

Chapter 4

Communicating with clients, including financial promotions

4.12 Restrictions on the promotion of non-mainstream pooled investments

Restrictions on the promotion of non-mainstream pooled investments

- 4.12.3 **R**
- (1) A *firm* must not *communicate* or *approve* an invitation or inducement to participate in, acquire, or underwrite a *non-mainstream pooled investment* where that invitation or inducement is addressed to or disseminated in such a way that it is likely to be received by a *retail client*.
 - (2) The restriction in (1) is subject to **COBS 4.12.4 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 **R**
- (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.

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

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
<p>4. Eligible employees</p>	<p>An eligible <i>employee</i>, that is, a <i>person</i> who is:</p> <ul style="list-style-type: none"> (1) an officer; (2) an <i>employee</i>; (3) a former officer or <i>employee</i>; or (4) a member of the immediate family of any of (1) - (3), of an employer which is (or is in the same <i>group</i> as) the <i>firm</i>, or which has accepted responsibility for the activities of the <i>firm</i> in carrying out the <i>designated investment business</i> in question. 	<p>1. A <i>non-mainstream pooled investment</i>, the instrument constituting which:</p> <ul style="list-style-type: none"> A. restricts the property of the <i>non-mainstream pooled investment</i>, apart from cash and near cash, to: <ul style="list-style-type: none"> (1) (where the employer is a company) <i>shares</i> in and <i>debentures</i> of the <i>company</i> or any other connected <i>company</i>; [See Note 2.] (2) (in any case), any property, provided that the <i>non-mainstream pooled investment</i> takes the form of: <ul style="list-style-type: none"> (i) a limited <i>partnership</i>, under the terms of which the employer (or connected <i>company</i>) will be the unlimited partner and the eligible employees will be some or all of the limited partners; or (ii) a trust which the <i>firm</i> reasonably believes not to contain any risk that any eligible employee may be liable to make any further payments (other than <i>charges</i>) for <i>investment</i> transactions earlier entered into, which the eligible <i>employee</i> was not aware of at the time he entered into them; and B. (in a case falling within A(1) above) restricts participation in the <i>non-mainstream pooled investment</i> to eligible <i>employees</i>, the employer and any connected <i>company</i>.

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

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
sophisticated investors	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 <i>person</i> who is the <i>firm's client</i> .	<p><i>pooled investment</i> the <i>firm</i> considers is likely to be suitable for that <i>client</i>, based on a preliminary assessment of the <i>client's</i> profile and objectives.</p> <p>[See COBS 4.12.5G (2)]</p>
10. Solicited advice	<i>Any person.</i>	<p>Any <i>non-mainstream pooled investment</i>, provided the communication meets all of the following requirements:</p> <p>(a) the communication only amounts to a <i>financial promotion</i> because it is a <i>personal recommendation</i> on a <i>non-mainstream pooled investment</i>;</p> <p>(b) the <i>personal recommendation</i> is made following a specific request by that <i>client</i> for advice on the merits of investing in the <i>non-mainstream pooled investment</i>; and</p> <p>(c) the <i>client</i> has not previously received a <i>financial promotion</i> or any other communication from the <i>firm</i> (or from a <i>person</i> connected to the <i>firm</i>) which is intended to influence the <i>client</i> in relation to that <i>non-mainstream pooled investment</i>. [See Note 3.]</p>
11. Excluded communications	<i>Any person.</i>	<p>Any <i>non-mainstream pooled investment</i>, provided the <i>financial promotion</i> is an <i>excluded communication</i>.</p> <p>[See COBS 4.12.12 G and COBS 4.12.13 G.]</p>

(5) Title of Exemption	Promotion to:	Promotion of a non-mainstream pooled investment which is:
12. Non-recognised UCITS	Any person.	Any EEA UCITS scheme which is not a recognised scheme, provided the following requirements are met: (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 (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. [See COBS 4.12.5G (2).]
13. US persons	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.	Any investment company registered and operated in the United States under the Investment Company Act 1940.

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

- Note 1 Promotion of *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

4.12.5

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- (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

4.12.6

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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

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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

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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

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- (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

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- (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

listed companies, life policies or units in regulated collective investment schemes (other than qualified investor schemes) is generally unlikely to possess the requisite knowledge to adequately understand the risks associated with investing in non-mainstream pooled investments.

(b) In exceptional circumstances, however, the *retail client* may have acquired the requisite knowledge through means other than his own investment experience, for example, if the *retail client* is a professional of several years' experience with the design, operation or marketing of complex investments such as *options, futures, contracts for differences or non-mainstream pooled investments*.

4.12.11 G

- (1) A *firm* which wishes to rely on any of the *self-certified sophisticated investor* exemptions (see Part II of the Schedule to the *Promotion of Collective Investment Schemes Order*, Part II of Schedule 5 to the *Financial Promotions Order* and ■ **COBS 4.12.8 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 G

- (1) A *firm* which wishes to rely on one of the *one-off promotion* exemptions provided by the *Promotion of Collective Investment Schemes* or the *Financial Promotion Order* to promote a *non-mainstream pooled investment* to a *retail client* should have regard to its duties under the *Principles* and the *client's best interests rule*. In particular, the *firm* should consider whether the promotion of the *non-mainstream pooled investment* is in the interests of the *client* and whether it is fair to make the promotion to that *client* on the basis of a *one-off promotion* exemption.
- (2) The *one-off promotion* exemptions permit the promotion of investments to clients under certain conditions (see ■ **PERG 8.14.3 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

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- (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

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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.