

Chapter 4

Communicating with clients, including financial promotions

4.10 Approving and confirming compliance of 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

- 4.10.1A G The purpose of ■ COBS 4.10.2R is to ensure that a *firm* that *approves a financial promotion for communication by an unauthorised person*:
- (1) satisfies itself of the compliance of that *financial promotion* with the *financial promotion rules*; and
 - (2) having *approved* that *financial promotion*, takes appropriate steps to ensure that the *financial promotion* remains compliant for the lifetime of its *communication*.
- 4.10.1B G
- (1) The effect of section 55NA of the *Act* is that a *firm* is unable to *approve a financial promotion* unless:
 - (a) the *firm* is a *permitted approver* in relation to the *financial promotion*; or
 - (b) an *approver permission exemption* applies.
 - (2) ■ SUP 6A contains *guidance* on applying for *approver permission*.
 - (3) The requirements in this section that apply to a *firm* after it has *approved a financial promotion* continue to apply even where the *firm* ceases to be entitled to *approve that financial promotion*, for example because it ceases to be a *permitted approver* in respect of that *financial promotion*. This includes the requirement to monitor continuing compliance of the *financial promotion*. In such a scenario, if the *firm* became aware that the *financial promotion* no longer complied with the *financial promotion rules*, it could withdraw its *approval* but could not *approve* amendments to the *financial promotion*.

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*.

(1A) After a *firm* has complied with (1), and for as long as the *financial promotion* is communicated, the *firm* must take reasonable steps to monitor the continuing compliance of that *financial promotion* with the *financial promotion rules*.

[**Note:** for the *FCA*'s guidance on 'Ongoing monitoring' see: <https://www.fca.org.uk/firms/financial-promotions-and-adverts/approving-financial-promotions>]

A *firm* that has approved a *financial promotion* issued, and for communication by, an *unauthorised person* must require from that *person*, a written quarterly attestation that there has been no material change:

- (a) to the *financial promotion*; or
- (b) in circumstances which might affect the continuing compliance of the *financial promotion* with the *financial promotion rules*.

For the purpose of (1B), a *firm* must:

- (a) require the first attestation no less than 3 *months* after it approves the *financial promotion*; and
- (b) thereafter, require attestations at least once every 3 *months* for as long as the *financial promotion* is communicated.

(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*.

4.10.2A

R

(1) This rule applies to a *firm* that approves:

- (a) a *direct offer financial promotion* relating to a *restricted mass market investment*; or
- (b) a *financial promotion* relating to a *non-mass market investment*, for communication to a *retail client*.

(2) A *firm* must take reasonable steps to ensure, on a continuing basis:

- (a) that the conditions specified in:
 - (i) ■ COBS 4.12A.15R(1)(b) are being satisfied in relation to each communication of the *direct offer financial promotion* relating to the *restricted mass market investment*;
 - (ii) ■ COBS 4.12B.10R(2)(b) are being satisfied in relation to each communication of the *financial promotion* relating to the *non-mass market investment*; and

- (b) if the *firm* will not itself carry out the appropriateness assessment required by ■ COBS 4.12A.28R, that the appropriateness assessments undertaken comply with the *rules* specified in ■ COBS 4.12A.28R.
- (3) If the *firm* is not satisfied that the relevant conditions are being satisfied or that the appropriateness assessments undertaken comply with the relevant *rules* then it must withdraw its *approval* of the *financial promotion* in accordance with ■ COBS 4.10.2R(2).
- 4.10.2B** G ■ COBS 4.11.6R requires a *firm* that *approves a direct offer financial promotion* relating to a *restricted mass market investment for communication* to a *retail client* to take reasonable steps to ensure that it is provided with, or has ready access to, information relating to the *communication* of the *direct offer financial promotion*. These records should assist the *firm* in complying with ■ COBS 4.10.2AR.
- 4.10.2C** G A *firm* is reminded of its obligations under ■ ESG 4.3.1R when it *communicates* or *approves a financial promotion* that makes reference to the *sustainability characteristics* of a product or service.
- 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.
- (5) The *rules* in ■ COBS 4.12B prevent a *firm* from *approving a financial promotion* for a *non-mass market investment for communication* to *retail clients* unless an exemption applies. Where an exemption requires a preliminary assessment of suitability, the effect of ■ COBS 4.12B.7R is that this assessment must be undertaken by the *firm* *approving the financial promotion*.
- (6) For the purposes of ■ COBS 4.10.2R(1B), a *financial promotion* should be considered to be issued by an *unauthorised person* where that

unauthorised person is responsible for the overall contents of the *financial promotion* (see also ■ PERG 8.6.1G).

(7) The effect of ■ COBS 4.10.2R(1A) and ■ (2) and ■ COBS 4.10.2AR(3) is that where a *firm* identifies that a *financial promotion* that it has *approved* is no longer compliant with the *financial promotion rules*, the *firm* must withdraw its *approval*.

(8) A *registered person* is not able to approve a *financial promotion*.

4.10.3A **G** If a *firm*:

(1) is unable to obtain an attestation required by ■ COBS 4.10.2R(1B), that *firm* should consider whether to withdraw its *approval*;

(2) in response to a request to provide an attestation, is informed of changes which indicate that the *financial promotion* no longer complies with the *financial promotion rules*, it must withdraw its approval,

in each case in accordance with ■ COBS 4.10.2R(2).

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.

4.10.7A **G** An *approved financial promotion* that is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client* is required to include the name of the *firm* that *approved* it and the date on which it was *approved* (■ COBS 4.5.2R).

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.

Competence and expertise

4.10.9A **R**

- (1) A *firm* must not *communicate* or *approve* a *financial promotion* unless the *individual* or *individuals* responsible for the compliance of the *financial promotion* with the *financial promotion rules* has or have appropriate competence and expertise.
- (2) Appropriate competence and expertise for the purposes of (1) means competence and expertise in the *investment* or financial service to which the *financial promotion* relates. It does not necessarily, for example, require competence or expertise in the day-to-day commercial activities of a *company* issuing *securities* for the purposes of raising capital.
- (3) If a *firm* (A) determines that it lacks appropriate competence and expertise in relation to a *financial promotion*, it must:
 - (a) have another *firm* (B) confirm that the *financial promotion* complies with the *financial promotion rules* before A *communicates* that *financial promotion*; or
 - (b) decline to *approve* that *financial promotion*.
- (4) A *registered person* is not permitted to confirm the compliance of a *financial promotion* for the purpose of ■ COBS 4.10.9AR(3).

4.10.9B **R**

A *firm* must not confirm the compliance of a *financial promotion* for the purpose of ■ COBS 4.10.9AR(3)(a) unless:

- (a) it is satisfied that the *financial promotion* complies with the *financial promotion rules*; and
- (b) the *individual* or *individuals* responsible for providing that confirmation has or have appropriate competence and expertise.

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

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;
 - (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*; and
- (d) A takes reasonable care to establish that B did not breach the *approver permission requirement* in the context of confirming compliance.

(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.

Conflicts of interest

4.10.12 **R**

- (1) This *rule* applies to a *firm* that:
 - (a) *approves a financial promotion for communication by an unauthorised person*; or
 - (b) confirms the compliance of a *financial promotion* for the purposes of **COBS 4.10.9AR(3)(a)**.
- (2) A *firm* must take all appropriate steps to identify and to prevent or manage conflicts of interest between the *firm*, including its managers, *employees* and *appointed representatives* (or, where applicable, *tied agents*), or any *person* directly or indirectly linked to them by *control*, and a *person* for whom the *firm*:
 - (a) *approves a financial promotion*; or
 - (b) confirms the compliance of a *financial promotion*.