

Chapter 4

Communicating with clients, including financial promotions

4.2 Fair, clear and not misleading communications

The fair, clear and not misleading rule

4.2.1

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- (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

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- (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*.

(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 G 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 G 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 G 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

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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 rule*, a contravention of that *rule* does not give rise to a right of action under section 138D of the Act.