

## UNREGULATED COLLECTIVE INVESTMENT SCHEMES AND CLOSE SUBSTITUTES INSTRUMENT 2013

### 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);
  - (5) section 139A (Guidance);
  - (6) section 238(5) (Restrictions on promotion); and
  - (7) the other powers and related provisions listed in Schedule 4 (Powers exercised) to the General Provisions of the Handbook.
- B. The rule-making powers referred to above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

### Commencement

- C. This instrument comes into force on 1 January 2014.

### Amendments to the Handbook

- D. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Conduct of Business sourcebook (COBS)	Annex B
Collective Investment Scheme sourcebook (COLL)	Annex C

### Amendments to material outside the Handbook

- E. The Perimeter Guidance manual (PERG) is amended in accordance with Annex D to this instrument.

### Notes

- F. In Annex A to this instrument, the “note” (indicated by “**Note:**”) is included for the convenience of readers but does not form part of the legislative text.

**Citation**

- G. This instrument may be cited as the Unregulated Collective Investments Schemes and Close Substitutes Instrument 2013.

By order of the Board  
3 June 2013

## Annex A

### Amendments to the Glossary of definitions

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

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

<i>certified high net worth investor</i>	a <i>person</i> who meets the requirements set out in article 21 of the <i>Promotion of Collective Investment Schemes Order</i> , in article 48 of the <i>Financial Promotions Order</i> or in <i>COBS 4.12.6R</i> .
<i>certified sophisticated investor</i>	a <i>person</i> who meets the requirements set out in article 23 of the <i>Promotion of Collective Investment Schemes Order</i> , in article 50 of the <i>Financial Promotions Order</i> or in <i>COBS 4.12.7R</i> .
<i>excluded security</i>	any of the following <i>investments</i> : <ul style="list-style-type: none"> <li>(a) a <i>security</i> whereby the issuer's 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 <i>shares</i>, <i>debentures</i> or <i>government and public securities</i>, whether or not such performance or changes in value are measured directly or via a market index or indices, and provided the relevant <i>shares</i> and <i>debentures</i> are not themselves issued by <i>special purpose vehicles</i>;</li> <li>(b) a <i>covered bond</i>;</li> <li>(c) a <i>share</i> in an <i>investment trust</i>;</li> <li>(d) a <i>share</i> in a <i>company</i> resident outside the <i>EEA</i>, where that <i>company</i> would qualify for approval as an <i>investment trust</i> by the Commissioners for HM Revenue and Customs under sections 1158 and 1159 of the Corporation Tax Act 2010 if resident and <i>listed</i> in the <i>United Kingdom</i>;</li> <li>(e) a <i>share</i> in a <i>venture capital trust</i>;</li> <li>(f) a <i>share</i> in a <i>company</i> to which Part 12 of the Corporation Tax Act 2010 (Real Estate Investment Trusts) applies or a member of a group to which that Part applies;</li> <li>(g) an <i>exchange traded product</i>.</li> </ul>
<i>exchange traded product</i>	any of the following <i>investments</i> :

- (a) a *unit* or *share* in an *exchange traded fund*, a *debt security* or a *contract for differences* which meets all of the following criteria:
- (i) it is traded on a *regulated market* or *designated investment exchange*;
  - (ii) it is created and redeemed in response to demand from investors or arbitrage opportunities arising from the difference in price from the *unit*, *share*, *debt security* or *contract for differences* and the price of the underlying asset(s) it seeks to track;
  - (iii) it aims to closely simulate the performance of a specified index or other benchmark (relating to any assets such as *shares*, *debentures*, *commodities* or *currencies*), whether or not the simulated performance is delta 1, inverse, leveraged, achieved by physical replication or synthetically through *derivatives*.
- (b) a senior, unsubordinated *debt security* traded on a *regulated market* or *designated investment exchange* featuring no periodic coupon payments and whose return tracks the performance of a specific index or other benchmark (relating to any assets such as *shares*, *debentures*, *commodities* or *currencies*), minus applicable fees, whether or not featuring delta 1, inverse or leveraged exposure to the index or other benchmark being tracked.

*non-mainstream  
pooled investment*

any of the following *investments*:

- (a) a *unit* in an *unregulated collective investment scheme*;
- (b) a *unit* in a *qualified investor scheme*;
- (c) a *security* issued by a *special purpose vehicle*, other than an *excluded security*;
- (d) a *traded life policy investment*;
- (e) *rights to or interests in investments* that are any of (a) to (d).

*one-off promotion*

a communication meeting the requirements set out in articles 15 or 15A of the *Promotion of Collective Investment Schemes Order* or in articles 28 or 28A of the *Financial Promotions Order*.

*Promotion of  
Collective Investment  
Schemes Order*

the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001.

*self-certified sophisticated investor* a person who meets the requirements set out in article 23A of the *Promotion of Collective Investment Schemes Order*, in article 50A of the *Financial Promotions Order* or in *COBS 4.12.8R*.

*traded life policy investment* an *investment* in relation to which one of the following conditions applies:

- (a) it is a *traded life policy* other than an *endowment assurance policy*;
- (b) its underlying assets are wholly or predominately *traded life policies* other than *endowment assurance policies*;
- (c) its investment returns, or the issuer's payment obligations, are linked to, contingent on, or highly sensitive to, the performance of *traded life policies* other than *endowment assurance policies*.

Amend the following as shown.

*investment trust* a company listed in the *United Kingdom* or another *EEA State* which:

- (a) is approved by the Commissioners for HM Revenue and Customs under ~~section 842 of the Income and Corporation Taxes Act 1988~~ sections 1158 and 1159 of the Corporation Tax Act 2010 (or, in the case of a newly formed *company*, has declared its intention to conduct its affairs so as to obtain such approval); or
- (b) is resident in an *EEA State* other than the *United Kingdom* and would qualify for such approval if resident and listed in the *United Kingdom*.

*retail investment product* ...  
 whether or not any of (a) to (h) are held within an *ISA* or a *CTF*.  
[Note: Section 238 of the Act and COBS 4.12.3R set out restrictions on the promotion of non-mainstream pooled investments to retail clients. See also COBS 9.3.5G (Non-mainstream pooled investments).]

## Annex B

### Amendments to the Conduct of Business sourcebook (COBS)

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

#### 4.1 Application

...

##### 4.1.9 G ...

- (3) The *financial promotion rules* do not apply to incoming communications in relation to the *MiFID business* of an *investment firm* from another *EEA State* that are, in its *home member state*, regulated under *MiFID* ~~in another *EEA State*~~ other than to the extent *COBS 4.12 (Restrictions on the promotion of non-mainstream pooled investments)* applies. ~~For the purpose of article 36 of the *Financial Promotion Order* the *FSA* does not make any rules in relation to such incoming communications.~~

...

#### 4.11 Record keeping: financial promotion

##### 4.11.1 R ...

- (2A) If a *firm* communicates or approves an invitation or inducement to participate in, acquire, or underwrite a *non-mainstream pooled investment* which is addressed to or disseminated in such a way that it is likely to be received by a *retail client*:
- (a) the *person* allocated the *compliance oversight function* in the *firm* must make a record certifying that the *financial promotion* complies with the restrictions set out in section 238 of the *Act* and in *COBS 4.12.3R*, as applicable;
- (b) the making of the record required in (a) may be delegated to one or more *employees* of the *firm* who report to and are supervised by the *person* allocated the *compliance oversight function*, provided the process for certification of compliance has been reviewed and approved by the *person* allocated the *compliance oversight function* no more than 12 months before the date of the *financial promotion*;
- (c) the *firm* must make a record of which exemption was relied on for the purposes of the invitation or inducement, together with the reason why the *firm* is satisfied that that exemption

applies:

- (d) where the *firm* relies on an exemption that requires investor certification and warnings to investors, it must make a record of any certificate or investor statement (as signed by the investor) and of any warnings or indications required by the exemption;
- (e) if the exemption relied on is that for an *excluded communication* under COBS 4.12.4R(5), the *firm* must identify in the record which type of *financial promotion* defined as an *excluded communication* corresponds to the promotion being made, including, where applicable, which article in the *Financial Promotion Order* or in the *Promotion of Collective Investment Schemes Order* was relied on for the purposes of the promotion, together with the reason why the *firm* is satisfied that the exemption applies;

...

#### **4.12 ~~Unregulated collective investment schemes~~ Restrictions on the promotion of Non-mainstream pooled investments**

COBS 4.12.1R and COBS 4.12.2G are deleted in their entirety. The deleted text is not shown.

COBS 4.12.3R to COBS 4.12.13G should be inserted after the deleted COBS 4.12.2G, all these provisions are new and the text is not underlined.

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

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

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

- 4.12.4 R (1) The restriction in COBS 4.12.3R does not apply if the promotion falls within an exemption in the table in (5) below.
- (2) A firm may communicate an invitation or inducement to participate in an *unregulated collective investment scheme* without breaching the restriction on promotion in section 238 of the *Act* if the promotion falls within an exemption in the table in (5) below.

- (3) Where the middle column in the table in (5) refers to promotion to a category of *person*, this means that the invitation or inducement:
- (a) is made only to recipients who the *firm* has taken reasonable steps to establish are *persons* in that category; or
  - (b) is directed at recipients in a way that may reasonably be regarded as designed to reduce, so far as possible, the risk of participation in, acquisition or underwriting of the *non-mainstream pooled investment* by *persons* who are not in that category.
- (4) A *firm* may rely on more than one exemption in relation to the same invitation or inducement.

(5)

<b>Title of Exemption</b>	<b>Promotion to:</b>	<b>Promotion of a non-mainstream pooled investment which is:</b>
1. Replacement products and rights issues	A <i>person</i> who already participates in, owns, holds rights to or interests in, a <i>non-mainstream pooled investment</i> that is being liquidated or wound down or which is undergoing a rights issue. [See Note 1.]	1. A <i>non-mainstream pooled investment</i> which is intended by the operator or manager to absorb or take over the assets of that <i>non-mainstream pooled investment</i> , or which is being offered by the operator or manager of that <i>non-mainstream pooled investment</i> as an alternative to cash on its liquidation; or 2. <i>Securities</i> offered by the existing <i>non-mainstream pooled investment</i> as part of a rights issue.
2. Certified high net worth investors	A <i>person</i> who meets the requirements set out in <i>COBS</i> 4.12.6R.	Any <i>non-mainstream pooled investment</i> the <i>firm</i> considers is likely to be suitable for that <i>client</i> , based on a preliminary assessment of the <i>client's</i> profile and objectives. [See <i>COBS</i> 4.12.5G(2).]



3. Enterprise and charitable funds	<p>A <i>person</i> who is eligible to participate or invest in an arrangement constituted under:</p> <p>(1) the Church Funds Investment Measure 1958;</p> <p>(2) section 96 of the Charities Act 2011;</p> <p>(3) section 25 of the Charities Act (Northern Ireland) 1964;</p> <p>(4) the Regulation on European Venture Capital Funds ('EuVECA's'); or</p> <p>(5) the Regulation on European Social Entrepreneurship Funds ('EuSEFs').</p>	Any <i>non-mainstream pooled investment</i> which is such an arrangement.
4. Eligible employees	<p>An eligible <i>employee</i>, that is, a <i>person</i> who is:</p> <p>(1) an officer;</p> <p>(2) an <i>employee</i>;</p> <p>(3) a former officer or <i>employee</i>; or</p> <p>(4) a member of the immediate family of any of (1) - (3), of an employer which is (or is in the same <i>group</i> as) the <i>firm</i>, or which has accepted responsibility for the activities of the <i>firm</i> in carrying out the <i>designated investment business</i> in question.</p>	<p>1. A <i>non-mainstream pooled investment</i>, the instrument constituting which:</p> <p>A. restricts the property of the <i>non-mainstream pooled investment</i>, apart from cash and near cash, to:</p> <p>(1) (where the employer is a company) <i>shares</i> in and <i>debentures</i> of the <i>company</i> or any other connected <i>company</i>; [See Note 2.]</p> <p>(2) (in any case), any property, provided that the <i>non-mainstream pooled investment</i></p>

		<p>takes the form of:</p> <p>(i) a limited <i>partnership</i>, under the terms of which the employer (or connected <i>company</i>) will be the unlimited partner and the eligible employees will be some or all of the limited partners; or</p> <p>(ii) a trust which the <i>firm</i> reasonably believes not to contain any risk that any eligible employee may be liable to make any further payments (other than <i>charges</i>) for <i>investment</i> transactions earlier entered into, which the eligible <i>employee</i> was not aware of at the time he entered into them; and</p> <p>B. (in a case falling within A(1) above) restricts participation in the <i>non-mainstream pooled investment</i> to eligible <i>employees</i>, the employer and any connected <i>company</i>.</p> <p>2. Any <i>non-mainstream pooled investment</i>, provided that the participation of eligible employees is to facilitate their co-investment:</p> <p>(i) with one or more <i>companies</i> in the same <i>group</i> as their employer</p>
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		(which may include the employer); or  (ii) with one or more <i>clients</i> of such a <i>company</i> .
5. Members of the Society of Lloyd's	A <i>person</i> admitted to membership of the Society of Lloyd's or any <i>person</i> by law entitled or bound to administer his affairs.	A <i>scheme</i> in the form of a limited <i>partnership</i> which is established for the sole purpose of underwriting <i>insurance business</i> at Lloyd's.
6. Exempt persons	An exempt <i>person</i> (other than a <i>person</i> exempted only by section 39 of the <i>Act</i> (Exemption of appointed representatives)) if the <i>financial promotion</i> relates to a <i>regulated activity</i> in respect of which the <i>person</i> is exempt from the <i>general prohibition</i> .	Any <i>non-mainstream pooled investment</i> .
7. Non-retail clients	An <i>eligible counterparty</i> or a <i>professional client</i> .	Any <i>non-mainstream pooled investment</i> in relation to which the <i>client</i> is categorised as a <i>professional client</i> or <i>eligible counterparty</i> . [See Note 4.]
8. Certified sophisticated investors	A <i>person</i> who meets the requirements set out in <i>COBS 4.12.7R</i> .	Any <i>non-mainstream pooled investment</i> .
9. Self-certified sophisticated investors	A <i>person</i> who meets the requirements set out in <i>COBS 4.12.8R</i> .	Any <i>non-mainstream pooled investment</i> the <i>firm</i> considers is likely to be suitable for that <i>client</i> , based on a preliminary assessment of the <i>client's</i> profile and objectives. [See <i>COBS 4.12.5G(2)</i> ]
10. Solicited	Any <i>person</i> .	Any <i>non-mainstream</i>

advice		<p><i>pooled investment</i>, provided the communication meets all of the following requirements:</p> <p>(a) the communication only amounts to a <i>financial promotion</i> because it is a <i>personal recommendation</i> on a <i>non-mainstream pooled investment</i>;</p> <p>(b) the <i>personal recommendation</i> is made following a specific request by that <i>client</i> for advice on the merits of investing in the <i>non-mainstream pooled investment</i>; and</p> <p>(c) the <i>client</i> has not previously received a <i>financial promotion</i> or any other communication from the <i>firm</i> (or from a <i>person</i> connected to the <i>firm</i>) which is intended to influence the <i>client</i> in relation to that <i>non-mainstream pooled investment</i>. [See Note 3.]</p>
11. Excluded communications	Any <i>person</i> .	<p>Any <i>non-mainstream pooled investment</i>, provided the <i>financial promotion</i> is an <i>excluded communication</i>.</p> <p>[See <i>COBS</i> 4.12.12G and <i>COBS</i> 4.12.13G.]</p>
12. Non-recognised UCITS	Any <i>person</i> .	<p>Any <i>EEA UCITS scheme</i> which is not a <i>recognised scheme</i>, provided the following requirements are met:</p> <p>(1) the <i>firm</i> considers it is likely to be suitable for that <i>client</i> based on a</p>

		<p>preliminary assessment of the <i>client's</i> profile and objectives; and</p> <p>(2) the <i>firm</i> provides that <i>client</i> with the same product information as it would be required to provide by <i>COBS 14.2</i> if the scheme were a <i>recognised scheme</i>.</p> <p>[See <i>COBS 4.12.5G(2)</i>.]</p>
13. US persons	A <i>person</i> who is classified as a United States person for tax purposes under United States legislation or who owns a US qualified retirement plan.	Any investment <i>company</i> registered and operated in the United States under the Investment Company Act 1940.

The following Notes explain certain words and phrases used in the table above.	
Note 1	Promotion of <i>non-mainstream pooled investments</i> to a category of person includes any nominee company acting for such a person.
Note 2	<p>A <i>company</i> is 'connected' with another <i>company</i> if:</p> <p>(a) they are both in the same <i>group</i>; or</p> <p>(b) one <i>company</i> is entitled, either alone or with another <i>company</i> in the same <i>group</i>, to exercise or control the exercise of a majority of the voting rights attributable to the <i>share</i> capital, which are exercisable in all circumstances at any general meeting of the other <i>company</i> or of its <i>holding company</i>.</p>
Note 3	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 4	In deciding whether a promotion is permitted under the rules of this section or under section 238 of the Act, <i>firms</i> may use the <i>client</i> categorisation regime that applies to

	business other than <i>MiFID</i> or equivalent third country business. (This is the case even if the <i>firm</i> will be carrying on a <i>MiFID</i> activity at the same time as or following the promotion.)
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## Advice and preliminary assessment of suitability

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

## Definition of sophisticated and high net worth investors

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

## “HIGH NET WORTH INVESTOR STATEMENT

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

- I had, throughout the financial year immediately preceding the date below, an annual **income** to the value of **£100,000 or more**;
- I held, throughout the financial year immediately preceding the date below, **net assets** to the value of **£250,000 or more**. Net assets for these purposes do **not** include:
  - (a) the property which is my primary residence or any money raised through a loan secured on that property;
  - (b) any rights of mine under a qualifying contract of insurance; or
  - (c) any benefits (in the form of pensions or otherwise) which are payable on the termination of my service or on my death or retirement and to which I am (or my dependants are), or may be, entitled.

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

Signature:

Date: ”

4.12.7 R A *certified sophisticated investor* is an individual:

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

“SOPHISTICATED INVESTOR STATEMENT

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

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

Signature:

Date: ”

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

“SELF-CERTIFIED SOPHISTICATED INVESTOR STATEMENT

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

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

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

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

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

Signature:

Date: ”

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

- 4.12.9 G (1) A *firm* which wishes to rely on any of the *certified high net worth investor* exemptions (see Part I of the Schedule to the *Promotion of Collective Investment Schemes Order*, Part I of Schedule 5 to the *Financial Promotions Order* and *COBS 4.12.6R*) should have regard to its duties under the *Principles* and the *client’s best interests rule*. In particular, the *firm* should take reasonable steps to ascertain that the *retail client* does, in fact, meet the income and net assets criteria set out in the relevant statement for *certified high net worth investors*.
- (2) In addition, the *firm* should consider whether the promotion of the *non-mainstream pooled investment* is in the interests of the *retail client* and whether it is fair to make the promotion to that *client* on the basis that the *client* is a *certified high net worth investor*, having



regard to the generally complex nature of *non-mainstream pooled investments*. A *retail client* who meets the criteria for a *certified high net worth investor* but not for a *certified sophisticated investor* may be unable to properly understand and evaluate the risks of the *non-mainstream pooled investment* in question.

- 4.12.10 G (1) A *firm* which is asked to or proposes to assess and certify a *retail client* as a *certified sophisticated investor* (see article 23 of the *Promotion of Collective Investment Schemes Order*, article 50 of the *Financial Promotions Order* and *COBS 4.12.7R*) should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should carry out that assessment with due skill, care and diligence, having regard to the generally complex nature of *non-mainstream pooled investments* and the level of experience, knowledge and expertise the *retail client* being assessed must possess in order to be fairly and reasonably assessed and certified as a sophisticated investor.
- (2) (a) For example, a *retail client* whose *investment* experience is limited to mainstream *investments* such as *securities* issued by *listed companies*, *life policies* or *units in regulated collective investment schemes* (other than *qualified investor schemes*) is generally unlikely to possess the requisite knowledge to adequately understand the risks associated with investing in *non-mainstream pooled investments*.
- (b) In exceptional circumstances, however, the *retail client* may have acquired the requisite knowledge through means other than his own investment experience, for example, if the *retail client* is a professional of several years' experience with the design, operation or marketing of complex investments such as *options*, *futures*, *contracts for differences* or *non-mainstream pooled investments*.
- 4.12.11 G (1) A *firm* which wishes to rely on any of the *self-certified sophisticated investor* exemptions (see Part II of the Schedule to the *Promotion of Collective Investment Schemes Order*, Part II of Schedule 5 to the *Financial Promotions Order* and *COBS 4.12.8R*) should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should consider whether the promotion of the *non-mainstream pooled investment* is in the interests of the *client* and whether it is fair to make the promotion to that *client* on the basis of self-certification.
- (2) For example, it is unlikely to be appropriate for a *firm* to make a promotion under any of the *self-certified sophisticated investor* exemption without first taking reasonable steps to satisfy itself that the investor does in fact have the requisite experience, knowledge or expertise to understand the risks of the *non-mainstream pooled investment* in question. A *retail client* who meets the criteria for a *self-certified sophisticated investor* but not for a *certified sophisticated*

*investor* may be unable to properly understand and evaluate the risks of a *non-mainstream pooled investment* which invests wholly or predominantly in assets other than *shares* in or *debentures* of unlisted *companies*.

#### One-off promotions

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

#### Qualified investor schemes

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

...

### 9.3 Guidance on assessing suitability

...

#### Non-mainstream pooled investments

- 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*.

- (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*.
- (3) (a) In addition to assessing whether the promotion is permitted, a *firm* giving advice on a *non-mainstream pooled investment* 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.

...

**Sch 1 Record keeping requirements**

...

Sch 1.3 G	Handbook reference	Subject of record	Contents of record	When record must be made
	...			
	<i>COBS</i>	...		

4.11.1R(2)			
<p><u>COBS</u> <u>4.11.1R(2A)</u></p>	<p><u>Non-mainstream pooled investments: certification of compliance</u></p>	<p>(1) <u>Certification by the person allocated the compliance oversight function or employees of the firm reporting to and supervised by that person confirming that the financial promotion is compliant with the restrictions in section 238 of the Act and COBS 4.12.3R, as applicable.</u></p> <p>(2) <u>Which exemption applies and the reason why that exemption applies. Where the exemption requires a certificate, investor statement, warning or indication, a copy of that certificate, investment statement, warning or indication.</u></p>	<p>(1) <u>Date of certification</u></p> <p>(2) <u>Date the promotion is made to the client</u></p>
...			

## Annex C

## Amendments to the Collective Investment Schemes sourcebook (COLL)

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

## 8.1 Introduction

...

Qualified investor schemes: eligible investors

8.1.3 R (1) The *authorised fund manager* of a *qualified investor scheme* must take reasonable care to ensure that ownership of *units* in that *scheme* is ~~only~~ recorded in the *register* only for a *person* ~~that falls into one or more of the categories set out in COLL 8 Annex 1R (Qualified Investor Scheme: eligible investors)~~ to whom such *units* may be promoted under COBS 4.12.4R.

(2) ...

Qualified investor schemes - explanation

8.1.4 G (1) *Qualified investor schemes* are *authorised funds* which ~~may only be sold to~~ are intended only for *professional clients* and for *retail clients* who are sophisticated investors. For this reason, *qualified investor schemes* are subject to a restriction on promotion under COBS 4.12.3R. See also COBS 4.12.13G. ~~Therefore, the *authorised fund manager* must take reasonable care to ensure that subscription in relation to the *units* of this type of *scheme* should only be in relation to the *client* types set out in COLL 8 Annex 1R.~~

...

...

COLL 8 Annex 1 is deleted in its entirety. The deleted text is not shown.

## Annex D

### Amendments to the Perimeter Guidance manual (PERG)

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

#### 8.20 Additional restriction on the promotion of collective investment schemes

...

- 8.20.4 G The *FCA* has made rules under section 238(5) which allow *authorised firms* to *communicate* or *approve a financial promotion* for an *unregulated collective investment scheme* in certain specified circumstances. These circumstances are set out in *COBS* ~~4.12.1R~~ 4.12.4R. To date, the Treasury has not made an order exempting single property schemes under section 239.

...

#### 9.10 Significance of being an open-ended investment company

Marketing of securities issued by a body corporate

...

- 9.10.6 G The *FCA* has also made rules under section 238(5) which allow *authorised persons* to *communicate* or *approve a financial promotion* for an *open-ended investment company* that is an *unregulated collective investment scheme* (that is, one that does not fall within *PERG* 9.10.4G). The circumstances in which such a *communication* or *approval* is allowed are explained in *COBS* ~~4.12.1R~~ 4.12.4R.