Chapter 11A

Underwriting and placing

11A.1 Underwriting and placing

11A.1.1 R

(1) This chapter applies only to *MiFID or equivalent third country business*.

(2) Subject to (3), in this chapter provisions marked "UK" apply to the *equivalent business of a third country investment* as if they were *rules*.

(3) In this chapter, provisions which derive from recitals to *MiFID* or the *MiFID Org Regulation* apply to the *equivalent business of a third country investment firm* as *guidance*.

Requirements to provide specific information to issuer clients

11A.1.2 UK

38 (1) Investment firms which provide advice on corporate finance strategy, as set out in Paragraph 3 of Part 3A of Schedule 2 to the Regulated Activities Order, and provide the service of underwriting or placing of financial instruments, shall, before accepting a mandate to manage the offering, have arrangements in place to inform the issuer client of the following:

(a)the various financing alternatives available with the firm, and an indication of the amount of transaction fees associated with each alternative;

(b)the timing and the process with regard to the corporate finance advice on pricing of the offer;

(c)the timing and the process with regard to the corporate finance advice on placing of the offering;

(d)details of the targeted investors, to whom the firm intends to offer the financial instruments;

(e)the job titles and departments of the relevant individuals involved in the provision of corporate finance advice on the price and allotment of financial instruments; and

(f)firm's arrangements to prevent or manage conflicts of interest that may arise where the firm places the relevant financial instruments with its investment clients of with its own proprietary book.

Requirements to identify underwriting and placing operations and to ensure that adequate controls are in place to manage conflicts of interest

11A.1.3 UK

38(2)Investment firms shall have in place a centralised process to identify all underwriting and placing operations of the firm and record such information, including the date on which the firm was informed of potential underwriting and placing operations. Firms shall identify all potential conflicts of interest arising from other activities of the investment firm, or group, and implement appropriate management procedures. In cases where an investment firm cannot manage a conflict of interest by way of implementing appropriate procedures, the investment firm shall not engage in the operation.

(3)Investment firms providing execution and research services as well as carrying out underwriting and placing activities shall ensure adequate controls are in place to manage any potential conflicts of interest between these activities and between their different clients receiving those services.

Additional requirements in relation to pricings of offerings in relation to the issuance of financial instruments

11A.1.4 UK

39(1)Investment firms shall have in place systems, controls and procedures to identify and prevent or manage conflicts of interest that arise in relation to possible under-pricing or over-pricing of an issue or involvement of relevant parties in the process. In particular, investment firms shall as a minimum requirement establish, implement and maintain internal arrangements to ensure both of the following:

(a)that the pricing of the offer does not promote the interests of other clients or firm's own interests, in a way that may conflict with the issuer client's interests; and

(b)the prevention or management of a situation where persons responsible for providing services to the firm's investment clients are directly involved in decisions about corporate finance advice on pricing to the issuer client.

Application of requirements for information flows during equity IPOs

11A.1.4A R

■ COBS 11A.1.4BR to ■ COBS 11A.1.4FR apply to a *firm* that:

(1) has *agreed to carry on regulated activities* for a *client* that is an *issuer* ("the *issuer client*") that include underwriting or placing of *financial instruments*, where:

(a) those *financial instruments* ("relevant securities") are either:

(i) *shares*; or

(ii) *certificates representing certain securities* where the certificate or other instrument confers rights in respect of *shares*;

(b) the relevant securities are intended to be *admitted to trading* in the *UK* for the first time;

(c) the trading under sub-paragraph (b) is intended to be effected by an *admission to trading* on a *regulated market*; and

(d) an approved *prospectus* will be required in accordance with article 3 of the *Prospectus Regulation* for the relevant securities; and

(2) is intending to disseminate *investment research* or *non-independent research* on that *issuer client* or those relevant securities before the *admission to trading*.

Communications between the issuer and research analysts in equity IPOs

11A.1.4B R

(1) Unless it complies with paragraphs (2) and (3) a *firm* must prevent its staff involved in the production of *investment research* or *non-independent research* ("the *firm's* analysts") from being in communication with the *issuer client* and/or the *issuer client's* representatives outside of the *firm* ("the *issuer* team").

(2) Prior to the *firm's* analysts being in communication with the *issuer* team, the *firm* must ensure that a range of unconnected analysts (as defined in paragraph (4)) will have the opportunity (subject to ■ COBS 11A.1.4CR) either:

(a) to join the *firm's* analysts in any communication with the *issuer* team that is made or received before the *firm* disseminates any *investment research* or *non-independent research* about the *issuer client* or the relevant securities as described in ■ COBS 11A.1.4AR(1); or

(b) to be in communication with the *issuer* team in a way that satisfies the following conditions:

(i) the communication results in those unconnected analysts receiving or being given access to all the information that is:

(A) given by the *issuer* team to the *firm's* analysts during the relevant period; and

(B) relevant for the purposes of the *firm* producing any *investment research* or *non-independent research* on the *issuer client* or the relevant securities;

(ii) the information that each of those unconnected analysts receives or can access is identical;

(iii) that communication is completed before the end of the relevant period; and

(iv) the relevant period for the purposes of sub-paragraphs (2)(b)(i) and (2)(b)(iii) starts from the time at which this *rule* applies and ends at the time at which the *firm* disseminates any *investment research* or *non-independent research* on the *issuer client* or the relevant securities.

(3) (a) To select the range of unconnected analysts under paragraph (2) the *firm* must:

(i) undertake an assessment of the potential range of unconnected analysts for the purposes of paragraph (2); and

(ii) use that assessment to ensure that the range of unconnected analysts given the opportunity under paragraph (2) is one that, in the *firm's* reasonable opinion, has a reasonable

prospect of enabling potential investors to undertake a better-informed assessment of the present or future value of the relevant securities based on a more diverse set of substantiated opinions, compared to a situation in which the only research available to potential investors is that disseminated by *firms* providing the service of underwriting or placing to the *issuer client*.

(b) For its assessment and opinion under sub-paragraph (a) the *firm* may assume that an unconnected analyst that is given an opportunity to interact with the *issuer* team will publish an opinion on the *firm's issuer client* that will be available to potential investors.

(c) The *firm* must make a written record of its assessment and opinion under sub-paragraph (a) at the time at which it forms its opinion.

(d) The *firm's* record under sub-paragraph (c) must:

(i) set out the *firm's* process for conducting the assessment and forming the opinion under sub-paragraph (a);

(ii) identify the *firm's* staff that were involved in forming that opinion; and

(iii) explain the *firm's* consideration of the number and expertise of the unconnected analysts included in the range.

(e) The *firm* must retain the record made under sub-paragraph (c) for five years from the date on which it is made.

(4) An "unconnected analyst" means a *person* other than the *firm* or its staff:

(a) who does not provide the service of underwriting or placing of the same relevant securities to the same *issuer client*; and

(b) whose business or occupation may reasonably be expected to involve the production of research.

11A.1.4C R

(1) If an opportunity communicated to the range of unconnected analysts under ■ COBS 11A.1.4BR(2) is subject to any restrictions that would apply to any of the unconnected analysts that accept the opportunity, a *firm* must ensure that those restrictions would not unreasonably prevent, limit or discourage those unconnected analysts from producing and disseminating research on the *issuer client* or the relevant securities.

(2) The *firm* must also make and retain a written record of any such restrictions, regardless of whether the restrictions are subsequently applied to any unconnected analyst.

(3) The *firm* must make the record at the time the opportunity is communicated to the range of unconnected analysts.

(4) The *firm* must keep the record for a period of five years after the date it was made.

11A.1.4D E

(1) A restriction is unreasonable under ■ COBS 11A.1.4CR(1) if it prevents an unconnected analyst from producing and disseminating research in circumstances in which the *firm* that is subject to ■ COBS 11A.1.4CR is itself able to produce and disseminate *investment research* or *non-independent research*.

(2) Contravention of (1) may be relied upon as tending to establish non-compliance with ■ COBS 11A.1.4CR(1).

11A.1.4E R

(1) Where a *firm* acts in accordance with ■ COBS 11A.1.4BR(2)(b) then it must make and retain a written record of:

(a) the information on the *issuer* or the relevant securities that is given by the *issuer* team to the *firm's* analysts during the relevant period under ■ COBS 11A.1.4BR(2)(b)(iv); and

(b) the information on the *issuer* or the relevant securities that is given by the *issuer* team to each of the relevant unconnected analysts during the same period.

(2) The *firm* must make the record at the end of that period.

(3) The *firm* must keep the record for a period of five years after the date it was made.

Timing restrictions for disseminating research on equity IPOs

11A.1.4F R

(1) A *firm* must not disseminate *investment research* or *non-independent research* on the relevant *issuer client* or relevant securities as described in ■ COBS 11A.1.4AR(1) until after the relevant time in paragraph (2).

(2) The relevant time is:

(a) where a *firm* acts in accordance with ■ COBS 11A.1.4BR(2)(a), one *day* after the publication of the relevant document in paragraph (3); or

(b) otherwise, seven *days* after the publication of the relevant document in paragraph (3).

(3) The relevant document is:

(a) an approved *prospectus* regarding the relevant securities; or

(b) an approved *registration document* regarding the *issuer*.

(4) For this *rule*, publication of the relevant document means making the relevant document available to the public in accordance with article 21 of the *Prospectus Regulation*.

(5) This *rule* does not apply to a *firm* in circumstances where, as a result of the *firm's* analysts being prevented from being in communication with the *issuer* team, it has not needed to engage with any unconnected analysts for the purposes of ■ COBS 11A.1.4BR.

Further requirements concerning the provision of information

11A.1.5 UK

39(2)Investment firms shall provide clients with information about how the recommendation as to the price of the offering and the timings involved is determined. In particular, the firm shall inform and engage with the issuer client about any hedging or stabilisation strategies it intends to undertake with respect to the offering, including how these strategies may impact the issuer clients' interests. During the offering process, firms shall also take all reasonable steps to keep the issuer client informed about developments with respect to the pricing of the issue.

11A.1.6 UK

40(1)Investment firms placing financial instruments shall establish, implement and maintain effective arrangements to prevent recommendations on placing from being inappropriately influenced by any existing or future relationships.

(2)Investment firms shall establish, implement and maintain effective internal arrangements to prevent or manage conflicts of interests that arise where persons responsible for providing services to the firm's investment clients are directly involved in decisions about recommendations to the issuer client on allocation.

(3) Investment firms shall not accept any third-party payments or benefits unless such payments or benefits comply with rules made by the Financial Conduct Authority under the Financial Services and Markets Act 2000 which were relied on before IP completion day to implement requirements laid down in Article 24 of Directive 2014/65/EU. In particular, the following practices shall be considered not compliant with those requirements and shall therefore be considered not acceptable:

(a)an allocation made to incentivise the payment of disproportionately high fees for unrelated services provided by the investment firm ('laddering'), such as disproportionately high fees or commissions paid by an investment client, or disproportionately high volumes of business at normal levels of commission provided by the investment client as a compensation for receiving an allocation of the issue;

(b)an allocation made to a senior executive or a corporate officer of an existing or potential issuer client, in consideration for the future or past award of corporate finance business ('spinning');

(c)an allocation that is expressly or implicitly conditional on the receipt of future orders or the purchase of any other service from the investment firm by an investment client, or any entity of which the investor is a corporate officer.

(4)Investment firms shall establish, implement and maintain an allocation policy that sets out the process for developing allocation recommendations. The allocation policy shall be provided to the issuer client before agreeing to undertake any placing services. The policy shall set out relevant information that is available at that stage, about the proposed allocation methodology for the issue.

(5)Investment firms shall involve the issuer client in discussions about the placing process in order for the firm to be able to understand and take into account the client's interests and objectives. The investment firm shall obtain the issuer client's agreement to its proposed allocation per type of client for the transaction in accordance with the allocation policy.

11A.1.7 UK

41 (1) Investment firms shall have in place systems, controls and procedures to identify and manage the conflicts of interest that arise when providing investment service to an investment client to participate in a new issue, where the investment firm receives commissions, fees or any monetary or non-monetary benefits in relation to arranging the issuance. Any commissions, fees or monetary or non-monetary benefits shall comply with the requirements in [■ COBS 2.3A.5R to ■ COBS 2.3A.7E, ■ COBS 2.3A.15R, ■ COBS 2.3A.16R, ■ COBS 2.3A.19R and ■ COBS 6.2B.11R] and be documented in the investment firm's conflicts of interest policies and reflected in the firm's inducements arrangements.

(2)Investment firms engaging in the placement of financial instruments issued by themselves or by entities within the same group, to their own clients, including their existing depositor clients in the case of credit institutions, or investment funds managed by entities of their group, shall establish, implement and maintain clear and effective arrangements for the identification, prevention or management of the potential conflicts of interest that arise in relation to this type of activity. Such arrangements shall include consideration of refraining from engaging in the activity, where conflicts of interest cannot be appropriately managed so as to prevent any adverse effects on clients.

(3)When disclosure of conflicts of interest is required, investment firms shall comply with the requirements in Article 34(4), including an explanation of the nature and source of the conflicts of interest inherent to this type of activity, providing details about the specific risks related to such practices in order to enable clients to make an informed investment decision.

(4) Investment firms which offer financial instruments issued that are by themselves or other group entities to their clients and that are included in the calculation of prudential requirements specified in Regulation (EU) No 575/2013 of the European Parliament and of the Council[1], the law of the United Kingdom or any part of the United Kingdom ("UK law") which was relied on before IP completion day to implement Directive 2013/36/EU of the European Parliament and of the Council[2] or Directive 2014/59/EU of the European Parliament and of the Council[3], shall provide those clients with additional information explaining the differences between the financial instrument and bank deposits in terms of yield, risk, liquidity and any protection provided in accordance with UK law which was relied on before IP completion day to implement Directive 2014/49/EU of the European Parliament and of the Council.

[1] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p.l)

[2] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p.338)

[3] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulation (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.201, p190)

Further requirements in relation to lending on provision of credit in the context of underwriting or placement

11A.1.8 UK

42(1)Where any previous lending or credit to the issuer client by an investment firm, or an entity within the same group, may be repaid with the proceeds of an issue, the investment firm shall have arrangements in place to identify and prevent or manage any conflicts of interest that may arise as a result.

(2)Where the arrangements taken to manage conflicts of interest prove insufficient to ensure that the risk of damage to the issuer client would be prevented, investment firms shall disclose to the issuer client the specific conflicts of interest that have arisen in relation to their, or group entities', activities in a capacity of credit provider, and their activities related to the securities offering.

(3)Investment firms' conflict of interest policy shall require the sharing of information about the issuer's financial situation with group entities acting as credit providers, provided this would not breach information barriers set up by the firm to protect the interests of a client.

Record keeping requirements in relation to underwriting or placing

11A.1.9 UK

Investment firms shall keep records of the content and timing of instructions received from clients. A record of the allocation decisions taken for each operation shall be kept to provide for a complete audit trail between the movements registered in clients' accounts and the instructions received by the investment firm. In particular, the final allocation made to each investment client shall be clearly justified and recorded. The complete audit trail of the material steps in the underwriting and placing process shall be made available to competent authorities upon request.

11A.2 Prohibition of future service restrictions

11A.2.1 R Unless exempted in ■ COBS 11A.2.2R, a *firm* must not enter into an agreement in writing with a *client* that contains a *future service restriction*.

11A.2.2 R ■ COBS 11A.2.1R does not apply to *future service restrictions* that:

(1) are included in an agreement in writing for the *firm* to provide a bridging loan; and

(2) only involve the *firm* providing the *primary market and M&A services* to which the bridging loan relates.

11A.2.3 R For the purposes of ■ COBS 11A2.2R, "bridging loan" means a loan provided to a client for the purpose of providing short-term financing, and with the commercial intention that it be replaced with another form of financing (such as a *debenture* issue or a *share* issue).

11A

11A.2.4 G A loan could be considered a bridging loan for the purposes of ■ COBS 11A.2.3 when, for example:

(1) it is expressly documented that the intention of both parties is that the loan offers a temporary solution until the client is able to obtain longer-term financing from the capital markets or other future financing;

(2) it has a short term, typically of less than four years from signing, or the client is otherwise discouraged from retaining the loan as longer term financing, for example by stepping up the interest rates after an initial short period; and

(3) the terms provide that the proceeds from the future financing are used as mandatory pre-payment on the loan.

11A.2.5 G (1) Agreements for the provision of a specified or certain *primary market and M&A service* by the *firm* to the *client* are not prohibited by ■ COBS 11A.2.1R, even where that service will take place in the future.

(2) ■ COBS 11A.2.1R prohibits *future service restrictions* related to *primary market and M&A services* which may be required in the future but which, at the date of the agreement, are not yet specified or certain. *Future service restrictions* are prohibited because they prevent a *client*

from freely deciding, as and when the need for *primary market and M&A services* arises, which *firm* to appoint to provide those services.

11A.2.6 G

(1) The *future service restrictions* prohibited by ■ COBS 11A.2.1R relate to services that will be provided in the future.

(2) An example of restrictions that would therefore not be caught are those which relate to the recuperation of *fees* for work already undertaken by a *firm* in relation to a particular service or transaction when the *client* decides to use another financial institution for the same service or transaction ('tailgunner clauses').

11A.2.7 G

(1) *Future service restrictions* bind the *client* to use the *firm* (or an *affiliated company*).

(2) Provisions in an agreement that only give a *firm* the right or opportunity to:

(a) pitch for future business; or

(b) be considered in good faith alongside other providers for future business; or

(c) match quotations from other providers, but which do not prevent the *client* from selecting the other providers,

are not *future service restrictions*. In these cases, the *client* is not obliged to use the *firm* (or an *affiliated company*).