

Chapter 22

Restrictions on the distribution of certain complex investment products



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).