

**PRODUCT INTERVENTION (CONTINGENT CONVERTIBLE INSTRUMENTS
AND MUTUAL SOCIETY SHARES) INSTRUMENT 2015**

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 137A (general rule-making power);
 - (2) section 137D (product intervention rules);
 - (3) section 137R (financial promotion rules);
 - (4) section 137T (general supplementary powers); and
 - (5) section 139A (power of the FCA to give guidance).
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force as follows:
- (1) Part 1 of Annex A and Part 1 of Annex B come into force on 1 July 2015;
 - (2) Part 2 of Annex A and Part 2 of Annex B come into force on 1 October 2015.

Amendments to the FCA Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Conduct of Business sourcebook (COBS) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Product Intervention (Contingent Convertible Instruments and Mutual Society Shares) Instrument 2015.

By order of the Board of the Financial Conduct Authority
4 June 2015

Annex A

Amendments to the Glossary of definitions

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

Part 1: Comes into force on 1 July 2015

Insert the following new definition in the appropriate alphabetical position. The text is not underlined.

<i>mutual society share</i>	<p>a <i>share</i> which:</p> <p>(a) meets the requirements for common equity Tier 1 capital instruments under article 28 or 29; and</p> <p>(b) is issued by an institution which is of a type listed in article 27;</p> <p>in each case of the Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.</p>
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Amend the following definition as shown.

<i>non-readily realisable security</i>	<p>a <i>security</i> which is not any of the following:</p> <p>...</p> <p>(c) a <i>non-mainstream pooled investment</i>;</p> <p><u>(d) a <i>mutual society share</i>.</u></p>
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Part 2: Comes into force on 1 October 2015

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

[*Editor's Note:* The definition of “contingent convertible instrument” replaces the definition made by the *Temporary Marketing Restriction (Contingent Convertible Securities) Instrument 2014 (FCA 2014/47)* which expires on 1 October 2015.]

CoCo fund

an *unregulated collective investment scheme, qualified investor scheme* or a *special purpose vehicle* under which the investment returns received by the investor, or the scheme or vehicle's ability to fulfil any payment obligations to the investor, are wholly or predominantly linked to, contingent on, highly sensitive to or dependent on, the performance of or changes in the value of *contingent convertible instruments*.

contingent convertible instrument

a *financial instrument* which meets the requirements for either:

- (a) Additional Tier 1 instruments under article 52; or
- (b) Tier 2 instruments under article 63, provided:
 - (i) the provisions governing the instrument require that, upon the occurrence of a trigger event, the principal amount of the instrument be written down on a permanent or temporary basis or the instrument be converted to one or more common equity Tier 1 instruments; and
 - (ii) the trigger mechanism in (i) is different from, or additional to, any discretionary mechanism for converting or writing down the principal amount of the instrument which is activated following a determination by the relevant authority that the issuer of the *financial instrument* (or its *group*, or any member of its *group*) is no longer viable, or will no longer be viable unless the relevant instrument is converted or written down;

in each case of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

Annex B

Amendments to the Conduct of Business sourcebook (COBS)

In this part, underlining indicates new text and striking through indicates deleted text, unless stated otherwise.

Part 1: Comes into effect on 1 July 2015

4.12 Restrictions on the promotion of non-mainstream pooled investments

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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.

Insert the following new section after COBS 22.1. The text is not underlined.

22.2 Requirements on the retail distribution of mutual society shares

Application

- 22.2.1 R (1) The requirements in this section apply to a *firm* when *dealing* in or *arranging a deal* in a *mutual society share* with or for a *retail client* in the *EEA* where the *retail client* is to enter into the *deal* as buyer.
- (2) The requirements in this section do not apply if:
- (a) the *firm* has taken reasonable steps to ensure that one (or more) of the exemptions in *COBS 22.2.4R* applies; or
 - (b) the *deal* relates to the trading of a *mutual society share* in the secondary market.
- (3) In this section, a *retail client* of the *firm* includes a *person* who would be a *retail client* if he were receiving services in the course of the *firm* carrying on a *regulated activity*.

Risk warning requirement

- 22.2.2 R The *firm* must give the *retail client* the following risk warning on paper or another *durable medium* and obtain confirmation in writing from the *retail client* that he has read it, in good time before the *retail client* has committed

to *buy* the *mutual society share*:

“The investment to which this communication relates is a share. Direct investment in shares can be high risk and is very different to investment in deposit accounts or other savings products. In particular, you should note that:

- (a) the entire amount you invest is at risk;
- (b) income, distribution or dividend payments are not guaranteed, are entirely discretionary, and may be suspended or cancelled at any time, for any reason;
- (c) the share is a perpetual instrument with no maturity date, and there is no obligation on the issuer to buy the share back;
- (d) the share may be difficult to sell on for the price you paid for it, or any price; and
- (e) investing more than 10% of your savings or net investment portfolio in this type of instrument is unlikely to be in your best interests.”

Further requirements for non-advised, non-MiFID sales

- 22.2.3 R (1) The requirements in (2) and (3) must be met if:
- (a) the *firm* is not providing an *investment service* in the course of *MiFID* or *equivalent third country business*; and
 - (b) the *retail client* is not otherwise receiving *advice* on the *mutual society share* from the *firm* or another *person*.
- (2) The *firm* must give the *retail client* the following statement on paper or another *durable medium* and obtain confirmation in writing from the *retail client* that he has signed it, in good time before the *retail client* has committed to *buy* the *mutual society share*:
- “I make this statement in connection with proposed investment in mutual society shares. I have been made aware that investing more than 10% of my net assets in mutual society shares is unlikely to be in my best interests. I declare that the proposed investment would not result in more than 10% of my net assets being invested in mutual society shares. Net assets for these purposes mean my financial assets after deduction of any debts I have, and do not include:
- (a) the property which is my primary residence, any amount owed under a mortgage relating to the purchase of that property, or any money raised through a loan secured on that property;
 - (b) any rights of mine under a qualifying contract of insurance (for example, a life assurance or critical illness policy); 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.

I accept that the investment to which this statement relates will expose me to a significant risk of losing all the money invested.

Signature:

Date: ”

- (3) The *firm* must assess whether investment in the *mutual society share* is appropriate for the *retail client*, complying with the requirements in *COBS 10* as though the *firm* was providing non-advised *investment services* in the course of *MiFID* or *equivalent third country business*.

Exemptions

- 22.2.4 R Each of the exemptions listed below applies only if the *retail client* is of the type described for the exemption and provided any additional conditions for the exemption are met.

Title	Type of retail client	Additional conditions
<i>Certified high net worth investor</i>	<p>(a) An individual who meets the requirements set out in <i>COBS 4.12.6R</i>; or</p> <p>(b) an individual in an <i>EEA State</i> other than the <i>UK</i> who meets requirements which are broadly equivalent to those set out in <i>COBS 4.12.6R</i>; or</p> <p>(c) a <i>person</i> (or <i>persons</i>) legally empowered to make investment decisions on behalf of an individual who meets the earnings or net asset requirements in (a) or (b) above.</p>	The <i>firm</i> must consider that the <i>mutual society share</i> is likely to be suitable for that individual, based on a preliminary assessment of that individual's profile and objectives (see <i>COBS 4.12.5G(2)</i>).
<i>Certified sophisticated investor</i>	<p>(a) An individual who meets the requirements set out in <i>COBS 4.12.7R</i>; or</p> <p>(b) an individual in an</p>	Not applicable.

	<p><i>EEA State</i> other than the <i>UK</i> who meets requirements which are broadly equivalent to those set out in <i>COBS 4.12.7R</i>; or</p> <p>(c) an individual who meets the requirements for either (a) or (b) above and who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the <i>firm's client</i>.</p>	
<i>Self-certified sophisticated investor</i>	<p>(a) An individual who meets the requirements set out in <i>COBS 4.12.8R</i>; or</p> <p>(b) an individual in an <i>EEA State</i> other than the <i>UK</i> who meets requirements which are broadly equivalent to those set out in <i>COBS 4.12.8R</i>; or</p> <p>(c) an individual who meets the requirements for either (a) or (b) above and 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>	Not applicable.

Adaptation of other rules and guidance to mutual society shares

- 22.2.5 R (1) For the purposes of any assessments or certifications required by the exemptions in *COBS 22.2.4R*, any references in *COBS 4.12* provisions to *non-mainstream pooled investments* must be read as though they are references to *mutual society shares*.
- (2) If the *firm* is relying on the exemptions for *certified high net worth*

investors, certified sophisticated investors or self-certified sophisticated investors to comply with this section, the statement the investor must sign should have references to *non-mainstream pooled investments* replaced with references to *mutual society shares*.

- (3) The *firm* must give the *retail client* a written copy of any risk warning or statement that that individual has been asked to sign for the purposes of compliance with this section.

Record keeping

- 22.2.6 R A *firm* which carries on an activity which is subject to this section must comply with the following record-keeping requirements:
- (1) the *person* allocated the *compliance oversight function* in the *firm* must make a record at or near the time of the activity certifying it complies with the requirements set out in this section;
 - (2) the making of the record required in (1) 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 *deal*;
 - (3) the record in (1) must include information and evidence demonstrating compliance with each of the requirements in this section, as applicable;
 - (4) if the requirements in *COBS 22.2.2R* and *COBS 22.2.3R* did not apply because the *firm* relied on one of the exemptions, the record in (1) must include which exemption was relied on, together with the reason why the *firm* is satisfied that that exemption applies;
 - (5) where the *firm* relies on the *certified high net worth investor*, the *certified sophisticated investor* or the *self-certified sophisticated investor* exemption, the record required in (1) must include a copy of the certificate or investor statement (as signed by the investor) and of the warnings or indications required by the exemption;
 - (6) a *firm* must retain the record required in (1) for five years if it relates to *MiFID* or *equivalent third country business*, and otherwise for three years.

Electronic documents

- 22.2.7 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.

Amend the following as shown.

Schedule 1 Record keeping requirements

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Sch 1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
COBS 20.3.1R	...			
<u>COBS 22.2.6R</u>	<u>Retail distribution of mutual society shares</u>	<u>Information and evidence demonstrating compliance with the requirements of COBS 22.2</u>	<u>At or near the time of the sale to a retail client</u>	<u>5 years for MiFID or equivalent third country business and 3 years for other business</u>
...				

Part 2: Comes into effect on 1 October 2015

9.3 Guidance on assessing suitability

...

Non-mainstream pooled investments Investments subject to restrictions on retail distribution

- 9.3.5 G (1) ~~*Firms should note that section 238 of the Act and COBS 4.12.3R set out restrictions on the promotion of non-mainstream pooled investments to retail clients. Firms should note that restrictions and specific requirements apply to the retail distribution of certain investments:*~~
- (a) *non-mainstream pooled investments* are subject to a restriction on *financial promotions* (see section 238 of the Act and COBS 4.12);
- (b) *non-readily realisable securities* are subject to a restriction for *direct offer financial promotions* (see COBS 4.7);

- (c) contingent convertible instruments and CoCo funds are subject to a restriction on sales and on promotions (see COBS 22.3);
- (d) mutual society shares are subject to specific requirements in relation to dealing and arranging activities (see COBS 22.3).
- (2) (a) ~~Firms should bear in mind that the provision of advice or information may involve the communication of a financial promotion (see PERG 8). In particular, making a personal recommendation that a client should enter into a non-mainstream pooled investment will generally amount to a financial promotion of that investment because a personal recommendation typically includes an invitation or inducement to engage in investment activity.~~
- (b) ~~Due to the restrictions in section 238 of the Act and COBS 4.12.3R, the promotion of a non-mainstream pooled investment to a retail client is not permitted except where a valid exemption is available and relied on by the firm communicating the promotion. Firms should therefore first satisfy themselves that an exemption is available in relation to the promotion of the non-mainstream pooled investment before recommending the investment to a retail client. A firm should be satisfied that an exemption is available before recommending an investment subject to a restriction on distribution to a retail client, noting in particular that a personal recommendation to invest will generally incorporate a financial promotion.~~
- (3) (a) In addition to assessing whether the promotion is permitted, a firm giving advice on a non-mainstream pooled investment designated investment subject to a restriction on distribution should comply with their obligations in COBS 9 and ensure any *personal recommendation* is suitable for its client.
- (b) ~~In considering its obligations under COBS 9, a firm purchasing a non-mainstream pooled investment on behalf of a client as part of a discretionary management agreement should have regard to whether that client is a person to whom promotion of that non-mainstream pooled investment is permissible under COBS 4.12.4R(5). Whilst the restriction in COBS 4.12.3R does not affect transactions where there is no prior communication with the client in connection with the transaction, a discretionary investment manager should exercise particular care to satisfy himself that the transaction is suitable for the client and that it is in that client's best interests, if promotion of the investment would not have been permitted.~~

- (i) In considering its obligations under COBS 9, a firm purchasing a *designated investment* subject to a restriction on distribution on behalf of a *retail client* as part of a discretionary management agreement should exercise particular care to ensure the transaction is suitable and in that *client's* best interests, having regard to the FCA's view that such *designated investments* pose particular risks of inappropriate distribution.
- (ii) A restriction on promotion does not affect a transaction where there has been no prior communication with the *client* in connection with the investment by the *firm* or a *person* connected to the *firm*. Nonetheless, if promotion of a *designated investment* to a *retail client* would not have been permitted, then the discretionary manager's decision to purchase it on behalf of the *retail client* should be supported by detailed and robust justification of his assessment of suitability.

...

Insert the following new section after COBS 22.2. The text is not underlined.

22.3 Restrictions on the retail distribution of contingent convertible instruments and CoCo funds

Restrictions

- 22.3.1 R (1) The restrictions in this section apply in relation to the following *investments*:
- (a) a *contingent convertible instrument*; or
 - (b) a *security* issued by a *CoCo fund*; or
 - (c) a beneficial interest in either of (a) or (b).
- (2) A *firm* must not:
- (a) *sell an investment* to a *retail client* in the *EEA*; or
 - (b) communicate or approve an invitation or inducement to participate in, acquire or underwrite an *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* in the *EEA*.
- (3) The restrictions do not apply if the *firm* has taken reasonable steps to

ensure that one (or more) of the exemptions in *COBS 22.3.2R* applies.

- (4) In this section a *retail client* includes a *person* who would be a *retail client* if he were receiving services from the *firm* in the course of the *firm* carrying on a *regulated activity*.

Exemptions

- 22.3.2 R Each of the exemptions listed below applies only if the *retail client* is of the type described for the exemption and provided any additional conditions for the exemption are met.

Title	Type of retail client	Additional conditions
<i>Certified high net worth investor</i>	(a) An individual who meets the requirements set out in <i>COBS 4.12.6R</i> ; or (b) an individual in an <i>EEA State</i> other than the <i>UK</i> who meets requirements which are broadly equivalent to those set out in <i>COBS 4.12.6R</i> ; or (c) a <i>person</i> (or <i>persons</i>) legally empowered to make investment decisions on behalf of an individual who meets the earnings or net asset requirements in (a) or (b) above.	The <i>firm</i> must consider that the <i>investment</i> is likely to be suitable for that individual, based on a preliminary assessment of that individual's profile and objectives (see <i>COBS 4.12.5G(2)</i>).
<i>Certified sophisticated investor</i>	(a) An individual who meets the requirements set out in <i>COBS 4.12.7R</i> ; or (b) an individual in an <i>EEA State</i> other than the <i>UK</i> who meets requirements which are broadly equivalent to those set out in <i>COBS 4.12.7R</i> ; or (c) an individual who meets the requirements for	Not applicable.

	either (a) or (b) above and who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the <i>firm's client</i> .	
<i>Self-certified sophisticated investor</i>	<p>(a) An individual who meets the requirements set out in <i>COBS 4.12.8R</i>; or</p> <p>(b) an individual in an <i>EEA State</i> other than the <i>UK</i> who meets requirements which are broadly equivalent to those set out in <i>COBS 4.12.8R</i>; or</p> <p>(c) an individual who meets the requirements for either (a) or (b) above and 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>	The <i>firm</i> must consider that the <i>investment</i> is likely to be suitable for that individual, based on a preliminary assessment of that individual's profile and objectives (see <i>COBS 4.12.5G(2)</i>).
Solicited advice	Any <i>retail client</i> .	<p>The restrictions do not apply provided all of the following requirements are met:</p> <p>(a) there is no invitation or inducement to participate in, acquire or underwrite the <i>investment</i> other than a <i>personal recommendation</i> on the <i>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 <i>investment</i>; and</p> <p>(c) the <i>client</i> has not previously received any other</p>

		communication (whether or not a <i>financial promotion</i>) 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 the <i>investment</i> . (See Note 1)
<i>MiFID</i> or equivalent <i>third country business</i> other than <i>financial promotions</i>	Any <i>retail client</i> .	<i>COBS</i> 22.3.1R(2)(a) does not apply to <i>MiFID</i> or equivalent <i>third country business</i> (see <i>COBS</i> 9.3.5G).
Prospectus	Any <i>retail client</i> .	The restrictions do not apply to the distribution of a prospectus required under the <i>Prospectus Directive</i> .
Issuers	Any <i>retail client</i>	To the extent that the <i>firm</i> is acting as issuer of a <i>contingent convertible instrument</i> , the restrictions only apply to the original issuance of the <i>contingent convertible instrument</i> and not to subsequent trading in the secondary market.
Indirect investment	Any <i>retail client</i>	The restrictions do not apply in relation to a beneficial interest in a <i>contingent convertible instrument</i> acquired through participation in a <i>regulated collective investment scheme</i> , investment in a <i>non-mainstream pooled investment</i> (provided it is not a <i>CoCo fund</i>), or membership of an <i>occupational pension scheme</i> .
Note 1	A <i>person</i> is connected with a <i>firm</i> if it acts as an <i>introducer</i> or <i>appointed representative</i> for that <i>firm</i> or if it is any other <i>person</i> , regardless of <i>authorisation</i> status, who has a relevant business relationship with the <i>firm</i> .	
Note 2	See <i>COBS</i> 2.4 for rules and guidance on agent as <i>client</i> and reliance on others.	

Adaptation of other rules and guidance to contingent convertible instruments and CoCo funds

- 22.3.3 R (1) For the purposes of any assessments or certifications required by the exemptions in *COBS 22.3.2R*, any references in *COBS 4.12* provisions to *non-mainstream pooled investments* must be read as though they are references to *contingent convertible instruments* or *CoCo funds*, as relevant.
- (2) If the *firm* is relying on the *high net worth investor*, the *sophisticated investor* or the *self-certified sophisticated investor* exemption to comply with this section, the statement the investor must sign should have references to *non-mainstream pooled investments* replaced with references to *contingent convertible instruments* or *CoCo funds*, as relevant.
- (3) The *firm* must give the *retail client* a written copy of any statements that individual has been asked to sign as part of certification as a *high net worth, sophisticated* or *self-certified sophisticated investor* for the purposes of compliance with this section.
- 22.3.4 G A *firm* wishing to certify a *retail client* as a sophisticated investor for the purposes of this section should note that, in the *FCA*'s view, it is likely that the only *retail clients* with the requisite sophistication in relation to *contingent convertible instruments* or *CoCo funds* are those with significant experience with investment in multiple types of complex *financial instruments* and who have sufficient understanding of how *credit institutions* are run, including risks to the ability of those institutions to meet prudential requirements on an ongoing basis.

Record keeping

- 22.3.5 R A *firm* which carries on an activity which is subject to this section must comply with the following record-keeping requirements:
- (1) the *person* allocated the *compliance oversight function* in the *firm* must make a record at or near the time of the activity certifying it complies with the restrictions set out in this section;
- (2) the making of the record required in (1) 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 sale or communication or approval of the invitation or inducement;
- (3) when making the record required in (1), the *firm* must make a record of which exemption was relied on for the purposes of the activity within the scope of this section, together with the reason why the *firm*

is satisfied that that exemption applies;

- (4) where the *firm* relies on the *certified high net worth investor*, the *certified sophisticated investor* or the *self-certified sophisticated investor* exemption, the record in (1) must include a copy of the certificate or investor statement (as signed by the investor) and of the warnings or indications required by the exemption, as applicable;
- (5) a *firm* must retain the record required in (1) for five years if it relates to *MiFID* or *equivalent third country business*, and otherwise for three years.

22.3.6 G To the extent the requirements in *COBS* 22.3.5R apply to the communication or approval of any invitation or inducement, such requirements are in addition to those set out in *COBS* 4.11.

Amend the following as shown.

Schedule 1 Record keeping requirements

...

Sch 1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
...				
<i>COBS</i> 22.2.6R	...			
<u><i>COBS</i> 22.3.5R</u>	<u>Retail distribution of contingent convertible instruments and CoCo funds</u>	<u>Information and evidence demonstrating compliance with the restrictions in <i>COBS</i> 22.3</u>	<u>At or near the time of the sale or communication or approval of a promotion to a retail client</u>	<u>5 years for <i>MiFID</i> or equivalent third country business and 3 years for other business</u>
...				