Chapter 4

Communicating with clients, including financial promotions
4.1 Application

Who? What?

This chapter applies to a firm:

1. communicating with a client in relation to its designated investment business (other than MiFID, equivalent third country or optional exemption business);

1A. communicating with a client in relation to its MiFID, equivalent third country or optional exemption business;

2. communicating or approving a financial promotion other than:
   
   a. a financial promotion of qualifying credit, a home purchase plan or a home reversion plan; or

   b. a financial promotion in respect of a non-investment insurance contract; or

   c. a promotion of an unregulated collective investment scheme that would breach section 238(1) of the Act if made by an authorised person (firms may not communicate or approve such promotions); or

   d. a financial promotion in relation to a credit agreement, a consumer hire agreement or a credit-related regulated activity.

3. when a MiFID investment firm or a credit institution is communicating in connection with selling, or advising clients in relation to, structured deposits as specified by COBS 1.1.1AAR.

4.1.1A R COBS 4.4.3 R applies to a firm with respect to the activity of issuing electronic money.

4.1.2 G (1) This chapter applies in relation to an authorised professional firm in accordance with COBS 18 (Specialist regimes).

   (2) This chapter applies, to a limited extent, in relation to communicating or approving a financial promotion that relates to a deposit if the deposit is a structured deposit, cash deposit ISA or cash deposit CTF.

4.1.3 G A firm is required to comply with the financial promotion rules in relation to a financial promotion communicated by its appointed representative even
where the financial promotion does not require approval because of the exemption in article 16 of the Financial Promotion Order (Exempt persons).

[Note: see section 39 of the Act]

4.1.4

(1) In COBS 4.3.1 R, the defined term “financial promotion” includes:

(a) in relation to MiFID, equivalent third country or optional exemption business, all communications that are marketing communications within the meaning of MiFID; and

(b) in relation to insurance distribution, all communications that are marketing communications within the meaning of IDD.

(2) In the case of MiFID, equivalent third country or optional exemption business, certain requirements in this chapter are subject to an exemption for the communication of a third party prospectus in certain circumstances (see recital 73 of the MiFID Org Regulation). This has a similar effect to the exemption in article 70(1)(c) of the Financial Promotion Order, which is referred to in the definition of an excluded communication.

(3) In this chapter “financial promotion” and “direct offer financial promotion” include communications that are marketing communications for the purposes of the UCITS Directive.

4.1.5

A firm communicating with an eligible counterparty should have regard to the application of COBS to eligible counterparty business (COBS 1 Annex 1 Part 1).

4.1.6

Approving a financial promotion without communicating it (which includes causing it to be communicated) is not MiFID, equivalent third country or optional exemption business. Communicating a financial promotion to a person, such as a corporate finance contact or a venture capital contact, who is not a client within the meaning of COBS 3.2.1 R (1), COBS 3.2.1 R (2) or COBS 3.2.1 R (4) in respect of the MiFID, equivalent third country or optional exemption business to which the financial promotion relates, is also not MiFID, equivalent third country or optional exemption business. Further guidance on what amounts to MiFID business may be found in PERG 13.

4.1.7

A reference in this chapter to MiFID, equivalent third country or optional exemption business includes a reference to communications that occur before an agreement to perform services in relation to MiFID, equivalent third country or optional exemption business.

[Note: see recital 16 to the MiFID Org Regulation]

What? Modification relating to the KII Regulation

4.1.7A

The rules in this chapter do not apply in relation to the form or content of a key investor information document, an EEA key investor information document or a NURS-KII document.
(1) The KII Regulation specifies in an exhaustive manner the form and content of the key investor information document for a UCITS scheme.

(2) The form and content of a NURS-KII document is specified by COLL 4.7.3AR (Form and content of a NURS-KII document) and in COLL Appendix 2R (Modifications to the KII Regulation for KII-compliant NURS).

[Note: see article 3(1) of the KII Regulation]

Where? General position

(1) In relation to communications by a firm to a client in relation to its designated investment business this chapter applies in accordance with the general application rule and the rule on business with UK clients from an overseas establishment (COBS 1 Annex 1 Part 2 paragraph 2.1R).

(2) In addition, the financial promotion rules apply to a firm in relation to:

(a) the communication of a financial promotion to a person inside the United Kingdom;

(b) the communication of a cold call to a person outside the United Kingdom, unless:
   (i) it is made from a place outside the United Kingdom; and
   (ii) it is made for the purposes of a business which is carried on outside the United Kingdom and which is not carried on in the United Kingdom; and

(c) the approval of a financial promotion for communication to a person inside the United Kingdom.

Where? Modifications to comply with EU law

(1) The EEA territorial scope rule modifies the general territorial scope of the rules in this chapter to the extent necessary to be compatible with European law. This means that in a number of cases, the rules in this chapter will apply to communications made by UK firms to persons located outside the United Kingdom and will not apply to communications made to persons inside the United Kingdom by EEA firms. Further guidance on this is located in COBS 1 Annex 1.

(2) One effect of the EEA territorial scope rule is that the rules in this chapter will not generally apply to an EEA key investor information document but will, for example, apply to a firm (including an EEA UCITS management company) when marketing in the United Kingdom the units of an EEA UCITS scheme that is a recognised scheme.

(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 other than to the extent COBS 4.12
COBS 4 : Communicating with clients, including financial promotions

Section 4.1 : Application

4.1.10  Firms should note the territorial scope of this chapter is also affected by:

(1) the disapplication for financial promotions originating outside the United Kingdom that are not capable of having an effect within the United Kingdom (section 21(3) of the Act (Restrictions on financial promotion)) (see the defined term “excluded communication”);

(2) the exemptions for overseas communicators (see the defined term “excluded communication”); and

(3) the rules on financial promotions with an overseas element (see COBS 4.9).
4.2 Fair, clear and not misleading communications

The fair, clear and not misleading rule

4.2.1 R

(1) A firm must ensure that a communication or a financial promotion is fair, clear and not misleading.

(2) This rule applies in relation to:

(a) a communication by the firm to a customer in relation to designated investment business which is not MiFID, equivalent third country or optional exemption business, other than a third party prospectus;

(aa) a communication to an eligible counterparty that is in relation to:

(i) MiFID or equivalent third country business other than a third party prospectus; or

(ii) insurance distribution;

(ab) a communication by the firm to a customer in relation to MiFID, equivalent third country or optional exemption business, other than a third party prospectus;

(b) a financial promotion communicated by the firm that is not:

(i) an excluded communication;

(ii) a non-retail communication;

(iii) a third party prospectus; and

(c) a financial promotion approved by the firm.

(3) As part of complying with (1), a firm must take into account the nature of the client.

[Note: article 24(3) and article 30(1) of MiFID, article 17(2) of the IDD and article 77 of the UCITS Directive]

4.2.2 G

(1) The fair, clear and not misleading rule applies in a way that is appropriate and proportionate taking into account the means of communication, the information the communication is intended to convey and the nature of the client and of its business, if any. So a communication addressed to a professional client or an eligible counterparty may not need to include the same information, or be presented in the same way, as a communication addressed to a retail client.
Section 4.2 : Fair, clear and not misleading communications

(2) COBS 4.2.1R(2)(b) does not limit the application of the fair, clear and not misleading rule under COBS 4.2.1R (2) (a). So, for example, a communication in relation to designated investment business that is both a communication to a professional client and a financial promotion, will still be subject to the fair, clear and not misleading rule.

[Note: article 30(1) of MiFID and recital 65 to the MiFID Org Regulation, article 17(2) of the IDD]

4.2.3 Part 7 (Offences relating to Financial Services) of the Financial Services Act 2012 creates criminal offences relating to certain misleading statements and practices.

Fair, clear and not misleading financial promotions

4.2.4 A firm should ensure that a financial promotion:

(1) for a product or service that places a client's capital at risk makes this clear;

(2) that quotes a yield figure gives a balanced impression of both the short and long term prospects for the investment;

(3) that promotes an investment or service whose charging structure is complex, or in relation to which the firm will receive more than one element of remuneration, includes the information necessary to ensure that it is fair, clear and not misleading and contains sufficient information taking into account the needs of the recipients;

(4) that names the FCA, PRA or both as its regulator and refers to matters not regulated by either the FCA, PRA or both makes clear that those matters are not regulated by the FCA, PRA or either;

(5) that offers packaged products or stakeholder products not produced by the firm, gives a fair, clear and not misleading impression of the producer of the product or the manager of the underlying investments.

4.2.5 A communication or a financial promotion should not describe a feature of a product or service as “guaranteed”, “protected” or “secure”, or use a similar term unless:

(1) that term is capable of being a fair, clear and not misleading description of it; and

(2) the firm communicates all of the information necessary, and presents that information with sufficient clarity and prominence, to make the use of that term fair, clear and not misleading.

The reasonable steps defence to an action for damages

4.2.6 If, in relation to a particular communication or financial promotion, a firm takes reasonable steps to ensure it complies with the fair, clear and not misleading...
misleading rule, a contravention of that rule does not give rise to a right of action under section 138D of the Act.
4.3 Financial promotions to be identifiable as such

4.3.1 (1) A firm must ensure that a financial promotion addressed to a client is clearly identifiable as such.

[Note: article 24(3) of MiFID, article 17(2) of the IDD and article 77 of the UCITS Directive]

(2) If a financial promotion relates to a firm’s MiFID, equivalent third country or optional exemption business, this rule does not apply to the extent that the financial promotion is a third party prospectus.

(3) If a financial promotion relates to a firm’s business that is not MiFID or equivalent third country business, this rule applies to communicating or approving the financial promotion but does not apply:

(a) to the extent that it is an excluded communication;

(b) to the extent that it is a prospectus advertisement to which article 22 of the Prospectus Regulation applies;

(c) if it is image advertising;

(d) if it is a non-retail communication;

(e) [deleted]

(4) In the case of a marketing communication that relates to:

(a) a UCITS scheme or an EEA UCITS scheme, or

(b) insurance distribution,

(2) and (3) do not limit the application of this rule.
4.4 Compensation information

4.4.1 **R** A *firm* must ensure that any reference in advertising to an investor compensation scheme established under the *Investor Compensation Directive* is limited to a factual reference to the scheme.

[Note: article 10(3) of the *Investor Compensation Directive*]

4.4.2 **G** [deleted]

4.4.3 **R** To ensure that a *firm* pays due regard to the information needs of its *clients*, and communicates information to them in a way which is clear, fair and not misleading with respect to the activity of *issuing electronic money*, a *firm* must ensure that, in good time before the *firm* issues *electronic money* to a *person*, it has been communicated to that *person* on paper or in another *durable medium* that the *compensation scheme* does not cover claims made in connection with *issuing electronic money*.
4.5 Communicating with retail clients (non-MiFID provisions)

Application

4.5.1 (1) Subject to (2) and (3), this section applies to a firm in relation to:

(a) the provision of information in relation to its designated investment business; and

(b) the communication or approval of a financial promotion;

where such information or financial promotion is addressed to, or disseminated in such a way that it is likely to be received by, a retail client.

(2) This section does not apply to a firm communicating in relation to its MiFID, equivalent third country or optional exemption business.

(3) This section does not apply in relation to a communication:

(a) to the extent that it is an excluded communication;

(b) to the extent that it is a prospectus advertisement to which article 22 of the Prospectus Regulation applies;

(c) if it is image advertising.

General rule

4.5.2 A firm must ensure that information:

(1) includes the name of the firm;

(2) is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of relevant business or a relevant investment;

(3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received;

(4) does not disguise, diminish or obscure important items, statements or warnings.

(5) uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout that ensures that such indication is prominent;
(6) is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has agreed to receive information in more than one language; and

(7) is up-to-date and relevant to the means of communication used.

4.5.3 G The name of the firm may be a trading name or shortened version of the legal name of the firm, provided the retail client can identify the firm communicating the information.

4.5.4 G In deciding whether, and how, to communicate information to a particular target audience, a firm should take into account the nature of the product or business, the risks involved, the client’s commitment, the likely information needs of the average recipient, and the role of the information in the sales process.

4.5.5 G When communicating information, a firm should consider whether omission of any relevant fact will result in the information being insufficient, unclear, unfair or misleading. When considering whether a fact should be included in the communication or omitted from it, a firm should bear in the mind the guidance in ▶ COBS 4.2.2G to provide information which is appropriate and proportionate.

**Comparative information**

4.5.6 R If information compares relevant business, relevant investments, or persons who carry on relevant business, a firm must ensure that the comparison is meaningful and presented in a fair and balanced way.

**Referring to tax**

4.5.7 R (1) If any information refers to a particular tax treatment, a firm must ensure that it prominently states that the tax treatment depends on the individual circumstances of each client and may be subject to change in future.

(2) This rule applies in relation to a financial promotion except to the extent that it relates to a pure protection contract that is a long-term care insurance contract.

**Consistent financial promotions**

4.5.8 R (1) A firm must ensure that information contained in a financial promotion is consistent with any information the firm provides to a retail client in the course of carrying on designated investment business.

(2) This rule does not apply to a financial promotion to the extent that it relates a pure protection contract that is a long-term care insurance contract.
### Innovative finance ISA

**4.5.9** Examples of information about relevant risks (COBS 4.5.2R) that a firm should give a retail client in relation to an innovative finance ISA include:

1. An explanation of the tax consequences if:
   - the innovative finance component is a P2P agreement that is not repaid; and
   - an operator of an electronic system in relation to lending which facilitates a P2P agreement fails;

2. The procedure for, timing and tax consequences of:
   - withdrawing a P2P agreement from the innovative finance ISA; and
   - a request for transfer of all or part of the innovative finance components in the innovative finance ISA; and

3. A warning, as relevant, that it may, or will, not be possible to sell or trade P2P agreements at market value on a secondary market.

**4.5.10** Operators of electronic systems in relation to lending and firms which advise on P2P agreements should also have regard to the guidance in COBS 14.3.7AG and COBS 14.3.7BG regarding the types of information they should provide to clients to explain the specific nature and risks of P2P agreements.

### Lifetime ISA

**4.5.11** Information about relevant risks (COBS 4.5.2R) that a firm should give a retail client in relation to a lifetime ISA may include:

1. An explanation of:
   - a retail client’s eligibility to subscribe to a lifetime ISA (including annual subscription limits) and to claim the lifetime ISA government bonus;
   - the lifetime ISA government withdrawal charge and the circumstances in which it might arise; and
   - the process by which a retail client can transfer a lifetime ISA; and

2. Warnings that, if the retail client:
   - incurs a lifetime ISA government withdrawal charge, the retail client may get back less than they paid in to a lifetime ISA;
   - saves in a lifetime ISA instead of enrolling in, or contributing to a qualifying scheme, occupational pension scheme, or personal pension scheme:
     - (i) the retail client may lose the benefit of contributions by an employer (if any) to that scheme; and
     - (ii) the retail client’s current and future entitlement to means tested benefits (if any) may be affected.
Subject to COBS 4.5.13R, an authorised fund manager must include in any communication about an authorised fund to which this section applies:

(1) a short explanation, in terms consistent with the relevant prospectus, of the choice and use of every target benchmark, constraining benchmark or comparator benchmark used in relation to the scheme; or

(2) where no target benchmark, constraining benchmark or comparator benchmark is referred to in the prospectus, a statement to that effect and a short explanation of how investors can assess the performance of the scheme.

Where an authorised fund manager includes, in any communication about an authorised fund to which this section applies, an indication of past performance for any authorised fund it manages, it must (in addition to complying with COBS 4.6.2R where applicable):

(1) include the corresponding past performance record of any target benchmark or constraining benchmark referred to in the prospectus of the scheme; and

(2) not include an indication of past performance for any index, indices or similar factor that is not referred to in the prospectus of the scheme.

(1) Subject to paragraph (2), if a communication to which COBS 4.5.13R applies includes information comparing past performance of the scheme against one or more comparator benchmarks, the authorised fund manager must, for the period specified in paragraph (3) and in every subsequent communication it makes that is also subject to COBS 4.5.13R:

(a) include a comparison against the same comparator benchmark or comparator benchmarks; and

(b) not include a comparison against any other benchmark.

(2) Paragraph (1) does not apply if such a comparison would not be compliant with COBS 4.5.13R as a result of a change to the prospectus of the scheme.

(3) The period specified for the purposes of paragraph (1) is:

(a) twelve months after a one-off communication is made; or

(b) for as long as the communication remains available to the public in a durable medium and has not been superseded by a revised version.

COBS 4.5.14R to COBS 4.5.14R do not apply in respect of any reference to a comparator benchmark that is not identified in the prospectus of the relevant scheme when that reference appears in a communication that is:
(1) used exclusively in the course of a personal visit, telephone conversation or other interactive dialogue; or

(2) in response to a specific unsolicited request by a client for past performance to be compared with a particular comparator benchmark.
4.5A Communicating with clients (including past, simulated past and future performance) (MiFID provisions)

Application

4.5A.1 (1) This section applies to a firm in relation to:
(a) the provision of information; or
(b) the communication of a financial promotion,
which relates to the firm’s MiFID, equivalent third country or optional exemption business.

(2) This section does not apply to a communication:
(a) to the extent that it is a third party prospectus; or
(b) if it is image advertising.

[Note: article 24(3) of MiFID]

4.5A.2 Provisions in this section marked “EU” apply in relation to MiFID optional exemption business as if they were rules (see ■COBS 1.2.2G).

4.5A.2A The effect of ■GEN 2.2.22AR is that provisions in this section marked “EU” also apply in relation to the equivalent business of a third country investment firm as if they were rules.

General requirements

4.5A.3 (1) Investment firms shall ensure that all information they address to, or disseminate in such a way that it is likely to be received by, retail or professional clients or potential retail or professional clients, including marketing communications, satisfies the conditions laid down in paragraphs 2 to 8.

(2) Investment firm shall ensure that the information referred to in paragraph 1 complies with the following conditions:
(a) the information includes the name of the investment firm,
(b) the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument,
(c) the information uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent,
(d) the information is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received,
(e) the information does not disguise, diminish or obscure important items, statements or warnings,
(f) the information is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has accepted to receive information in more than one language,
(g) the information is up-to-date and relevant to the means of communication used.

[Note: article 44(1) and (2) of the MiFID Org Regulation]

4.5A.4 The name of the firm may be a trading name or shortened version of the legal name of the firm, provided the client can identify the firm communicating the information.

4.5A.5 In deciding whether, and how, to communicate information to a particular target audience, a firm should take into account the nature of the product or business, the risks involved, the client’s commitment, the likely information needs of the average recipient, and the role of the information in the sales process.

4.5A.6 When communicating information, a firm should consider whether omission of any relevant fact will result in the information being insufficient, unclear, unfair or misleading.

Comparative information

4.5A.7 Where the information compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, investment firms shall ensure that the following conditions are satisfied:
(a) the comparison is meaningful and presented in a fair and balanced way;
(b) the sources of the information used for the comparison are specified;
(c) the key facts and assumptions used to make the comparison are included.

[Note: article 44(3) of the MiFID Org Regulation]
Referring to tax

4.5A.8 [EU] 44(7) Where the information refers to a particular tax treatment, it shall prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

[Note: article 44(7) of the MiFID Org Regulation]

Consistent financial promotions

4.5A.9 [EU] 46(5) Investment firms shall ensure that information contained in a marketing communication is consistent with any information the firm provides to clients in the course of carrying on investment and ancillary services.

[Note: article 46(5) of the MiFID Org Regulation]

Past performance

4.5A.10 [EU] 44(4) Where the information contains an indication of past performance of a financial instrument, a financial index or an investment service, investment firms shall ensure that the following conditions are satisfied:

(a) that indication is not the most prominent feature of the communication;

(b) the information must include appropriate performance information which covers the preceding 5 years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided where less than five years, or such longer period as the firm may decide, and in every case that performance information is based on complete 12-month periods;

(c) the reference period and the source of information is clearly stated;

(d) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;

(e) where the indication relies on figures denominated in a currency other than that of the Member State in which the retail client or potential retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;

(f) where the indication is based on gross performance, the effect of commissions, fees or other charges are disclosed.

[Note: article 44(4) of the MiFID Org Regulation]

4.5A.11 [G] The obligations relating to describing performance should be interpreted in the light of their purpose and in a way that is appropriate and proportionate taking into account the means of communication and the information the communication is intended to convey. For example, a periodic statement in relation to managing investments that is sent in accordance with the rules on reporting information to clients (see ■ COBS 16 and ■ COBS 16A) may include past performance as its most prominent feature.

[Note: recital 65 to the MiFID Org Regulation]
COBS 4 : Communicating with clients, including financial promotions  
Section 4.5A : Communicating with clients (including past, simulated past and future performance) (MiFID provisions)

Simulated past performance

4.5A.12 **EU**  
44(5) Where the information includes or refers to simulated past performance, investment firms shall ensure that the information relates to a financial instrument or a financial index, and the following conditions are satisfied:

44(5)(a) the simulated past performance is based on the actual past performance of one or more financial instruments or financial indices which are the same as, or substantially the same as, or underlie, the financial instrument concerned;

44(5)(b) in respect of the actual past performance referred to in point (a), the conditions set out in points (a) to (c), (e) and (f) of paragraph 4 are satisfied;

44(5)(c) the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

[Note: article 44(5) of the MiFID Org Regulation]

4.5A.13 **G**  
For the purposes of **COBS 4.5A.12**, the conditions referred to in article 44(5)(b) can be found reproduced in **COBS 4.5A.10**.

Future performance

4.5A.14 **EU**  
44(6) Where the information contains information on future performance, investment firms shall ensure that the following conditions are satisfied:

(a) the information is not based on or refer to simulated past performance;

(b) the information is based on reasonable assumptions supported by objective data;

(c) where the information is based on gross performance, the effect of commissions, fees or other charges is disclosed;

(d) the information is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specific types of instruments included in the analysis;

(e) the information contains a prominent warning that such forecasts are not a reliable indicator of future performance.

[Note: article 44(6) of the MiFID Org Regulation]

4.5A.15 **G**  
A firm should not provide information on future performance if it is not able to obtain the objective data needed to comply with the requirements regarding information on future performance in **COBS 4.5A.14**. For example, objective data in relation to EIS shares may be difficult to obtain.

Information that uses the name of any competent authority

4.5A.16 **EU**  
44(8) The information shall not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval by that authority of the products or services of the investment firm.

[Note: article 44(8) of the MiFID Org Regulation]
4.6 Past, simulated past and future performance (non-MiFID provisions)

Application

1. Subject to (2) and (3), this section applies to a firm in relation to:
   (a) [deleted]
   (b) the communication or approval of a financial promotion,
       where such information or financial promotion is addressed to, or
       disseminated in such a way that it is likely to be received by, a retail client.

2. This section does not apply to a firm communicating in relation to its MiFID, equivalent third country or optional exemption business.

3. This section does not apply in relation to a communication:
   (a) to the extent that it is an excluded communication;
   (b) to the extent that it is a prospectus advertisement to which article 22 of the Prospectus Regulation applies;
   (c) if it is image advertising;
   (d) to the extent that it relates to a deposit that is not a structured deposit (see also ■ COBS 4.1.1R(3));
   (e) to the extent that it relates to a pure protection contract that is a long-term care insurance contract.

Past performance

A firm must ensure that information that contains an indication of past performance of relevant business, a relevant investment or a financial index, satisfies the following conditions:

1. that indication is not the most prominent feature of the communication;

2. the information includes appropriate performance information which covers the preceding five years, or the whole period for which the investment has been offered, the financial index has been established, or the service has been provided (where less than five years, or such longer period as the firm may decide), and in every case that performance information must be based on complete 12-month periods;

3. the reference period and the source of information are clearly stated;
(4) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;

(5) if the indication relies on figures denominated in a currency other than that of the EEA State in which the retail client is resident, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;

(6) if the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed.

4.6.3 The obligations relating to describing performance should be interpreted in the light of their purpose and in a way that is appropriate and proportionate taking into account the means of communication and the information the communication is intended to convey. For example, a periodic statement in relation to managing investments that is sent in accordance with the rules on reporting information to clients (see ▪ COBS 16) may include past performance as its most prominent feature.

4.6.4 If a financial promotion includes information referring to the past performance of a packaged product that is not a financial instrument, a firm will comply with the rule on appropriate performance information (▪ COBS 4.6.2R (2)) if the financial promotion includes, in the case of a scheme, unit-linked life policy, unit-linked personal pension scheme or unit-linked stakeholder pension scheme (other than a unitised with-profits life policy or stakeholder pension scheme) past performance information calculated and presented in accordance with the table in ▪ COBS 4.6.4A G.

4.6.4A This Table belongs to ▪ COBS 4.6.4 G

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<td>pgr%</td>
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</tr>
</tbody>
</table>

Notes:
1. The table should show performance information for five (or if performance information for fewer than five is available, all) complete 12-month periods, the most recent of which ends with the last full quarter preceding the date on which the firm first communicates or approves the financial promotion.
2. For products with performance data for fewer than five 12-month periods, firms should clearly indicate that performance data does not exist for the relevant periods.
3. No allowance should be made for tax recoveries on income for pension contracts, ISAs or PEPs.
4. pgr is the percentage growth rate for the year, where: pgr = ((P1 - P0)/ P0)*100 and rounded to the nearest 0.1%, with exact 0.05% rounded to the nearest even 0.1%; and where P0 is the price at the start of the 12-month period and P1 is the price on the same day in the following 12-month period.
5. The prices should allow for any net distributions to be reinvested.
6. The price at \( P_1 \) must be adjusted for any charges since the date of \( P_0 \) which are based on a proportion of the fund and are levied by the cancellation of units.

7. The firm should use single pricing, or (if this is not available) bid to bid prices, unless the firm has reasonable grounds to be satisfied that another basis would better reflect the past performance of the fund.

4.6.4B

(1) The firm should present the information referred to in COBS 4.6.4 G no less prominently than any other past performance information.

(2) This guidance does not apply to a prospectus, key investor information document or NURS-KII document drawn up in accordance with COLL.

4.6.5

(1) In relation to a packaged product (other than a scheme, a unit-linked life policy, unit-linked personal pension scheme or a unit-linked stakeholder pension scheme (that is not a unitised with-profits life policy or stakeholder pension scheme)), the information should be given on:

   (a) an offer to bid basis (which should be stated) if there is an actual return or comparison of performance with other investments; or

   (b) an offer to offer, bid to bid or offer to bid basis (which should be stated) if there is a comparison of performance with an index or with movements in the price of units; or

   (c) a single pricing basis with allowance for charges.

(2) If the pricing policy of the investment has changed, the prices used should include such adjustments as are necessary to remove any distortions resulting from the pricing method.

Simulated past performance

4.6.6

A firm must ensure that information that contains an indication of simulated past performance of relevant business, a relevant investment or a financial index, satisfies the following conditions:

(1) it relates to an investment or a financial index;

(2) the simulated past performance is based on the actual past performance of one or more investments or financial indices which are the same as, substantially the same as, or underlie, the investment concerned;

(3) in respect of the actual past performance referred to in (2), the conditions set out in paragraphs (1) to (3), (5) and (6) of the rule on past performance (COBS 4.6.2 R) are complied with; and

(4) the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.
Future performance

4.6.7  A firm must ensure that information that contains an indication of future performance of relevant business, a relevant investment, a structured deposit or a financial index, satisfies the following conditions:

(a) it is not based on and does not refer to simulated past performance;
(b) it is based on reasonable assumptions supported by objective data;
(c) where the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed;
(d) it is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specified types of investments included in the analysis; and
(d) it contains a prominent warning that such forecasts are not a reliable indicator of future performance.

(2) This rule only applies in relation to financial promotions that relate to a financial instrument (or a financial index that relates exclusively to financial instruments) or a structured deposit.

4.6.8  A firm should not provide information on future performance if it is not able to obtain the objective data needed to comply with the rule on future performance. For example, objective data in relation to EIS shares may be difficult to obtain.

4.6.9  (1) A firm that communicates to a client a projection for a packaged product which is not a financial instrument must ensure that the projection complies with the projections rules in COBS 13.4, COBS 13.5 and COBS 13 Annex 2.

(2) A firm must not communicate a projection for a highly volatile product to a client unless the product is a financial instrument.
4.7 Direct offer financial promotions

Application

4.7.2 This section (other than § COBS 4.7.-1AEU to § COBS 4.7.-1DG) does not apply in relation to a communication:

(1) to the extent that it is an excluded communication;

(2) to the extent that it is a prospectus advertisement to which article 22 of the Prospectus Regulation applies;

(3) if it is image advertising;

(4) to the extent that it relates to a deposit that is not a cash deposit ISA, cash-only lifetime ISA or cash deposit CTF;

(5) to the extent that it relates to a pure protection contract that is a long-term care insurance contract.

4.7.1 (1) § COBS 4.7.-1AEU to § COBS 4.7.1R contain provisions on the communication of direct offer financial promotions.

(2) In broad terms:

(a) § COBS 4.7.-1AEU is relevant to a firm communicating a direct offer financial promotion in relation to its MiFID, equivalent third country or optional exemption business;

(b) § COBS 4.7.1R is relevant to a firm communicating a direct offer financial promotion that does not relate to its MiFID, equivalent third country or optional exemption business; and

(c) the application of the other operative provisions in this section is not affected by reference to MiFID, equivalent third country or optional exemption business.

(3) However, a MiFID investment firm, third country investment firm or MiFID optional exemption firm which is subject to the requirements in § COBS 4.7.-1AEU may be subject to the rule in § COBS 4.7.1R to the extent that it communicates a direct offer financial promotion:

(a) which is not a marketing communication; or

(b) which does not relate to its MiFID, equivalent third country or optional exemption business.
Direct offer financial promotions relating to MiFID, equivalent third country or optional exemption business

4.7.-1A [EU] 46(6) Marketing communications containing an offer or invitation of the following nature and specifying the manner of response or including a form by which any response may be made, shall include such of the information referred to in Articles 47 to 50 as is relevant to that offer or invitation:

(a) an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service with any person who responds to the communication;

(b) an invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service.

However, the first subparagraph shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the potential client must refer to another document or documents, which, alone or in combination, contain that information.

[Note: article 46(6) of the MiFID Org Regulation]

Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms

4.7.-1B [R] Provisions in this section marked “EU” apply in relation to MiFID optional exemption business as if they were rules (see ■ COBS 1.2.2G).

4.7.-1C [G] The effect of ■ GEN 2.2.22AR is that provisions in this section marked “EU” also apply in relation to the equivalent business of a third country investment firm as if they were rules.

4.7.-1D [G] For the purposes of ■ COBS 4.7.-1AEU, the provisions of articles 47 to 50 of the MiFID Org Regulation can be found reproduced in ■ COBS 6.12A and ■ COBS 14.3A.

Other direct offer financial promotions

4.7.1 [R] (1) Subject to (3) and (4), a firm must ensure that a direct offer financial promotion that is addressed to, or disseminated in such a way that it is likely to be received by, a retail client contains:

(a) the information referred to in the rules on information disclosure (■ COBS 6.1.4 R, ■ COBS 6.1.6 R, ■ COBS 6.1.7 R, ■ COBS 6.1.9 R, ■ COBS 14.3.2 R, ■ COBS 14.3.3 R, ■ COBS 14.3.4 R and ■ COBS 14.3.5 R) as is relevant to that offer or invitation; and

(b) additional appropriate information about the relevant business and relevant investments so that the client is reasonably able to understand the nature and risks of the relevant business and relevant investments and consequently to take investment decisions on an informed basis.

(2) This rule does not require the information in (1) to be included in a direct offer financial promotion if, in order to respond to an offer or invitation contained in it, the retail client must refer to another
document or documents, which, alone or in combination, contain that information.

(3) This rule does not apply in relation to a marketing communication that relates to a firm’s MiFID, equivalent third country or optional exemption business

(4) [deleted]

(5) [deleted]

Guidance

4.7.2 Although COBS 4.7.1R(1)(b) does not apply in relation to MiFID, equivalent third country or optional exemption business, similar requirements may apply under COBS 2.2A.

4.7.2A (1) BCBOs 2A contains rules and guidance about the inclusion of a summary box in a direct offer financial promotion relating to a cash deposit ISA or cash deposit CTF provided by a firm other than a credit union.

(2) Where BCBOs 2A applies, COBS 4.7.1R(1)(b) does not require a firm to include information outside a summary box in a direct offer financial promotion to the extent that this would simply repeat information included in a summary box in the same financial promotion.

4.7.3 COBS 4.7.1R(2) allows a firm to communicate a direct offer financial promotion that does not contain all the information required by COBS 4.7.1R(1), if the firm can demonstrate that the client has referred to the required information before the client makes or accepts an offer in response to the direct offer financial promotion.

(2) A firm communicating or approving a direct offer financial promotion may also be subject to:

(a) the rules on providing product information in COBS 14.2, including the exceptions in COBS 14.2.5R to 14.2.9R; and

(b) the requirement in the PRIIPs Regulation to provide a key information document.

4.7.4 In order to enable a client to make an informed assessment of a relevant investment or relevant business, a firm may wish to include in a direct offer financial promotion:

(1) a summary of the taxation of any investment to which it relates and the taxation consequences for the average member of the group to whom it is directed or by whom it is likely to be received;

(2) a statement that the recipient should seek a personal recommendation if he has any doubt about the suitability of the investments or services being promoted; and
(3) (in relation to a promotion for a non-PRIIP packaged product that is not a financial instrument) a key features illustration, in which a generic projection may generally be used.

4.7.5 [deleted]

4.7.5A ■ COBS 4.13.2 R (Marketing communications relating to UCITS schemes or EEA UCITS schemes) and ■ COBS 4.13.3 R (Marketing communications relating to feeder UCITS) contain additional disclosure requirements for firms in relation to marketing communications (other than key investor information) that concern particular investment strategies of a UCITS scheme or EEA UCITS scheme.

Warrants and derivatives

4.7.6 A firm must not communicate or approve a direct offer financial promotion:

(a) relating to a warrant or derivative;

(b) to or for communication to a retail client; and

(c) where the firm will not itself be required to comply with the rules on appropriateness (see ■ COBS 10 and ■ 10A);

unless the firm has adequate evidence that the condition in (2) is satisfied.

(2) The condition is that the person who will arrange or deal in relation to the derivative or warrant will comply with the rules on appropriateness or equivalent requirements for any application or order that the person is aware, or ought reasonably to be aware, is in response to the direct offer financial promotion.

4.7.6A Firms are reminded of their obligations in relation to the marketing, distribution and sale of restricted speculative investments in ■ COBS 22.5.

Non-readily realisable securities and P2P agreements

4.7.7 (1) Unless permitted by ■ COBS 4.7.8 R, a firm must not communicate or approve a direct-offer financial promotion relating to a non-readily realisable security a P2P agreement or a P2P portfolio to or for communication to a retail client without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the retail client recipient of the direct-offer financial promotion is one of the following:

(a) certified as a ‘high net worth investor’ in accordance with ■ COBS 4.7.9 R;

(b) certified as a ‘sophisticated investor’ in accordance with ■ COBS 4.7.9 R;

(c) self-certified as a ‘sophisticated investor’ in accordance with ■ COBS 4.7.9 R; or
A firm may communicate or approve a direct-offer financial promotion relating to a non-readily realisable security, a P2P agreement or a P2P portfolio to or for communication to a retail client if:

(1) the firm itself will comply with the suitability rules (COBS 9 and 9A) in relation to the investment promoted; or

(2) the retail client has confirmed before the promotion is made that they are a retail client of another firm that will comply with the suitability rules (COBS 9 and 9A) in relation to the investment promoted; or

(3) the retail client is a corporate finance contact or a venture capital contact.

(1) A certified high net worth investor, a certified sophisticated investor or 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 terms set out in the applicable rule listed below and as modified by (2):

(a) certified high net worth investor: COBS 4.12.6 R;

(b) certified sophisticated investor: COBS 4.12.7 R;

(c) self-certified sophisticated investor: COBS 4.12.8 R.

(2) Each of the statements in (1), when used in relation to non-readily realisable securities, P2P agreements or a P2P portfolio, must, as appropriate, be modified as follows:

in all of the statements, any references to “non-mainstream pooled investments” must be replaced with references to “non-readily realisable securities” or “P2P agreements or P2P portfolios”, as applicable;

in the statement in COBS 4.12.8R, the reference to “unlisted company” must be replaced with a reference to “P2P agreement or P2P portfolio”; and

in the statement in COBS 4.12.8R, the reference to “private equity sector, or in the provision of finance for small and medium enterprises” must be replaced with a reference to “provision of finance, resulting in an understanding of the P2P
A certified restricted 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, substituting “P2P agreements or P2P portfolios” for “non-readily realisable securities”, as appropriate:

**“RESTRICTED INVESTOR STATEMENT”**

I make this statement so that I can receive promotional communications relating to non-readily realisable securities as a restricted investor. I declare that I qualify as a restricted investor because:

(a) in the twelve months preceding the date below, I have not invested more than 10% of my net assets in non-readily realisable securities; and

(b) I undertake that in the twelve months following the date below, I will not invest more than 10% of my net assets in non-readily realisable securities.

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; or

(d) any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).

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-readily realisable securities.

Signature: ____________________________
Date: ________________
4.7.13 In relation to a P2P agreement or a P2P portfolio, a firm may communicate to a retail client information about a P2P agreement or a P2P portfolio before needing to satisfy the conditions in [COBS 4.7.7R(2) and (3)], provided that the defining elements of a direct offer financial promotion are not present in that communication. This information may comprise, without limitation, mandatory disclosures applicable to that firm, such as those set out in [COBS 18.12.24R to 18.12.28R], including information about:

(1) the identity of the borrower(s);
(2) the price or target rate, provided they are accompanied by a fair description of the anticipated actual return, taking into account fees, default rates and taxation;
(3) the term;
(4) the risk categorisation; and
(5) a description of any security interest, insurance, guarantee or other risk mitigation measures adopted by the firm.
4.8 Cold calls and other promotions that are not in writing

Application

4.8.1 This section applies to a firm in relation to the communication of a financial promotion that is not in writing, but it does not apply:

1. to the extent that the financial promotion is an excluded communication;
2. if the financial promotion is image advertising;
3. if the financial promotion is a non-retail communication;
4. [deleted]
5. to the extent that the financial promotion relates to a pure protection contract that is a long-term care insurance contract.

Restriction on cold calling

4.8.2 A firm must not make a cold call unless:

1. the recipient has an established existing client relationship with the firm and the relationship is such that the recipient envisages receiving cold calls; or
2. the cold call relates to a generally marketable packaged product which is not:
   a. a higher volatility fund; or
   b. a life policy with a link (including a potential link) to a higher volatility fund; or
3. the cold call relates to a controlled activity to be carried on by an authorised person or exempt person and the only controlled investments involved or which reasonably could be involved are:
   a. readily realisable securities (other than warrants); and
   b. generally marketable non-geared packaged products.
Promotions that are not in writing

A firm must not communicate a solicited or unsolicited financial promotion that is not in writing, to a client outside the firm's premises, unless the person communicating it:

(1) only does so at an appropriate time of the day;

(2) identifies himself and the firm he represents at the outset and makes clear the purpose of the communication;

(3) clarifies if the client would like to continue with or terminate the communication, and terminates the communication at any time that the client requests it; and

(4) gives a contact point to any client with whom he arranges an appointment.
4.9 Financial promotions with an overseas element

Application

4.9.1 R (1) Subject to (2) and (3), this section applies to a firm in relation to the communication or approval of a financial promotion that relates to the business of an overseas person.

(2) This section does not apply to a firm in relation to its MiFID or equivalent third country business.

(3) If a communication relates to a firm’s business that is not MiFID or equivalent third country business, this section does not apply:

(a) to the extent that it is an excluded communication;
(b) to the extent that it is a prospectus advertisement to which article 22 of the Prospectus Regulation applies;
(c) if it is image advertising;
(d) if it is a non-retail communication;
(e) [deleted]
(f) to the extent that it relates to a pure protection contract that is a long-term care insurance contract.

4.9.2 G Approving a financial promotion for communication by an unauthorised person is not MiFID or equivalent third country business.

Financial promotions for the business of an overseas person

4.9.3 R A firm must not communicate or approve a financial promotion which relates to a particular relevant investment or relevant business of an overseas person, unless:

(1) the financial promotion makes clear which firm has approved or communicated it and, where relevant, explains:

(a) that the rules made under the Act for the protection of retail clients do not apply;
(b) the extent and level to which the compensation scheme will be available, or if the scheme will not be available, a statement to that effect; and
(c) if the communicator wishes, the protection or compensation available under another system of regulation; and
(2) the firm has taken reasonable steps to satisfy itself that the overseas person will deal with retail clients in the United Kingdom in an honest and reliable way.

### Financial promotions for an overseas long-term insurer

**R4.9.4** A firm may only communicate or approve a financial promotion to enter into a life policy with a person who is:

1. an authorised person; or
2. an exempt person who is exempt in relation to effecting or carrying out contracts of insurance of the class to which the financial promotion relates; or
3. an overseas long-term insurer that is entitled under the law of its home country or territory to carry on there insurance business of the class to which the financial promotion relates.

**R4.9.6** A financial promotion for an overseas long-term insurer, which has no establishment in the United Kingdom, must include:

1. the full name of the overseas long-term insurer, the country where it is registered, and, if different, the country where its head office is situated;
2. a prominent statement that 'holders of policies issued by the company will not be protected by the Financial Services Compensation Scheme if the company becomes unable to meet its liabilities to them'; and
3. if any trustee, investment manager or United Kingdom agent of the overseas long-term insurer is named which is not independent of the overseas long-term insurer, a prominent statement of that fact.

**R4.9.6** A financial promotion for an overseas long-term insurer which is authorised to carry on long-term insurance business in any country or territory listed in paragraph (c) of the Glossary definition of overseas long-term insurer must also include:

1. the full name of any trustee of property of any description which is retained by the overseas long-term insurer in respect of the promoted contracts;
2. an indication whether the investment of such property (or any part of it) is managed by the overseas long-term insurer or by another person and the full name of any investment manager;
3. the registered office of any such trustee and of any investment manager and of his principal office (if different); and
4. where any person in the United Kingdom takes, or may take, any steps on behalf of the overseas long-term insurer to enter into a promoted contract, the following details:
   a. the full name of the overseas long-term insurer;
(b) the registered office, head office or principal place of business of that person in the United Kingdom; and

(c) if there is more than one such person, the principal or main person in the United Kingdom.

4.9.7 If a financial promotion relates to a life policy with an overseas long-term insurer but does not name the overseas long-term insurer by giving its full name or its business name:

(1) it must include the following prominent statement: "This financial promotion relates to an insurance company which does not, and is not authorised to, carry on in any part of the United Kingdom the class of insurance business to which this promotion relates. This means that the management and solvency of the company are not supervised by the Financial Conduct Authority or the Prudential Regulation Authority. Holders of policies issued by the company will not have the right to complain to the Financial Ombudsman Service if they have a complaint against the company and will not be protected by the Financial Services Compensation Scheme if the company should become unable to meet its liabilities to them"; and

(2) if it also refers to other investments, it must make this clear.
4.10 Systems and controls and approving and communicating financial promotions

Systems and controls

4.10.1 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

4.10.2 (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.

(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.

4.10.3 (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.

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.

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.

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; and

(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.

(2) This rule does not apply in relation to MiFID, equivalent third country or optional exemption business.

4.10.11 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.
4.11 Record keeping: financial promotion

(1) A firm must make an adequate record of any financial promotion it communicates or approves, other than a financial promotion made in the course of a personal visit, telephone conversation or other interactive dialogue.

(2) For a telemarketing campaign, a firm must make an adequate record of copies of any scripts used.

(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 at or near the time of the communication or approval certifying that the invitation or inducement complies with the restrictions set out in section 238 of the Act and in COBS 4.12.3 R, 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 invitation or inducement;

(c) when making the record required in (a), 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, the record required in (a) must include 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 required in (a) which type of financial promotion defined as an excluded communication corresponds to the invitation or inducement 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 invitation or inducement, together with the reason why the firm is satisfied that the exemption applies;

(3) A firm must retain the record in relation to a financial promotion relating to:
   (a) a pension transfer, pension conversion, pension opt-out or FSAVC, indefinitely;
   (b) a life policy, occupational pension scheme, SSAS, personal pension scheme or stakeholder pension scheme, for six years;
   (c) MiFID or equivalent third country business, for five years; and
d) any other case, for three years.

(4) If a communication relates to a firm’s MiFID, equivalent third country or optional exemption business, this section does not apply:
   (a) to the extent that the communication is a third party prospectus;
   (b) if it is image advertising;
   (c) if it is a non-retail communication.

(5) If a communication relates to a firm’s business that is not MiFID or equivalent third country business, this section does not apply:
   (a) to the extent that it is an excluded communication;
   (b) to the extent that it is a prospectus advertisement to which article 22 of the Prospectus Regulation applies;
   (c) if it is image advertising;
   (d) if it is a non-retail communication;
   (e) [deleted]
   (f) to the extent that it relates to a pure protection contract that is a long-term care insurance contract.

4.11.1A G A MiFID investment firm, third country investment firm or MiFID optional exemption firm should refer to the requirements on record keeping in the MiFID Org Regulation and SYSC 9.

4.11.2 G A firm should consider maintaining a record of why it is satisfied that the financial promotion complies with the financial promotion rules.

4.11.3 G If the financial promotion includes market information that is updated continuously in line with the relevant market, the record-keeping rules do not require a firm to record that information.
4.12 Restrictions on the promotion of non-mainstream pooled investments

Restrictions on the promotion of non-mainstream pooled investments

4.12.3

(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 4.12.4 R 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

(1) The restriction in COBS 4.12.3 R 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.
<table>
<thead>
<tr>
<th>(5) Title of Exemption</th>
<th>Promotion to:</th>
<th>Promotion of a non-mainstream pooled investment which is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Replacement products and rights issues</td>
<td>A <em>person</em> who already participates in, owns, holds rights to or interests in, a <em>non-mainstream pooled investment</em> that is being liquidated or wound down or which is undergoing a rights issue. [See Note 1.]</td>
<td>1. A <em>non-mainstream pooled investment</em> which is intended by the operator or manager to absorb or take over the assets of that <em>non-mainstream pooled investment</em>, or which is being offered by the operator or manager of that <em>non-mainstream pooled investment</em> as an alternative to cash on its liquidation; or 2. <em>Securities</em> offered by the existing <em>non-mainstream pooled investment</em> as part of a rights issue.</td>
</tr>
<tr>
<td>2. Certified high net worth investors</td>
<td>An individual who meets the requirements set out in COBS 4.12.6 R, or a person (or persons) legally empowered to make investment decisions on behalf of such individual.</td>
<td>Any <em>non-mainstream pooled investment</em> the firm considers is likely to be suitable for that individual, based on a preliminary assessment of the client's profile and objectives. [See COBS 4.12.5G (2).]</td>
</tr>
</tbody>
</table>
| 3. Enterprise and charitable funds | A *person* who is eligible to participate or invest in an arrangement constituted under:  
  
  (1) the [Church Funds Investment Measure 1958](#);  
  
  (2) section 96 or 100 of the [Charities Act 2011](#);  
  
  (3) [section 25](#) of the Charities Act (Northern Ireland) 1964;  
  
  (4) the [Regulation on European Venture Capital Funds](#) (‘EuVECA’s’); or  
  
  (5) the [Regulation on European Social Entrepreneurship Funds](#) (‘EuSEF’s’). | Any *non-mainstream pooled investment* which is such an arrangement. |
**COBS 4 : Communicating with clients, including financial promotions**

**Section 4.12 : Restrictions on the promotion of non-mainstream pooled investments**

<table>
<thead>
<tr>
<th>(5) Title of Exemption</th>
<th>Promotion to:</th>
<th>Promotion of a non-mainstream pooled investment which is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Eligible employees</td>
<td>An eligible employee, that is, a person who is:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1) an officer;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) an employee;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(3) a former officer or employee; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(4) a member of the immediate family of any of (1) - (3), of an employer which is (or is in the same group as) the firm, or which has accepted responsibility for the activities of the firm in carrying out the designated investment business in question.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1. A non-mainstream pooled investment, the instrument constituting which:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>A. restricts the property of the non-mainstream pooled investment, apart from cash and near cash, to:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1) (where the employer is a company) shares in and debentures of the company or any other connected company; [See Note 2.]</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) (in any case), any property, provided that the non-mainstream pooled investment takes the form of:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(i) a limited partnership, under the terms of which the employer (or connected company) will be the unlimited partner and the eligible employees will be some or all of the limited partners; or</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(ii) a trust which the firm reasonably believes not to contain any risk that any eligible employee may be liable to make any further payments (other than charges) for investment transactions earlier entered into, which the eligible employee was not aware of at the time he entered into them; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>B. (in a case falling within A(1) above) restricts participation in the non-mainstream pooled investment to eligible employees, the employer and any connected company.</td>
<td></td>
</tr>
</tbody>
</table>
## COBS 4: Communicating with clients, including financial promotions

### Section 4.12: Restrictions on the promotion of non-mainstream pooled investments

<table>
<thead>
<tr>
<th>(5) Title of Exemption</th>
<th>Promotion to:</th>
<th>Promotion of a non-mainstream pooled investment which is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Members of the Society of Lloyd’s</td>
<td>A person admitted to membership of the Society of Lloyd’s or any person by law entitled or bound to administer his affairs.</td>
<td>2. Any non-mainstream pooled investment, provided that the participation of eligible employees is to facilitate their co-investment: (i) with one or more companies in the same group as their employer (which may include the employer); or (ii) with one or more clients of such a company.</td>
</tr>
<tr>
<td>6. Exempt persons</td>
<td>An exempt person (other than a person exempted only by section 39 of the Act (Exemption of appointed representatives)) if the financial promotion relates to a regulated activity in respect of which the person is exempt from the general prohibition.</td>
<td>A scheme in the form of a limited partnership which is established for the sole purpose of underwriting insurance business at Lloyd’s. Any non-mainstream pooled investment.</td>
</tr>
<tr>
<td>7. Non-retail clients</td>
<td>An eligible counterparty or a professional client.</td>
<td>Any non-mainstream pooled investment in relation to which the client is categorised as a professional client or eligible counterparty. [See Note 4.]</td>
</tr>
<tr>
<td>8. Certified sophisticated investors</td>
<td>An individual who meets the requirements set out in COBS 4.12.7R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the firm’s client.</td>
<td>Any non-mainstream pooled investment.</td>
</tr>
<tr>
<td>9. Self-certified</td>
<td>An individual who</td>
<td>Any non-mainstream</td>
</tr>
</tbody>
</table>
### Section 4.12 : Restrictions on the promotion of non-mainstream pooled investments

<table>
<thead>
<tr>
<th>(5)</th>
<th>Title of Exemption</th>
<th>Promotion to:</th>
<th>Promotion of a non-mainstream pooled investment which is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>sophisticated investors</td>
<td>meets the requirements set out in COBS 4.12.8 R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the firm’s client.</td>
<td>pooled investment the firm considers is likely to be suitable for that client, based on a preliminary assessment of the client’s profile and objectives.</td>
<td>[See COBS 4.12.5G (2)]</td>
</tr>
<tr>
<td>10. Solicited advice</td>
<td>Any person.</td>
<td>Any non-mainstream pooled investment, provided the communication meets all of the following requirements:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a) the communication only amounts to a financial promotion because it is a personal recommendation on a non-mainstream pooled investment;</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) the personal recommendation is made following a specific request by that client for advice on the merits of investing in the non-mainstream pooled investment; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) the client has not previously received a financial promotion or any other communication from the firm (or from a person connected to the firm) which is intended to influence the client in relation to that non-mainstream pooled investment. [See Note 3.]</td>
<td></td>
</tr>
<tr>
<td>11. Excluded communications</td>
<td>Any person.</td>
<td>Any non-mainstream pooled investment, provided the financial promotion is an excluded communication.</td>
<td>[See COBS 4.12.12 G and COBS 4.12.13 G.]</td>
</tr>
</tbody>
</table>
### COBS 4 : Communicating with clients, including financial promotions

#### Section 4.12 : Restrictions on the promotion of non-mainstream pooled investments

<table>
<thead>
<tr>
<th>(5) Title of Exemption</th>
<th>Promotion to:</th>
<th>Promotion of a non-mainstream pooled investment which is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>12. Non-recognised UCITS</td>
<td>Any person.</td>
<td>Any EEA UCITS scheme which is not a recognised scheme, provided the following requirements are met:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(1) the firm considers it is likely to be suitable for that client based on a preliminary assessment of the client's profile and objectives; and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(2) the firm provides that client with the same product information as it would be required to provide by COBS 14.2 if the scheme was a recognised scheme.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>[See COBS 4.12.5G (2).]</td>
</tr>
<tr>
<td>13. US persons</td>
<td>A person who is classified as a United States person for tax purposes under United States legislation or who owns a US qualified retirement plan.</td>
<td>Any investment company registered and operated in the United States under the Investment Company Act 1940.</td>
</tr>
</tbody>
</table>

The following Notes explain certain words and phrases used in the table above.

**Note 1** Promotion of non-mainstream pooled investments to a category of person includes any nominee company acting for such a person.

**Note 2** A *company* is 'connected' with another *company* if:
- (a) they are both in the same *group*; or
- (b) one *company* is entitled, either alone or with another *company* in the same *group*, to exercise or control the exercise of a majority of the voting rights attributable to the *share* capital, which are exercisable in all circumstances at any general meeting of the other *company* or of its *holding company*.

**Note 3** A *person* is connected with a *firm* if it acts as an *introducer* or *appointed representative* for that *firm* or if it is any other *person*, regardless of *authorisation* status, who has a relevant business relationship with the *firm*.

**Note 4** In deciding whether a promotion is permitted under the rules of this section or under section 238 of the Act, *firms* may use the *client* categorisation regime that applies to business other than MiFID or equivalent third country business. (This is the case even if the *firm* will be carrying on a MiFID activity at the same time as or following the promotion.)
Advice and preliminary assessment of suitability

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 or 9A (as applicable). Firms should also be mindful of the appropriateness requirements in COBS 10 and 10A 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 or 9A (as applicable) 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 or 9A apply (as applicable). However, it requires that the firm takes 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

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. Annual income for these purposes does not include money withdrawn from my pension savings (except where the withdrawals are used directly for income in retirement).
- 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; or
  (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; or any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).

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 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 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

(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 4.12.6 R) 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

(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 4.12.7 R) 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
COBS 4 : Communicating with clients, including financial promotions

Section 4.12 : Restrictions on the promotion of non-mainstream pooled investments

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

(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 4.12.8 R) 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

(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 8.14.3 G to PERG 8.14.13 G 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.

**Electronic documents**

4.12.14 (G) In this section:

(1) any requirement that a document is signed may be satisfied by an electronic signature or electronic evidence of assent; and

(2) any references to writing should be construed in accordance with [GEN 2.2.14R] and its related guidance provisions.
**4.13 UCITS**

Application

4.13.1 R

(1) This section applies to a firm in relation to a communication to a client, including an excluded communication, that is a marketing communication within the meaning of the UCITS Directive.

(2) This section does not apply to:

(a) image advertising; or

(b) the instrument constituting the fund, the prospectus, the key investor information or the periodic reports and accounts of either a UCITS scheme or an EEA UCITS scheme.

[Note: recital (58) of the UCITS Directive]

Marketing communications relating to UCITS schemes or EEA UCITS schemes

4.13.2 R

(1) A firm must ensure that a marketing communication that comprises an invitation to purchase units in a UCITS scheme or EEA UCITS scheme and that contains specific information about the scheme:

(a) makes no statement that contradicts or diminishes the significance of the information contained in the prospectus and the key investor information document or EEA key investor information document for the scheme;

(b) indicates that a prospectus exists for the scheme and that the key investor information document or EEA key investor information document is available; and

(c) specifies where and in which language such information or documents may be obtained by investors or potential investors or how they may obtain access to them.

(2) Where a UCITS scheme or an EEA UCITS scheme may invest more than 35% of its scheme property in transferable securities and money market instruments issued or guaranteed by an EEA State, one or more of its local authorities, a third country or a public international body to which one or more EEA States belong, the firm must ensure that a marketing communication relating to the scheme contains a prominent statement drawing attention to the investment policy and indicating the particular EEA States, local authorities, third countries or public international bodies in the securities of which the scheme intends to invest or has invested more than 35% of its scheme property.

(3) Where a UCITS scheme or EEA UCITS scheme invests principally in units in collective investment schemes, deposits or derivatives, or
replicates a stock or debt securities index in accordance with ■ COLL 5.2.31 R (Schemes replicating an index) or equivalent national measures implementing article 53 of the UCITS Directive, the firm must ensure that a marketing communication relating to the scheme contains a prominent statement drawing attention to the investment policy.

(4) Where the net asset value of a UCITS scheme or EEA UCITS scheme has, or is likely to have, high volatility owing to its portfolio composition or the portfolio management techniques that are or may be used, the firm must ensure that a marketing communication relating to the scheme contains a prominent statement drawing attention to that characteristic.

[Note: articles 54(3), 70(2), 70(3) and 77 of the UCITS Directive]

Marketing communications relating to a feeder UCITS

4.13.3 R

A firm must ensure that a marketing communication (other than a key investor information document or EEA key investor information document) relating to a feeder UCITS contains a statement that the feeder UCITS permanently invests at least 85% in value of its assets in units of its master UCITS.

[Note: article 63(4) of the UCITS Directive]
4.14 Restrictions on the promotion of speculative illiquid securities to retail clients

Application and purpose

4.14.1 (1) This section contains temporary product intervention rules and is intended to ensure that financial promotions relating to speculative illiquid securities are not communicated to ordinary retail investors.

(2) The rules in this section therefore restrict firms approving or communicating financial promotions in relation to speculative illiquid securities which are addressed to or disseminated in such a way that they are likely to be received by a retail client, subject to certain exemptions.

(3) The rules also ensure financial promotions contain prominent information on key risks, costs and charges related to the speculative illiquid security.

(4) The rules reflect the often complex and high-risk nature of speculative illiquid securities.

(5) The definition of speculative illiquid security can be found in COBS 4.14.17R.

(6) The temporary product intervention rules in this section will cease to have effect on 31 December 2020.

Restriction on the promotion of speculative illiquid securities to retail clients

4.14.2 (1) A firm must not communicate or approve a financial promotion in relation to a speculative illiquid security where that financial promotion 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 4.14.3R.

Exemptions from the restrictions on the promotion of speculative illiquid securities

4.14.3 (1) The restriction in COBS 4.14.2R does not apply if the financial promotion falls within an exemption in the table in (4) below.

(2) Where the middle column in the table in (4) refers to promotion to a category of person, this means that the financial promotion:

(a) is made only to recipients who the firm has taken reasonable steps to establish are persons in that category; or
Section 4.14 : Restrictions on the promotion of speculative illiquid securities to retail clients

(b) is directed at recipients in a way that may reasonably be regarded as designed to reduce, so far as possible, the risk of acquisition of a speculative illiquid security by persons who are not in that category.

(3) A firm may rely on more than one exemption in relation to the same financial promotion.

<table>
<thead>
<tr>
<th>(4) Title of exemption</th>
<th>Promotion to:</th>
<th>Promotion of speculative illiquid security which is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Certified high net worth investor</td>
<td>An individual who meets the requirements set out in COBS 4.14.14R or a person (or persons) legally empowered to make investment decisions on behalf of such an individual.</td>
<td>Any speculative illiquid security the firm considers is likely to be suitable for that individual, based on a preliminary assessment of the client’s profile and objectives. [See COBS 4.14.4G].</td>
</tr>
<tr>
<td>2. Certified sophisticated investor</td>
<td>An individual who meets the requirements set out in COBS 4.14.15R, including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the firm’s client.</td>
<td>Any speculative illiquid security.</td>
</tr>
<tr>
<td>3. Self-certified sophisticated investor</td>
<td>An individual who meets the requirements set out in COBS 4.14.16R including an individual who is legally empowered (solely or jointly with others) to make investment decisions on behalf of another person who is the firm’s client.</td>
<td>Any speculative illiquid security the firm considers is likely to be suitable for that individual, based on a preliminary assessment of the client’s profile and objectives. [See COBS 14.14.4G]</td>
</tr>
<tr>
<td>4. Excluded communications</td>
<td>Any person.</td>
<td>Any speculative illiquid security, provided the financial promotion is an excluded communication.</td>
</tr>
</tbody>
</table>

Preliminary assessment of suitability

4.14.4 (1) A firm which wishes to rely on exemptions 1 (certified high net worth investor) or 3 (self-certified sophisticated investor) as provided under COBS 4.14.3R(4), should note that these exemptions require a preliminary assessment of suitability before promotion of the speculative illiquid security to clients (in addition to other requirements).

(2) 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
Section 4.14: Restrictions on the promotion of speculative illiquid securities to retail clients

COBS 4: Communicating with clients, including financial promotions

complies with the rules in ■ COBS 9 or ■ 9A (as applicable) on suitability.

(3) 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 speculative illiquid security being promoted, in which case the requirements in ■ COBS 9 or ■ 9A apply (as applicable). However, it requires that the firm takes reasonable steps to acquaint itself with the client’s profile and objectives to ascertain whether the speculative illiquid security under contemplation is likely to be suitable for the client. The firm should not promote the speculative illiquid security to the client if it does not consider it likely to be suitable for that client following such preliminary assessment.

Requirements governing the form and content of financial promotions for speculative illiquid securities

Subject to ■ COBS 4.14.2R and ■ COBS 4.14.3R, a firm must not communicate or approve a financial promotion which relates to a speculative illiquid security unless it contains:

(1) a risk warning that complies with ■ COBS 4.14.6R;
(2) if applicable, the date on which the financial promotion was approved; and
(3) statements that comply with ■ COBS 4.14.9R disclosing all costs, charges and commission.

(1) For the purposes of ■ COBS 4.14.5R(1), and subject to ■ COBS 4.14.6R(2) and ■ COBS 4.14.6R(3), the financial promotion must contain the following risk warning:

You could lose all of your money invested in this product.
This is a high-risk investment and is much riskier than a savings account

(3) Where the financial promotion contains a reference to an innovative finance ISA, the risk warning is as follows:

You could lose all of your money invested in this product
This is a high-risk investment and is much riskier than a savings account
ISA eligibility does not guarantee returns or protect you from losses

(3) 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:

You could lose all of your money invested in this product

(4) Where the financial promotion does not appear on a website or mobile application, the risk warning must be provided in a durable medium.
4.14.7 The relevant risk warning in COBS 4.14.6R must be:

(1) prominent;
(2) contained within its own border and with bold 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.

4.14.8 The relevant risk warning, including the font size, should be:

(1) proportionate to the financial promotion, taking into account the content, size and orientation of the financial promotion as a whole; and
(2) published so that it is clearly legible against a neutral background.

4.14.9 For the purposes of COBS 4.14.5R(3) the financial promotion must contain:

(1) a statement which expresses as a percentage the total amount of the capital raised by the issue of the speculative illiquid security which will be paid out in costs, fees, charges and commissions and other expenses to any third party;
(2) a statement which expresses as a cash sum the percentage referred to in (1) above; and
(3) in addition to the statements in (1) and (2) above, a statement which provides a breakdown of the actual or potential expenditure to be paid out of an investor’s capital and details of the third party (or parties) who will receive it.

4.14.10 There is an illustration of how a firm should comply with COBS 4.14.9R(2) in (2) below.

(2) Where a firm pays 30% of the total amount of capital raised by the issue of speculative illiquid securities towards costs, fees, charges and commissions and other expenses to any third party, the statement should say: “For every £100 you invest, £30 will be paid to third parties to meet costs, fees, charges and commissions.”

4.14.11 The statements providing the percentage figure in COBS 4.14.9R(1) and the cash sum in COBS 4.14.9R(2) must be:

(1) prominent;
(2) contained together within their own border and with bold text;
(3) immediately follow the most prominent reference to the expected return on the speculative illiquid security; and
(4) published so that they are clearly legible against a neutral background.
The statement providing the breakdown of expenditure in COBS 4.14.9R(3) should be included in the financial promotion in a clear and prominent way.

The purpose of the statements required by COBS 4.14.9R is to enable an investor to consider the proportion of capital raised by an issue of speculative illiquid securities that will not be invested. This information should help the investor to assess the risk that the issuer will be unable to pay any advertised interest payments or otherwise to repay the investor’s capital at maturity.

Definitions of certified high net worth and sophisticated investors

A high net worth investor is an individual who has signed, within the period of twelve months ending on 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 speculative illiquid securities. The exemption relates to 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. Annual income for these purposes does not include money withdrawn from my pension savings (except where the withdrawals are used directly for income in retirement).

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; or

(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; or

(d) any withdrawals from my pension savings (except where the withdrawals are used directly for income in retirement).

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 speculative illiquid securities.

Signature:
Date:
A certified sophisticated investor is an individual who:

1. 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 speculative illiquid securities; and

2. 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 speculative illiquid securities. 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 speculative illiquid securities.

   Signature:
   Date: “

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:

“I declare that I am a self-certified sophisticated investor for the purposes of the restriction on promotion of speculative illiquid securities. 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 speculative illiquid securities;

(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 speculative illiquid securities.

Signature: 
Date: “

**Definition of speculative illiquid security**

For the purposes of this section, and subject to COBS 4.14.18R, a speculative illiquid security is a debenture or preference share which:

1. has a denomination or minimum investment of £100,000 or less; and
2. has been issued, or is to be issued, in circumstances where the issuer or a member of the issuer's group uses, will use or purports to use some or all of the proceeds of the issue directly or indirectly for one or more of the following:
   - the provision of loans or finance to any person other than a member of the issuer's group;
   - buying or acquiring investments (whether they are to be held directly or indirectly);
   - buying property or an interest in property (whether it is to be held directly or indirectly);
   - paying for or funding the construction of property.

A debenture or preference share is not a speculative illiquid security where one or more of the exemptions in (1), (3) or (4) below applies.

1. This exemption applies where:
   - the issuer or a member of the issuer's group uses or purports to use the proceeds of the issue for the purpose of the activities in COBS 4.14.17R(2)(c) or (d) (buying or constructing property); and
   - the relevant property is or will be used by the issuer or a member of the issuer's group for a general commercial or industrial purpose which it carries on.

2. The exemption in (1) will not apply if the ability of the issuer to pay in relation to the debenture or preference share:
   - any coupon or other income; and/or
   - capital at maturity
   is wholly or predominantly linked to, contingent on, sensitive to or dependent on a return generated as a result of the matters referred to in COBS 4.14.17R(2)(c) or (d).

3. This exemption applies where the debenture or preference share is:
   - issued, or to be issued, by a credit institution;
   - a non-mainstream pooled investment;
   - a readily realisable security; or
(d) a P2P agreement.

(4) This exemption applies where the issuer is a property holding vehicle.

1. For the purposes of COBS 4.14.18R(1)(b), a general commercial or industrial purpose includes the following:

(a) a commercial activity, involving the purchase, sale and/or exchange of goods or commodities and/or the supply of services (other than property development or construction services); or

(b) an industrial activity involving the production of goods; or

(c) a combination of (a) and (b).

2. For the purposes of COBS 4.14.18R(1)(b), a general commercial or industrial purpose does not include investment to generate a pooled return.

Guidance on general commercial or industrial purpose

1. COBS 4.14.17R provides that a debenture or preference share will fall within the definition of a speculative illiquid security where the proceeds of the issue are to be used by the issuer or a member of the issuer’s group to fund various activities including the buying or construction of property.

2. However, COBS 4.14.18R(1) provides an exemption in cases where the property which is bought or constructed is or will be used by the issuer or a member of the issuer’s group for a general commercial or industrial purpose which it carries on.

3. General commercial or industrial purpose is defined in COBS 4.14.19R.

4. The effect of the exemption in COBS 4.14.18R(1) is that a debenture or preference share will not be a speculative illiquid security where the proceeds of the issue are used by the issuer or a member of the issuer’s group to buy or construct a property which is used by the issuer or group member for the purposes of its own commercial or industrial activities.

5. For instance:

(a) where a retailer issues a debenture or preference share and uses the proceeds to build a shop, the debenture or preference share will benefit from the exemption because the property is used by the retailer for its own commercial activities (in this case, the sale of goods);

(b) where a property developer issues a debenture or preference share and uses the proceeds to fund the costs of a property development or construction of property, which is intended to be sold, it will not benefit from the exemption because the development will not be used by the developer itself, and property development and construction services are excluded from the definition of general commercial or industrial purpose.

(c) where a company issues a debenture or preference share to fund the costs of constructing a power station which the company intends to operate itself with a view to selling the electricity it
produces, the *debenture or preference share* will benefit from the exemption (unless § COBS 4.14.18R(2) applies). That is because it will use the property for its own commercial or industrial activities (generating electricity). However, *firms* should also consider § COBS 4.14.18R(2) and the guidance in (6) below.

(6) § COBS 4.14.18R(2) provides that the general commercial or industrial purposes exemption does not apply where the ability of the issuer to pay the *coupon* or other income or to repay capital on maturity in relation to the *debenture or preference share* is wholly or predominantly linked to, contingent on, sensitive to or dependent on the return generated as a result of the matters referred to in § COBS 4.14.17R(2)(c) or § (d) (buying or constructing property).

(7) The effect of the above is that where a company issues a *debenture or preference share* for the purpose of funding the construction of a particular project and the company’s ability to pay interest on the *debenture or preference share* or repay capital depends on the success of that project, the exemption in § COBS 4.14.18R(1) will not apply. In those circumstances, the *debenture or preference share* will be a *speculative illiquid security* unless one of the other exemptions in § COBS 4.14.18R applies.