

Chapter 22

Restrictions on the distribution of certain complex investment products

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

Restrictions

22.3.1

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- (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

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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	<p>(a) An individual who meets the requirements set out in COBS 4.12B.38R; or</p> <p>(b) a person (or persons) legally empowered to make investment decisions on behalf of an individual who meets the earnings or net asset requirements in (a) above.</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)).
Certified sophisticated investor	<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>

Title	Type of retail client	Additional conditions
		<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 (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>.</p>
<i>MiFID or equivalent third country business other than financial promotions</i>	<i>Any retail client.</i>	<p>(See Note 1)</p> <p>COBS 22.3.1R(2)(a) does not apply to <i>MiFID or equivalent third country business</i> (see COBS 9.3.5G).</p>
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> .

Title	Type of retail client	Additional conditions
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

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- (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

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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

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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**.