

## Chapter 22

# Restrictions on the distribution of certain complex investment products



## 22.2 Restrictions on the retail distribution of mutual society shares

- 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 *United Kingdom* 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
  - the *deal* relates to the trading of a *mutual society share* in the secondary market.

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*.

- 22.2.1A** **G** **COBS 22.2** does not apply in relation to deferred shares issued by a *credit union*. *Firms* are reminded that **CREDS 3A** contains requirements regarding the retail distribution of these shares.

### 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:
- () the entire amount you invest is at risk;
  - () income, distribution or dividend payments are not guaranteed, are entirely discretionary, and may be suspended or cancelled at any time, for any reason;
  - () the share is a perpetual instrument with no maturity date, and there is no obligation on the issuer to buy the share back;
  - () the share may be difficult to sell on for the price you paid for it, or any price; and
  - () 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 a *personal recommendation* 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 or she 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);
- (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 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*.

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
Certified high net worth investor	(a) An individual who meets the requirements set out in COBS 4.12B.38R; or  (b) 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) above.	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 COBS 4.12B.9G(2)).
Certified sophisticated investor	(a) An individual who meets the requirements set out in COBS 4.12B.39R; or  (b) an individual who meets the requirements for (a) 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</i> client.	Not applicable.
Self-certified sophisticated investor	(a) An individual who meets the requirements set out in COBS 4.12B.40R; or  (b) an individual who meets the requirements for (a) 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</i> client.	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 4.12B provisions to *non-mass market investments* must be read as though they are references to mutual society shares.
- (2) [deleted]

- (2) 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

**R**

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.



## 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 *United Kingdom*; 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 *United Kingdom*.
- (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
Certified high net worth investor	<ul style="list-style-type: none"> <li>(a) An individual who meets the requirements set out in <b>COBS 4.12B.38R</b>; or</li> <li>(b) a <i>person</i> (or <i>persons</i>) legally empowered to make investment decisions on</li> </ul>	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 <b>COBS 4.12B.9G(2)</b> ).

Title	Type of retail client	Additional conditions
Certified sophisticated investor	<p>behalf of an individual who meets the earnings or net asset requirements in (a) above.</p> <p>(a) An individual who meets the requirements set out in COBS 4.12B.39R; or</p> <p>(b) an individual who meets the requirements for (a) 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</i> client.</p>	Not applicable.
Self-certified sophisticated investor	<p>(a) An individual who meets the requirements set out in COBS 4.12B.40R; or</p> <p>(b) an individual who meets the requirements for (a) 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</i> client.</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 COBS 4.12B.9G(2)).
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 communication</p>

Title	Type of retail client	Additional conditions
		(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 or equivalent third country business other than financial promotions</i>	<i>Any retail client.</i>	COBS 22.3.1R(2)(a) does not apply to <i>MiFID or equivalent third country business</i> (see COBS 9.3.5G).
Prospectus	<i>Any retail client.</i>	The restrictions do not apply to the distribution of a prospectus required under the <i>Prospectus Regulation</i> .
Issuers	<i>Any 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	<i>Any 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 COBS 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 4.12B** provisions to *non-mass market investments* must be read as though they are references to *contingent convertible instruments* or *CoCo funds*, as relevant.
- (2) [deleted]
- (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.



## 22.4 Prohibition on the retail marketing, distribution and sale of derivative contracts of a binary or other fixed outcomes nature

### Application

22.4.1

**R**

This section applies to:

- (1) *MiFID investment firms*, with the exception of *collective portfolio management investment firms*; and
- (2) *branches of third country investment firms*,

in relation to the marketing, distribution or sale of *investments* specified in articles 85(4A) and 85(4B) of the *Regulated Activities Order* in or from the *United Kingdom* to a *retail client*.

22.4.2

**G**

*Firms* are reminded that the *Glossary* definition of *MiFID investment firm* includes *CRD credit institutions* when those institutions are providing an *investment service or activity*.

22.4.2A

**G**

*Persons* (including *unauthorised persons*) who benefit from a temporary exemption or exclusion from the *general prohibition* under:

- (1) Part 7 of the *EU Exit Passport Regulations*; or
- (2) Part 4 of the *Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1361)*

are required to comply with the *rules* in this section as a consequence of:

- (3) regulation 59 of the *EU Exit Passport Regulations*; or
- (4) regulation 19 of the *Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019*.

22.4.3

**G**

For the avoidance of doubt, in **■** COBS 22.4.1R, “marketing” includes *communicating and/or approving financial promotions*, and “distribution or sale” includes *dealing* in relation to *investments* specified in articles 85(4A) and 85(4B) of the *Regulated Activities Order*.

**Prohibitions**

22.4.4

**R**

- (1) A *firm* must not:
  - (a) sell an *investment* specified in articles 85(4A) and 85(4B) of the *Regulated Activities Order* to a *retail client*; or
  - (b) distribute an *investment* specified in articles 85(4A) and 85(4B) of the *Regulated Activities Order* to a *retail client*; or
  - (c) market an *investment* specified in articles 85(4A) and 85(4B) of the *Regulated Activities Order* if the marketing is addressed to or disseminated in such a way that it is likely to be received by a *retail client*.
- (2) "Marketing" includes, but is not limited to, *communicating* and/or *approving financial promotions*.

**22.5 Restrictions on the retail marketing, distribution and sale of contracts for differences and similar speculative investments**

**Application**

- 22.5.1** **R** (1) Subject to ■ COBS 22.5.1AR and ■ COBS 22.5.1BG this section applies to:
- (a) *MiFID investment firms with the exception of collective portfolio management investment firms; and*
  - (b) *branches of third country investment firms,*
- in relation to the marketing, distribution or sale of *restricted speculative investments* in or from the *United Kingdom* to a *retail client*.
- (2) [deleted]
- 22.5.1-A** **G** *Persons (including unauthorised persons) who benefit from a temporary exemption or exclusion from the general prohibition under:*
- (1) *Part 7 of the EU Exit Passport Regulations; or*
  - (2) *Part 4 of the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1361)*
- are required to comply with the *rules* in this section as a consequence of:
- (3) *regulation 59 of the EU Exit Passport Regulations; or*
  - (4) *regulation 19 of the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019.*
- 22.5.1A** **R** The *rules* in this section do not apply to the sale and distribution of *restricted options* by a *firm* (F) in circumstances where F sells a *restricted option* to a *retail client* through an intermediary.
- 22.5.1B** **G** For the avoidance of doubt, the exclusion in ■ COBS 22.5.1AR only applies to F.
- 22.5.1C** **R** [deleted]
- 22.5.2** **G** [deleted]

22.5.3 **G** Firms are reminded that the *Glossary* definition of *MiFID investment firm* includes *CRD credit institutions* when those institutions are providing an *investment service or activity*.

22.5.4 **G** For the avoidance of doubt, “marketing” *restricted speculative investments* includes *communicating* and/or *approving financial promotions*, and “distribution or sale” includes *dealing* in relation to *restricted speculative investments*.

22.5.5 **R** The *rules* in this section do not apply to:

- (1) *derivative instruments* for the transfer of credit risk to which article 85(3) of the *Regulated Activities Order* applies; or
- (2) *cryptoasset derivatives*.

22.5.5A **G** Firms are reminded of the prohibitions in relation to the marketing, distribution and sale of *cryptoasset derivatives* in ■ COBS 22.6.

**Standardised risk warning**.....

22.5.6 **R** (1) Subject to ■ COBS 22.5.7R and ■ COBS 22.5.7AR, a *firm* must not:

- (a) market, publish, provide or communicate in any other way any communication or information in a *durable medium* or on a webpage or website to a *retail client*, or in such a way that it is likely to be received by a *retail client*;
- (b) *approve* or *communicate* a *financial promotion* in a *durable medium* or on a webpage or website; or
- (c) disseminate such a communication, information or *financial promotion* to a *retail client*, or in such a way that it is likely to be received by a *retail client*,

unless the *firm* includes one of the following risk warnings, as appropriate.

(1A) Subject to 1B, if a *firm* markets, distributes or sells:

- (a) *leveraged contracts for differences*;
- (b) *leveraged spread bets*; or
- (c) *leveraged rolling spot forex contracts*,

the *firm* must include the following risk warning:

“CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.

**[insert percentage per provider]% of retail investor accounts lose money when trading CFDs with this provider.**

You should consider whether you understand how CFDs work and whether you can afford to take the high risk of losing your money.”

If a *firm* markets, distributes or sells:

*restricted options*; and

one or more of the following:

leveraged *contracts for differences*;

leveraged *spread bets*; or

leveraged *rolling spot forex contracts*,

the *firm* must include the following risk warning:

“CFDs and restricted options are complex instruments and come with a high risk of losing money rapidly due to leverage.

**[insert percentage per provider]% of retail investor accounts lose money when trading CFDs and restricted options with this provider.**

You should consider whether you understand how CFDs and restricted options work and whether you can afford to take the high risk of losing your money.”

If a *firm* markets, distributes or sells *restricted options* but does not market, distribute or sell leveraged *contracts for differences*, leveraged *spread bets* or leveraged *rolling spot forex contracts*, the *firm* must include the following risk warning:

“Restricted options are complex instruments and come with a high risk of losing money rapidly due to leverage.

**[insert percentage per provider]% of retail investor accounts lose money when trading restricted options with this provider.**

You should consider whether you understand how restricted options work and whether you can afford to take the high risk of losing your money.”

- (2) The risk warning must be modified as necessary to refer to the percentage of *retail client* accounts that lost *money* relevant to the *firm*.
- (3) The *firm's* disclosure of the percentage of *retail client* accounts that lost *money* must include an up-to-date percentage based on a calculation of the percentage of *retail client* accounts held with the *firm* that lost *money*.
- (4) The calculation in (3) must be performed every three *months* and cover the 12-*month* period preceding the date of the calculation.
- (5) For the purposes of the calculation in (3), an individual *retail client* account must be considered to have lost *money* if the sum of all realised and unrealised net profits on *restricted speculative investments* traded in that *retail client's* account during the 12-*month* calculation period is below zero.
- (6) The calculation in (3) must include all costs, fees, *commissions* and any other charges.
- (7) The calculation in (3) must not include:
  - (a) a *retail client* account that did not have an open *restricted speculative investment* connected to it within the calculation period;

- (b) any profits or losses from investments other than *restricted speculative investments*;
  - (c) any deposits of funds; or
  - (d) any withdrawals of funds.
- (8) The *firm* must retain records of the *retail client accounts* used for these calculations for five years.
- (9) Where the *retail client* has not approached the *firm* through a website or mobile application, the risk warning must be provided in a *durable medium* in good time before the *firm* carries on any business for the *retail client*.
- (10) Where the communication, information or *financial promotion* referred to in ■ COBS 22.5.6R(1) is in a medium other than a *durable medium*, website or webpage, *firms* must include one of the following risk warnings, as appropriate.
- (10A) Subject to 10B, if a *firm* markets, distributes or sells:
- (a) leveraged *contracts for differences*;
  - (b) leveraged *spread bets*; or
  - (c) leveraged *rolling spot forex contracts*,
- the *firm* must include the following risk warning:
- “[insert percentage per provider]% of retail investor accounts lose money when trading CFDs with this provider.**
- You should consider whether you can afford to take the high risk of losing your money.”
- (10B) If a *firm* markets, distributes or sells:
- (a) *restricted options*; and
  - (b) one or more of the following:
    - (i) leveraged *contracts for difference*;
    - (ii) leveraged *spread bets*; or
    - (iii) leveraged *rolling spot forex contracts*,
- the *firm* must include the following risk warning:
- “[insert percentage per provider]% of retail investor accounts lose money when trading CFDs and restricted options with this provider.**
- You should consider whether you can afford to take the high risk of losing your money.”
- (10C) If a *firm* markets, distributes or sells *restricted speculative options* but does not market, distribute or sell leveraged *contracts for differences*, leveraged *spread bets* or leveraged *rolling spot forex contracts*, the *firm* must include the following risk warning:
- “[insert percentage per provider]% of retail investor accounts lose money when trading restricted options with this provider.**
- You should consider whether you can afford to take the high risk of losing your money.”
- (11) For the purposes of ■ COBS 22.5.6R(10), if the number of characters contained in that risk warning exceeds the character limit permitted



by a third party marketing provider, the following risk warning must be used:

**[insert percentage per provider]% of retail CFD accounts lose money."**

- (12) Where the risk warning in ■ COBS 22.5.6R(11) is used, the *firm* must ensure that the risk warning is accompanied by a direct link to the *firm's* webpage which contains the risk warning in ■ COBS 22.5.6R.

22.5.7

**R**

- (1) This rule applies when:

- (a) a *firm* is required to perform the calculation of percentage of loss for the purposes of the risk warning and the *firm* has not entered into a single trade involving a *restricted speculative investment* with a *retail client* in the previous 12 months; and
- (b) the *firm's* communication, information or *financial promotion* is provided in a *durable medium*, website or webpage.
- (c) [deleted]

The *firm* must use one of the following risk warnings as appropriate for the purposes of ■ COBS 22.5.6R:

- (a) If a *firm* markets, distributes or sells:

- (i) leveraged *contracts for differences*;
- (ii) leveraged *spread bets*; or
- (iii) leveraged *rolling spot forex contracts*,

the *firm* must use the following risk warning:

"CFDs are complex instruments and come with a high risk of losing money rapidly due to leverage.

**The vast majority of retail client accounts lose money when trading in CFDs.**

You should consider whether you can afford to take the high risk of losing your money."

- (b) If a *firm* markets, distributes or sells:

- (i) *restricted speculative options*; and
- (ii) leveraged *contracts for differences*;
- (iii) leveraged *spread bets*; or
- (iv) leveraged *rolling spot forex contracts*,

the *firm* must use the following risk warning:

"CFDs and restricted options are complex instruments and come with a high risk of losing money rapidly due to leverage.

**The vast majority of retail client accounts lose money when trading in CFDs and restricted options.**

You should consider whether you can afford to take the high risk of losing your money."

- (c) If a *firm* markets, distributes or sells *restricted options* but does not market, distribute or sell leveraged *contracts for differences*,

leveraged *spread bets* or leveraged *rolling spot forex contracts*, the *firm* must use the following risk warning:

**"Restricted options are complex instruments and come with a high risk of losing money rapidly due to leverage.**

**The vast majority of retail client accounts lose money when trading in restricted options.**

You should consider whether you can afford to take the high risk of losing your money."

22.5.7A **R**

- (1) This *rule* applies when:
- (a) a *firm* is required to perform the calculation of percentage of loss for the purposes of the risk warning and the *firm* has not entered into a single trade involving a *restricted speculative investment* with a *retail client* in the previous 12 months; and
  - (b) the *firm's* communication, information or *financial promotion* is in a medium other than a *durable medium*, website or webpage.
- (2) The *firm* must use one of the following risk warnings as appropriate for the purposes of ■ COBS 22.5.6R:

- (a) If a *firm* markets, distributes or sells:

- (i) leveraged *contracts for differences*;
  - (ii) leveraged *spread bets*; or
  - (iii) or leveraged *rolling spot forex contracts*,
- the *firm* must use the following risk warning:

**"The vast majority of retail client accounts lose money when trading in CFDs.**

You should consider whether you can afford to take the high risk of losing your money."

- (b) If a *firm* markets, distributes or sells:

- (i) *restricted options*; and
  - (ii) leveraged *contracts for differences*;
  - (iii) leveraged *spread bets*; or
  - (iv) leveraged *rolling spot forex contracts*,
- the *firm* must use the following risk warning:

**"The vast majority of retail client accounts lose money when trading in CFDs and restricted options.**

You should consider whether you can afford to take the high risk of losing your money."

- (c) If a *firm* markets, distributes or sells *restricted options* but does not market, distribute or sell leveraged *contracts for differences*, leveraged *spread bets* or leveraged *rolling spot forex contracts*, the *firm* must use the following risk warning:

**"The vast majority of retail client accounts lose money when trading in restricted options.**

You should consider whether you can afford to take the high risk of losing your money."

- (d) Where the number of characters contained in the risk warnings in this *rule* exceeds the character limit permitted by a third party marketing provider, the following risk warning must be used:

**"CFD-retail client accounts generally lose money."**

- 22.5.8** **R** The relevant risk warning in ■ COBS 22.5.6R or ■ COBS 22.5.7R must be:
- (1) prominent;
  - (2) contained within its own border and with bold and unbold text as indicated;
  - (3) if provided on a website or via a mobile application, statically fixed and visible at the top of the screen even when the *retail client* scrolls up or down the webpage; and
  - (4) if provided on a website, included on each linked webpage on the website.

- 22.5.9** **G** The relevant risk warning, including the font size, should be:
- (1) proportionate, taking into account the content, size and orientation of the marketing material as a whole; and
  - (2) published against a neutral background.

#### **Margin requirements for retail clients**

- 22.5.10** **R** A *firm* must not open a position in relation to a *restricted speculative investment* for a *retail client* unless the *margin* posted to open the position is in the form of *money*.

- 22.5.11** **R** A *firm* must require a *retail client* to post *margin* to open a position of at least the following amounts:
- (1) 3.33% of the value of the exposure that the trade provides when the underlying asset is a *major foreign exchange pair* or *relevant sovereign debt*;
  - (2) 5% of the value of the exposure that the trade provides when the underlying asset is a *major stock market index*, *minor foreign exchange pair* or *gold*;
  - (3) 10% of the value of the exposure that the trade provides when the underlying asset is a *minor stock market index* or a *commodity* other than *gold*; or
  - (4) [deleted]
  - (5) 20% of the value of the exposure that the trade provides when the underlying asset is a *share* or an asset not otherwise listed in ■ COBS 22.5.11R(1) to (4) above.

- 22.5.12** **G** For the purposes of ■ COBS 22.5.11R, "exposure" means the total value of the exposure that the *restricted speculative investment* provides. Examples are set out below.

- (1) A firm offers a restricted speculative investment when the underlying asset is a 5 x leveraged index on gold. The value of the index is £800. The value of the exposure that the trade provides is therefore £800 x 5, or £4000; or
- (2) a firm offers a contract for differences where the underlying asset is a restricted option that references the FTSE 100. For this contract for differences, the value of the exposure that the trade provides is equal to the value of the underlying asset of the restricted option. For pricing the restricted option, the firm offers £1 of exposure for each point of the FTSE 100. Under these terms, if the retail client buys the contract for differences on a restricted option when the FTSE 100 is trading at 7070, the value of the exposure that the trade provides is £7070 (i.e. 7070 x £1).

### Margin close out requirements for retail clients

22.5.13

**R**

- (1) A firm must ensure a retail client's net equity in an account used to trade restricted speculative investments does not fall below 50% of the margin requirement (as outlined in ■ COBS 22.5.11R) required to maintain the retail client's open positions.
- (2) Where a retail client's net equity falls below 50% of the margin requirement, the firm must close the retail client's open position(s) on restricted speculative investments as soon as market conditions allow.
- (3) In this rule, "net equity" means the sum of the retail client's net profit and loss on their open position(s) and the retail client's deposited margin.

22.5.14

**R**

A firm must not maintain an open position in relation to a restricted speculative investment for a retail client unless the margin posted to maintain the open position is in the form of money.

22.5.15

**R**

A firm must provide to a retail client a clear description in a durable medium or make available on a website (where that does not constitute a durable medium) that meets the website conditions of how the retail client's margin close out level will be calculated and triggered:

- (1) in good time before the retail client opens their first position; and
- (2) in good time before any change to the terms and conditions applicable to the retail client takes effect.

22.5.16

**G**

Firms are reminded that they must comply with ■ COBS 2.1.1R (the client's best interests rule) and ■ COBS 11.2A.2R (obligation to execute orders on terms most favourable to the client) when:

- (1) making a margin call to a retail client; or
- (2) exercising a discretionary right to close a retail client's position; or
- (3) closing a retail client's position(s).

**Negative balance protection**

- 22.5.17 **R** The liability of a *retail client* for all *restricted speculative investments* connected to the *retail client's* account is limited to the funds in that account.
- 22.5.18 **G** ■ COBS 22.5.17R means that a *retail client* cannot lose more than the funds specifically dedicated to trading *restricted speculative investments*.
- 22.5.19 **G** For the purposes of ■ COBS 22.5.17R, funds in a *retail client's* account are limited to the *cash* in the account and unrealised net profits from open positions. "Unrealised net profits from open positions" means the sum of unrealised gains and losses of all open positions recorded in the account. Any funds or other assets in the *retail client's* account for purposes other than trading *restricted speculative investments* should be disregarded.

**Restrictions on monetary incentives and non-monetary incentives**

- 22.5.20 **R** A *firm* must not offer to a *retail client*, or provide a *retail client* with, any of the following when marketing, distributing or selling a *restricted speculative investment*:
- (1) a monetary incentive; or
  - (2) a non-monetary incentive.
- 22.5.21 **G** For the purposes of ■ COBS 22.5.20R:
- (1) monetary incentives include, but are not limited to, the offering of bonuses in relation to the opening of a new account or the offering of rebates on fees (including volume-based rebates);
  - (2) lower fees offered to all *retail clients* do not constitute a monetary incentive; and
  - (3) information and research tools do not constitute non-monetary incentives.

**Other products**

- 22.5.22 **G** *Firms* that market, distribute or sell *derivatives* with similar features to *restricted speculative investments* (particularly where the *derivatives* are leveraged) to *retail clients*, should have particular regard to how they comply with applicable obligations found elsewhere in the *FCA Handbook*, including, where relevant:
- (1) ■ COBS 2.1.1R (The client's best interests rule);
  - (2) ■ COBS 4.2.1R (The fair, clear and not misleading rule);
  - (3) ■ COBS 9A (Suitability (MiFID and insurance-based investment products provisions));

- (4) ■ COBS 10A (Appropriateness (for non-advised services) (MiFID and insurance-based investment products provisions));
- (5) *PRIN*, particularly *principles* 1, 2 and 6; and
- (6) ■ PROD 3 (Product governance: MiFID).

## 22.6 Prohibition on the retail marketing, distribution and sale of cryptoasset derivatives and cryptoasset exchange traded notes

### Application

22.6.1

**R**

This section applies to:

- (1) *MiFID investment firms*, with the exception of *collective portfolio management investment firms*;
- (2) *branches of third country investment firms*
- (3) *MiFID optional exemption firms*; and
- (4) *TP firms* which are *EEA MiFID investment firms* with the exception of *collective portfolio management investment firms*,

in relation to the marketing, distribution or sale of *cryptoasset derivatives* and *cryptoasset exchange traded notes* in or from the *United Kingdom* to a *retail client*.

22.6.2

**G**

In addition to the *persons* listed above, *persons* (including *unauthorised persons*) who benefit from a temporary exemption or exclusion from the *general prohibition* under:

- (1) Part 7 of the *EU Exit Passport Regulations*; or
- (2) Part 4 of the *Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1361)*

are required to comply with the *rules* in this section as a consequence of:

- (3) regulation 59 of the *EU Exit Passport Regulations*; or
- (4) regulation 19 of the *Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019*.

22.6.3

**G**

*Firms* and *TP firms* are reminded that the *Glossary* definition of *MiFID investment firm* includes *CRD credit institutions* when those institutions are providing an *investment service or activity*.

22.6.4 **G** For the avoidance of doubt, in **■** COBS 22.6.1R, “marketing” includes *communicating and/or approving financial promotions*, and “distribution or sale” includes *dealing* in relation to *cryptoasset derivatives* and *cryptoasset exchange traded notes*.

**Prohibitions**

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22.6.5 **R**

- (1) A *firm* or *TP firm* must not:
  - (a) sell a *cryptoasset derivative* or a *cryptoasset exchange traded note* to a *retail client*; or
  - (b) distribute a *cryptoasset derivative* or a *cryptoasset exchange traded note* to a *retail client*; or
  - (c) market a *cryptoasset derivative* or a *cryptoasset exchange traded note* if the marketing is addressed to or disseminated in such a way that it is likely to be received by a *retail client*.
- (2) “Marketing” includes, but is not limited to, *communicating and/or approving financial promotions*.