

Chapter 4

Communicating with clients, including financial promotions

4.5A Communicating with clients (including past, simulated past and future performance) (MiFID provisions)

Application

- 4.5A.1** **R** (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 **R** Provisions in this section marked "UK" apply in relation to *MiFID optional exemption business* as if they were *rules* (see **■** COBS 1.2.2G).

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

General requirements

- 4.5A.3** **UK** 44(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.
- 44(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 **G** 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 **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.
- 4.5A.6 **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.

Comparative information.....

- 4.5A.7 **UK** 44(3) 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 UK 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 UK 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 UK 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 pounds sterling, 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*]

Simulated past performance

4.5A.12 UK

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.12UK, the conditions referred to in article 44(5)(b) can be found reproduced in ■ COBS 4.5A.10UK.

Future performance

4.5A.14 UK

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.14UK. 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 **UK** 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*]

Funds investing in inherently illiquid assets (FIAs).....

4.5A.17 **R** (1) This *rule* applies to any *financial promotion* relating to a *FIA* that is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client*, except the *FIA's prospectus*.

(2) A *firm* must ensure that the following risk warning is given:

“[Name of fund] invests in assets that may at times be hard to sell. This means that there may be occasions when you experience a delay or receive less than you might otherwise expect when selling your investment. For more information on risks, see the prospectus and key investor information document.”

(3) If the *financial promotion* is a *non-real time financial promotion*, the risk warning must be prominently placed in the *financial promotion* in a font size that is at least equal to the predominant font size used throughout the communication.

4.5A.18 **G** The *rules* in ■ COBS 4.5A do not apply to the form or content of a *NURS-KII document* (see ■ COBS 4.1.7AR (Modification relating to the KII Regulation)).