *compensation scheme* will be available, or if the scheme will not be available, a statement to that effect; and
  - (c) if the communicator wishes, the protection or compensation available under another system of regulation; and



- (2) the *firm* has taken reasonable steps to satisfy itself that the *overseas person* will deal with *retail clients* in the *United Kingdom* in an honest and reliable way.

**Financial promotions for an overseas long-term insurer**.....

4.9.4

**R**

A *firm* may only communicate or approve a financial promotion to enter into a life policy with a person who is:

- (1) an *authorised person*; or
- (2) an *exempt person* who is exempt in relation to *effecting or carrying out contracts of insurance* of the class to which the *financial promotion* relates; or
- (3) an *overseas long-term insurer* that is entitled under the law of its home country or territory to carry on there *insurance business* of the class to which the *financial promotion* relates.

4.9.5

**R**

A financial promotion for an *overseas long-term insurer*, which has no establishment in the *United Kingdom*, must include:

- (1) the full name of the *overseas long-term insurer*, the country where it is registered, and, if different, the country where its head office is situated;
- (2) a prominent statement that 'holders of policies issued by the company will not be protected by the Financial Services Compensation Scheme if the company becomes unable to meet its liabilities to them'; and
- (3) if any trustee, investment manager or *United Kingdom* agent of the *overseas long-term insurer* is named which is not independent of the *overseas long-term insurer*, a prominent statement of that fact.

4.9.6

**R**

A financial promotion for an *overseas long-term insurer* which is authorised to carry on *long-term insurance business* in any country or territory listed in paragraph (c) of the Glossary definition of *overseas long-term insurer* must also include:

- (1) the full name of any trustee of property of any description which is retained by the *overseas long-term insurer* in respect of the promoted contracts;
- (2) an indication whether the investment of such property (or any part of it) is managed by the *overseas long-term insurer* or by another *person* and the full name of any *investment manager*;
- (3) the registered office of any such trustee and of any *investment manager* and of his principal office (if different); and
- (4) where any *person* in the *United Kingdom* takes, or may take, any steps on behalf of the *overseas long-term insurer* to enter into a promoted contract, the following details:
  - (a) the full name of the *overseas long-term insurer*;

4

4.9.7

**R**

If a *financial promotion* relates to a *life policy* with an *overseas long-term insurer* but does not name the *overseas long-term insurer* by giving its full name or its business name:

- (b) the registered office, head office or principal place of business of that *person* in the *United Kingdom*; and
- (c) if there is more than one such *person*, the principal or main *person* in the *United Kingdom*.

- (1) it must include the following prominent statement: "This financial promotion relates to an insurance company which does not, and is not authorised to, carry on in any part of the United Kingdom the class of insurance business to which this promotion relates. This means that the management and solvency of the company are not supervised by the *Financial Conduct Authority* or the *Prudential Regulation Authority*. Holders of policies issued by the company will not have the right to complain to the Financial Ombudsman Service if they have a complaint against the company and will not be protected by the Financial Services Compensation Scheme if the company should become unable to meet its liabilities to them"; and
- (2) if it also refers to other *investments*, it must make this clear.



## 4.10 Systems and controls and approving and communicating financial promotions

### Systems and controls

**4.10.1** **G** The rules in ■ SYSC 3 (and also for *Solvency II firms*, the PRA Rulebook: Solvency II firms: Conditions Governing Business) and ■ SYSC 4 require a *firm* that communicates with a *client* in relation to *designated investment business*, or *communicates* or *approves* a *financial promotion*, to put in place systems and controls or policies and procedures, or an effective internal control system, in order to comply with the *rules* in this chapter.

### Approving financial promotions

**4.10.2** **R**

- (1) Before a *firm* approves a *financial promotion* for communication by an *unauthorised person*, it must confirm that the *financial promotion* complies with the *financial promotion rules*.
- (2) If, at any time after a *firm* has complied with (1), a *firm* becomes aware that a *financial promotion* no longer complies with the *financial promotion rules*, it must withdraw its *approval* and notify any *person* that it knows to be relying on its *approval* as soon as reasonably practicable.
- (3) When *approving* a *financial promotion*, the *firm* must confirm compliance with the *financial promotion rules* that would have applied if the *financial promotion* had been communicated by a *firm* other than in relation to *MiFID* or *equivalent third country business*.

**4.10.3** **G**

- (1) Section 21(1) of the *Act* (Restrictions on financial promotion) prohibits an *unauthorised person* from *communicating* a *financial promotion*, in the course of business, unless an exemption applies or the *financial promotion* is *approved* by a *firm*. Many of the *rules* in this chapter apply when a *firm* *approves* a *financial promotion* in the same way as when a *firm* *communicates* a *financial promotion* itself.
- (2) A *firm* may also wish to *approve* a *financial promotion* that it *communicates* itself. This would ensure that an *unauthorised person* who then also *communicates* the *financial promotion* to another *person* will not contravene the restriction on *financial promotion* in the *Act* (section 21).

- (3) *Approving a financial promotion for communication by an unauthorised person is not MiFID, equivalent third country or optional exemption business.*
- (4) *A firm may not approve a financial promotion relating to an unregulated collective investment scheme unless the firm would be able to communicate the promotion without breaching section 238(1) of the Act (see section 240 of the Act). The exemptions from that section in the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (as amended from time to time) are relevant.*

**4.10.4** **R** *A firm must not approve a financial promotion to be made in the course of a personal visit, telephone conversation or other interactive dialogue.*

**4.10.5** **R** *If a firm approves a financial promotion in circumstances in which one or more of the financial promotion rules, or the prohibition on approval of promotions for collective investment schemes in section 240(1) of the Act (Restriction on approval), are expressly disapplied, the approval must be given on terms that it is limited to those circumstances.*

**4.10.6** **G** *For example, if a firm approves a financial promotion for communication to a professional client or an eligible counterparty, the approval must be limited to communication to such persons.*

**4.10.7** **G** *If an approval is limited, and an unauthorised person communicates the financial promotion to persons not covered by the approval, the unauthorised person may commit an offence under the restriction on financial promotion in the Act (section 21). A firm giving a limited approval may wish to notify the unauthorised person accordingly.*

**Communicating financial promotions**

**4.10.8** **G** *If a firm continues to communicate a financial promotion when the financial promotion no longer complies with the rules in this chapter, it will breach those rules.*

**4.10.9** **G** *A financial promotion which is clearly only relevant at a particular date will not cease to comply with the financial promotion rules merely because the passage of time has rendered it out-of-date; an example would be a dated analyst's report.*

**Relying on another firm's confirmation of compliance**

- 4.10.10** **R**
- (1) *A firm (A) will not contravene any of the financial promotion rules if it communicates a financial promotion which has been produced by another person and:*
    - (a) *A takes reasonable care to establish that another firm (B) has confirmed that the financial promotion complies with the financial promotion rules;*

- (b) A takes reasonable care to establish that it *communicates* the *financial promotion* only to recipients of the type for whom it was intended at the time B carried out the confirmation exercise; and
  - (c) so far as A is, or ought reasonably to be, aware:
    - (i) the *financial promotion* has not ceased to be fair, clear and not misleading since that time; and
    - (ii) B has not withdrawn the *financial promotion*.
- (2) This *rule* does not apply in relation to *MiFID, equivalent third country or optional exemption business*.

**4.10.11**

**G**

A *firm* should inform anyone relying on its confirmation of compliance if it becomes aware that the *financial promotion* no longer complies with the *rules* in this chapter.

## 4.11 Record keeping: financial promotion

### 4.11.1

R

- (1) A *firm* must make an adequate record of any *financial promotion* it *communicates* or *approves*, other than a *financial promotion* made in the course of a personal visit, telephone conversation or other interactive dialogue.
- (2) For a telemarketing campaign, a *firm* must make an adequate record of copies of any scripts used.
- (2A) If a *firm communicates* or *approves* an invitation or inducement to participate in, acquire, or underwrite a *non-mainstream pooled investment* which is addressed to or disseminated in such a way that it is likely to be received by a *retail client*:
  - (a) the *person* allocated the *compliance oversight function* in the *firm* must make a record at or near the time of the communication or approval certifying that the invitation or inducement complies with the restrictions set out in section 238 of the Act and in ■ COBS 4.12.3 R, as applicable;
  - (b) the making of the record required in (a) may be delegated to one or more *employees* of the *firm* who report to and are supervised by the *person* allocated the *compliance oversight function*, provided the process for certification of compliance has been reviewed and approved by the *person* allocated the *compliance oversight function* no more than 12 months before the date of the invitation or inducement;
  - (c) when making the record required in (a), the *firm* must make a record of which exemption was relied on for the purposes of the invitation or inducement, together with the reason why the *firm* is satisfied that that exemption applies;
  - (d) where the *firm* relies on an exemption that requires investor certification and warnings to investors, the record required in (a) must include a record of any certificate or investor statement (as signed by the investor) and of any warnings or indications required by the exemption;
  - (e) if the exemption relied on is that for an *excluded communication* under ■ COBS 4.12.4R (5), the *firm* must identify in the record required in (a) which type of *financial promotion* defined as an *excluded communication* corresponds to the invitation or inducement being made, including, where applicable, which article in the *Financial Promotion Order* or in the *Promotion of Collective Investment Schemes Order* was relied on for the

purposes of the invitation or inducement, together with the reason why the *firm* is satisfied that the exemption applies;

- (3) A *firm* must retain the record in relation to a *financial promotion* relating to:
  - (a) a *pension transfer, pension conversion, pension opt-out or FSAVC*, indefinitely;
  - (b) a *life policy, occupational pension scheme, SSAS, personal pension scheme or stakeholder pension scheme*, for six years;
  - (c) *MiFID or equivalent third country business*, for five years; and
  - (d) any other case, for three years.
- (4) If a communication relates to a *firm's MiFID, equivalent third country or optional exemption business*, this section does not apply:
  - (a) to the extent that the communication is a *third party prospectus*;
  - (b) if it is *image advertising*;
  - (c) if it is a *non-retail communication*.
- (5) If a communication relates to a *firm's business that is not MiFID or equivalent third country business*, this section does not apply:
  - (a) to the extent that it is an *excluded communication*;
  - (b) to the extent that it is a prospectus advertisement to which article 22 of the *Prospectus Regulation* applies;
  - (c) if it is *image advertising*;
  - (d) if it is a *non-retail communication*;
  - (e) [deleted]
  - (f) to the extent that it relates to a *pure protection contract that is a long-term care insurance contract*.

**4.11.1A** G A *MiFID investment firm, third country investment firm or MiFID optional exemption firm* should refer to the requirements on record keeping in the *MiFID Org Regulation* and ■ SYSC 9.

**4.11.2** G A *firm* should consider maintaining a record of why it is satisfied that the *financial promotion* complies with the *financial promotion rules*.

**4.11.3** G If the *financial promotion* includes market information that is updated continuously in line with the relevant market, the record-keeping *rules* do not require a *firm* to record that information.

## 4.12 Restrictions on the promotion of non-mainstream pooled investments

### Restrictions on the promotion of non-mainstream pooled investments

- 4.12.3 **R**
- (1) A *firm* must not *communicate* or *approve* an invitation or inducement to participate in, acquire, or underwrite a *non-mainstream pooled investment* where that invitation or inducement is addressed to or disseminated in such a way that it is likely to be received by a *retail client*.
  - (2) The restriction in (1) is subject to **COBS 4.12.4 R** and does not apply to *units* in *unregulated collective investment schemes*, which are subject to a statutory restriction on promotion in section 238 of the *Act*.

### Exemptions from the restrictions on the promotion of non-mainstream pooled investments

- 4.12.4 **R**
- (1) The restriction in **COBS 4.12.3 R** does not apply if the promotion falls within an exemption in the table in (5) below.
  - (2) A *firm* may communicate an invitation or inducement to participate in an *unregulated collective investment scheme* without breaching the restriction on promotion in section 238 of the *Act* if the promotion falls within an exemption in the table in (5) below.
  - (3) Where the middle column in the table in (5) refers to promotion to a category of *person*, this means that the invitation or inducement:
    - (a) is made only to recipients who the *firm* has taken reasonable steps to establish are *persons* in that category; or
    - (b) is directed at recipients in a way that may reasonably be regarded as designed to reduce, so far as possible, the risk of participation in, acquisition or underwriting of the *non-mainstream pooled investment* by *persons* who are not in that category.
  - (4) A *firm* may rely on more than one exemption in relation to the same invitation or inducement.



(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
1. Replacement products and rights issues	A person who already participates in, owns, holds rights to or interests in, a <i>non-mainstream pooled investment</i> that is being liquidated or wound down or which is undergoing a rights issue. [See Note 1.]	1. A <i>non-mainstream pooled investment</i> which is intended by the operator or manager to absorb or take over the assets of that <i>non-mainstream pooled investment</i> , or which is being offered by the operator or manager of that <i>non-mainstream pooled investment</i> as an alternative to cash on its liquidation; or 2. <i>Securities</i> offered by the existing <i>non-mainstream pooled investment</i> as part of a rights issue.
2. Certified high net worth investors	An individual who meets the requirements set out in COBS 4.12.6 R, or a person (or persons) legally empowered to make investment decisions on behalf of such individual.	Any <i>non-mainstream pooled investment</i> the firm considers is likely to be suitable for that individual, based on a preliminary assessment of the <i>client's</i> profile and objectives. [See COBS 4.12.5G (2).]
3. Enterprise and charitable funds	A person who is eligible to participate or invest in an arrangement constituted under:  (1) the Church Funds Investment Measure 1958;  (2) section 96 or 100 of the Charities Act 2011;  (3) section 25 of the Charities Act (Northern Ireland) 1964;  (4) the Regulation on European Venture Capital Funds ('EuVECA's'); or  (5) the Regulation on European Social Entrepreneurship Funds ('EuSEFs').	Any <i>non-mainstream pooled investment</i> which is such an arrangement.

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
<p>4. Eligible employees</p>	<p>An eligible <i>employee</i>, that is, a <i>person</i> who is:</p> <ul style="list-style-type: none"> <li>(1) an officer;</li> <li>(2) an <i>employee</i>;</li> <li>(3) a former officer or <i>employee</i>; or</li> <li>(4) a member of the immediate family of any of (1) - (3), of an employer which is (or is in the same <i>group</i> as) the <i>firm</i>, or which has accepted responsibility for the activities of the <i>firm</i> in carrying out the <i>designated investment business</i> in question.</li> </ul>	<p>1. A <i>non-mainstream pooled investment</i>, the instrument constituting which:</p> <ul style="list-style-type: none"> <li>A. restricts the property of the <i>non-mainstream pooled investment</i>, apart from cash and near cash, to: <ul style="list-style-type: none"> <li>(1) (where the employer is a company) <i>shares</i> in and <i>debentures</i> of the <i>company</i> or any other connected <i>company</i>; [See Note 2.]</li> <li>(2) (in any case), any property, provided that the <i>non-mainstream pooled investment</i> takes the form of: <ul style="list-style-type: none"> <li>(i) a limited <i>partnership</i>, under the terms of which the employer (or connected <i>company</i>) will be the unlimited partner and the eligible employees will be some or all of the limited partners; or</li> <li>(ii) a trust which the <i>firm</i> reasonably believes not to contain any risk that any eligible employee may be liable to make any further payments (other than <i>charges</i>) for <i>investment</i> transactions earlier entered into, which the eligible <i>employee</i> was not aware of at the time he entered into them; and</li> </ul> </li> </ul> </li> <li>B. (in a case falling within A(1) above) restricts participation in the <i>non-mainstream pooled investment</i> to eligible <i>employees</i>, the employer and any connected <i>company</i>.</li> </ul>

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
		<p>2. Any <i>non-mainstream pooled investment</i>, provided that the participation of eligible employees is to facilitate their co-investment:</p> <p>(i) with one or more <i>companies</i> in the same <i>group</i> as their employer (which may include the employer); or</p> <p>(ii) with one or more <i>clients</i> of such a <i>company</i>.</p>
5. Members of the Society of Lloyd's	A <i>person</i> admitted to membership of the Society of Lloyd's or any <i>person</i> by law entitled or bound to administer his affairs.	A <i>scheme</i> in the form of a limited <i>partnership</i> which is established for the sole purpose of underwriting <i>insurance business</i> at Lloyd's.
6. Exempt persons	An exempt <i>person</i> (other than a <i>person</i> exempted only by section 39 of the Act (Exemption of appointed representatives)) if the <i>financial promotion</i> relates to a <i>regulated activity</i> in respect of which the <i>person</i> is exempt from the <i>general prohibition</i> .	Any <i>non-mainstream pooled investment</i> .
7. Non-retail clients	An <i>eligible counterparty</i> or a <i>professional client</i> .	Any <i>non-mainstream pooled investment</i> in relation to which the <i>client</i> is categorised as a <i>professional client</i> or <i>eligible counterparty</i> .  [See Note 4.]
8. Certified sophisticated investors	An individual who meets the requirements set out in COBS 4.12.7 R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another <i>person</i> who is the <i>firm's client</i> .	Any <i>non-mainstream pooled investment</i> .
9. Self-certified	An individual who	Any <i>non-mainstream</i>

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
sophisticated investors	meets the requirements set out in COBS 4.12.8 R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another <i>person</i> who is the <i>firm's client</i> .	<p><i>pooled investment</i> the <i>firm</i> considers is likely to be suitable for that <i>client</i>, based on a preliminary assessment of the <i>client's</i> profile and objectives.</p> <p>[See COBS 4.12.5G (2)]</p>
10. Solicited advice	<i>Any person.</i>	<p><i>Any non-mainstream pooled investment</i>, provided the communication meets all of the following requirements:</p> <p>(a) the communication only amounts to a <i>financial promotion</i> because it is a <i>personal recommendation</i> on a <i>non-mainstream pooled investment</i>;</p> <p>(b) the <i>personal recommendation</i> is made following a specific request by that <i>client</i> for advice on the merits of investing in the <i>non-mainstream pooled investment</i>; and</p> <p>(c) the <i>client</i> has not previously received a <i>financial promotion</i> or any other communication from the <i>firm</i> (or from a <i>person</i> connected to the <i>firm</i>) which is intended to influence the <i>client</i> in relation to that <i>non-mainstream pooled investment</i>. [See Note 3.]</p>
11. Excluded communications	<i>Any person.</i>	<p><i>Any non-mainstream pooled investment</i>, provided the <i>financial promotion</i> is an <i>excluded communication</i>.</p> <p>[See COBS 4.12.12 G and COBS 4.12.13 G.]</p>

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
12. Non-recognised UCITS	Any person.	Any EEA UCITS scheme which is not a recognised scheme, provided the following requirements are met:  (1) the firm considers it is likely to be suitable for that client based on a preliminary assessment of the client's profile and objectives; and  (2) the firm provides that client with the same product information as it would be required to provide by COBS 14.2 if the scheme was a recognised scheme.  [See COBS 4.12.5G (2).]
13. US persons	A person who is classified as a United States person for tax purposes under United States legislation or who owns a US qualified retirement plan.	Any investment company registered and operated in the United States under the Investment Company Act 1940.

The following Notes explain certain words and phrases used in the table above.

**Note 1** Promotion of *non-mainstream pooled investments* to a category of person includes any nominee company acting for such a person.

**Note 2** A *company* is 'connected' with another *company* if:  
(a) they are both in the same *group*; or  
(b) one *company* is entitled, either alone or with another *company* in the same *group*, to exercise or control the exercise of a majority of the voting rights attributable to the *share* capital, which are exercisable in all circumstances at any general meeting of the other *company* or of its *holding company*.

**Note 3** A *person* is connected with a *firm* if it acts as an *introducer* or *appointed representative* for that *firm* or if it is any other *person*, regardless of *authorisation* status, who has a relevant business relationship with the *firm*.

**Note 4** In deciding whether a promotion is permitted under the rules of this section or under section 238 of the Act, *firms* may use the *client* categorisation regime that applies to business other than *MiFID* or *equivalent third country business*. (This is the case even if the *firm* will be carrying on a *MiFID* activity at the same time as or following the promotion.)

**Advice and preliminary assessment of suitability**

4.12.5

G

- (1) Where a *firm* communicates any promotion of a *non-mainstream pooled investment* in the context of advice, it should have regard to and comply with its obligations under ■ COBS 9 or ■ 9A (as applicable). *Firms* should also be mindful of the appropriateness requirements in ■ COBS 10 and ■ 10A which apply to a wide range of non-advised services.
- (2) (a) A *firm* which wishes to rely on exemptions 2 (certified high net worth investors), 9 (self-certified sophisticated investors) or 12 (non-recognised UCITS), as provided under ■ COBS 4.12.4R (5), should note that these exemptions require a preliminary assessment of suitability before promotion of the *non-mainstream pooled investment* to clients (in addition to other requirements).
- (b) There is no duty to communicate the preliminary assessment of suitability to the *client*. If the *firm* does so, it must not do so in a way that amounts to making a *personal recommendation* unless it complies with the rules in ■ COBS 9 or ■ 9A (as applicable) on suitability.
- (c) The requirement for a preliminary assessment of suitability does not extend to a full suitability assessment, unless advice is being offered in relation to the *non-mainstream pooled investment* being promoted, in which case the requirements in ■ COBS 9 or ■ 9A apply (as applicable). However, it requires that the *firm* takes reasonable steps to acquaint itself with the *client's* profile and objectives in order to ascertain whether the *non-mainstream pooled investment* under contemplation is likely to be suitable for that *client*. The *firm* should not promote the *non-mainstream pooled investment* to the *client* if it does not consider it likely to be suitable for that *client* following such preliminary assessment.

**Definition of sophisticated and high net worth investors**

4.12.6

R

A *certified high net worth investor* is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

“HIGH NET WORTH INVESTOR STATEMENT

I make this statement so that I can receive promotional communications which are exempt from the restriction on promotion of non-mainstream pooled investments. The exemption relates to certified high net worth investors and I declare that I qualify as such because at least one of the following applies to me:

- I had, throughout the financial year immediately preceding the date below, an annual **income** to the value of **£100,000 or more**. Annual income for these purposes does not include money withdrawn from my pension savings (except where the withdrawals are used directly for income in retirement).
- I held, throughout the financial year immediately preceding the date below, **net assets** to the value of **£250,000 or more**. Net assets for these purposes do **not** include:
  - (a) the property which is my primary residence or any money raised through a loan secured on that property; or
  - (b) any rights of mine under a qualifying contract of insurance; or

(c) any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependants are), or may be, entitled; or

any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).

**I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested.** I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-mainstream pooled investments.

Signature:

Date: "

**4.12.7**

**R**

A *certified sophisticated investor* is an individual:

- (1) who has a written certificate signed within the last 36 months by a *firm* confirming he has been assessed by that *firm* as sufficiently knowledgeable to understand the risks associated with engaging in investment activity in *non-mainstream pooled investments*; and
- (2) who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"SOPHISTICATED INVESTOR STATEMENT

I make this statement so that I can receive promotional communications which are exempt from the restriction on promotion of non-mainstream pooled investments. The exemption relates to certified sophisticated investors and I declare that I qualify as such.

**I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested.** I am aware that it is open to me to seek advice from an authorised person who specialises in advising on non-mainstream pooled investments.

Signature:

Date: "

**4.12.8**

**R**

A *self-certified sophisticated investor* is an individual who has signed, within the period of twelve months ending with the day on which the communication is made, a statement in the following terms:

"SELF-CERTIFIED SOPHISTICATED INVESTOR STATEMENT

I declare that I am a self-certified sophisticated investor for the purposes of the restriction on promotion of non-mainstream pooled investments. I understand that this means:

- (i) I can receive promotional communications made by a person who is authorised by the Financial Conduct Authority which relate to investment activity in non-mainstream pooled investments;
- (ii) the investments to which the promotions will relate may expose me to a significant risk of losing all of the property invested.

I am a self-certified sophisticated investor because at least one of the following applies:

- (a) I am a member of a network or syndicate of business angels and have been so for at least the last six months prior to the date below;
- (b) I have made more than one investment in an unlisted company in the two years prior to the date below;
- (c) I am working, or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises;
- (d) I am currently, or have been in the two years prior to the date below, a director of a company with an annual turnover of at least £1 million.

**I accept that the investments to which the promotions will relate may expose me to a significant risk of losing all of the money or other property invested.** I am aware that it is open to me seek advice from someone who specialises in advising on non-mainstream pooled investments.

Signature:

Date: "

**Sophisticated and high net worth investors: guidance on certification by authorised person and reliance on self-certification**

4.12.9

G

- (1) A *firm* which wishes to rely on any of the *certified high net worth investor* exemptions (see Part I of the Schedule to the *Promotion of Collective Investment Schemes Order*, Part I of Schedule 5 to the *Financial Promotions Order* and ■ COBS 4.12.6 R) should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should take reasonable steps to ascertain that the *retail client* does, in fact, meet the income and net assets criteria set out in the relevant statement for *certified high net worth investors*.
- (2) In addition, the *firm* should consider whether the promotion of the *non-mainstream pooled investment* is in the interests of the *retail client* and whether it is fair to make the promotion to that *client* on the basis that the *client* is a *certified high net worth investor*, having regard to the generally complex nature of *non-mainstream pooled investments*. A *retail client* who meets the criteria for a *certified high net worth investor* but not for a *certified sophisticated investor* may be unable to properly understand and evaluate the risks of the *non-mainstream pooled investment* in question.

4.12.10

G

- (1) A *firm* which is asked to or proposes to assess and certify a *retail client* as a *certified sophisticated investor* (see article 23 of the *Promotion of Collective Investment Schemes Order*, article 50 of the *Financial Promotions Order* and ■ COBS 4.12.7 R) should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should carry out that assessment with due skill, care and diligence, having regard to the generally complex nature of *non-mainstream pooled investments* and the level of experience, knowledge and expertise the *retail client* being assessed must possess in order to be fairly and reasonably assessed and certified as a *sophisticated investor*.
- (2) (a) For example, a *retail client* whose *investment* experience is limited to mainstream *investments* such as *securities* issued by



*listed companies, life policies or units in regulated collective investment schemes (other than qualified investor schemes) is generally unlikely to possess the requisite knowledge to adequately understand the risks associated with investing in non-mainstream pooled investments.*

(b) In exceptional circumstances, however, the *retail client* may have acquired the requisite knowledge through means other than his own investment experience, for example, if the *retail client* is a professional of several years' experience with the design, operation or marketing of complex investments such as *options, futures, contracts for differences or non-mainstream pooled investments*.

**4.12.11** G

- (1) A firm which wishes to rely on any of the *self-certified sophisticated investor* exemptions (see Part II of the Schedule to the *Promotion of Collective Investment Schemes Order*, Part II of Schedule 5 to the *Financial Promotions Order* and ■ **COBS 4.12.8 R**) should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should consider whether the promotion of the *non-mainstream pooled investment* is in the interests of the *client* and whether it is fair to make the promotion to that *client* on the basis of self-certification.
- (2) For example, it is unlikely to be appropriate for a *firm* to make a promotion under any of the *self-certified sophisticated investor* exemption without first taking reasonable steps to satisfy itself that the investor does in fact have the requisite experience, knowledge or expertise to understand the risks of the *non-mainstream pooled investment* in question. A *retail client* who meets the criteria for a *self-certified sophisticated investor* but not for a *certified sophisticated investor* may be unable to properly understand and evaluate the risks of a *non-mainstream pooled investment* which invests wholly or predominantly in assets other than *shares* in or *debentures* of unlisted *companies*.

**One-off promotions**

**4.12.12** G

- (1) A firm which wishes to rely on one of the *one-off promotion* exemptions provided by the *Promotion of Collective Investment Schemes* or the *Financial Promotion Order* to promote a *non-mainstream pooled investment* to a *retail client* should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should consider whether the promotion of the *non-mainstream pooled investment* is in the interests of the *client* and whether it is fair to make the promotion to that *client* on the basis of a *one-off promotion* exemption.
- (2) The *one-off promotion* exemptions permit the promotion of investments to clients under certain conditions (see ■ **PERG 8.14.3 G** to ■ **PERG 8.14.13 G** for guidance on the scope of the one-off exemptions in the *Financial Promotion Order*). *Firms* should note that, in the *FCA's* view, promotion of a *non-mainstream pooled investment* to a *retail client* who is not a *certified high net worth investor*, a *certified sophisticated investor* or a *self-certified sophisticated investor* is unlikely to be appropriate or in that *client's* best interests.

**Qualified investor schemes**

4.12.13

G

- (1) A *firm* which wishes to rely on the *excluded communications* exemption in ■ COBS 4.12.4R (5) to promote *units* in a *qualified investor scheme* to a *retail client* should have regard to its duties under the *Principles* and the *client's best interests rule*.
- (2) As explained in ■ COLL 8.1, *qualified investor schemes* are intended only for *professional clients* and *retail clients* who are sophisticated investors. *Firms* should note that, in the *FCA's* view, promotion of *units* in a *qualified investor scheme* to a *retail client* who is not a *certified sophisticated investor* or a *self-certified sophisticated investor* is unlikely to be appropriate or in that client's best interests.

**Electronic documents**

4.12.14

G

In this section:

- (1) any requirement that a document is signed may be satisfied by an electronic signature or electronic evidence of assent; and
- (2) any references to writing should be construed in accordance with ■ GEN 2.2.14R and its related *guidance* provisions.

4.13 UCITS

Application

4.13.1

R

- (1) This section applies to a *firm* in relation to a communication to a *client*, including an *excluded communication*, that is a marketing communication within the meaning of the *UCITS Directive*.
- (2) This section does not apply to:
  - (a) *image advertising*; or
  - (b) the *instrument constituting the fund*, the *prospectus*, the *key investor information* or the periodic reports and accounts of either a *UCITS scheme* or an *EEA UCITS scheme*.

[Note: recital (58) of the *UCITS Directive*]

Marketing communications relating to UCITS schemes or EEA UCITS schemes

4.13.2

R

- (1) A *firm* must ensure that a marketing communication that comprises an invitation to purchase *units* in a *UCITS scheme* or *EEA UCITS scheme* and that contains specific information about the *scheme*:
  - (a) makes no statement that contradicts or diminishes the significance of the information contained in the *prospectus* and the *key investor information document* or *EEA key investor information document* for the *scheme*;
  - (b) indicates that a *prospectus* exists for the *scheme* and that the *key investor information document* or *EEA key investor information document* is available; and
  - (c) specifies where and in which language such information or *documents* may be obtained by investors or potential investors or how they may obtain access to them.
- (2) Where a *UCITS scheme* or an *EEA UCITS scheme* may invest more than 35% of its *scheme property* in *transferable securities* and money market instruments issued or guaranteed by an *EEA State*, one or more of its local authorities, a third country or a public international body to which one or more *EEA States* belong, the *firm* must ensure that a marketing communication relating to the *scheme* contains a prominent statement drawing attention to the investment policy and indicating the particular *EEA States*, local authorities, third countries or public international bodies in the *securities* of which the *scheme* intends to invest or has invested more than 35% of its *scheme property*.
- (3) Where a *UCITS scheme* or *EEA UCITS scheme* invests principally in *units* in *collective investment schemes*, *deposits* or *derivatives*, or

replicates a stock or debt securities index in accordance with ■ COLL 5.2.31 R (Schemes replicating an index) or equivalent national measures implementing article 53 of the *UCITS Directive*, the *firm* must ensure that a marketing communication relating to the *scheme* contains a prominent statement drawing attention to the investment policy.

- (4) Where the net asset value of a *UCITS scheme* or *EEA UCITS scheme* has, or is likely to have, high volatility owing to its portfolio composition or the portfolio management techniques that are or may be used, the *firm* must ensure that a marketing communication relating to the *scheme* contains a prominent statement drawing attention to that characteristic.

[Note: articles 54(3), 70(2), 70(3) and 77 of the *UCITS Directive*]

### Marketing communications relating to a feeder UCITS

#### 4.13.3

R

A *firm* must ensure that a marketing communication (other than a *key investor information document* or *EEA key investor information document*) relating to a *feeder UCITS* contains a statement that the *feeder UCITS* permanently invests at least 85% in value of its assets in *units* of its *master UCITS*.

[Note: article 63(4) of the *UCITS Directive*]