

## **FINANCIAL PROMOTIONS (PAST PERFORMANCE) INSTRUMENT 2003**

### **Powers exercised**

- A. The Financial Services Authority makes this instrument in the exercise of the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
- (1) section 138 (General rule-making power);
  - (2) section 145 (Financial promotion rules);
  - (3) section 156 (General supplementary powers);
  - (4) section 157(1) (Guidance).
- B. The rule-making powers listed above are specified for the purpose of section 153(2) of the Act (Rule-making instruments).

### **Commencement**

- C. This instrument comes into force on 1 June 2004.

### **Amendments to the Conduct of Business sourcebook**

- D. The Conduct of Business sourcebook is amended in accordance with the Annex to this instrument.

### **Citation**

- E. This instrument may be cited as the Financial Promotions (Past Performance) Instrument 2003.

By Order of the Board  
18 December 2003

## Annex

### Amendments to the Conduct of Business sourcebook

In this Annex underlining indicates new text and striking through indicates deleted text.

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#### Non-real time financial promotions: guidance on clear, fair and not misleading

- 3.8.7 G (1) It cannot be assumed that recipients necessarily have an understanding of the *investment* or service being promoted. The use of terms that are ambiguous, or the targeting of an audience which is unlikely to understand the promotion, are matters which are relevant to an assessment of whether the promotion is 'clear, fair and not misleading'. If a *non-real time financial promotion* is specially designed for a targeted collection of recipients who are reasonably believed to have particular knowledge of the *investment* or service being promoted, this fact should be made clear.

...

...

- 3.8.9 G (1) ...
- (2) ...
- (3) In giving a fair and adequate explanation of the *investment* or service being promoted *firms* should avoid:
- (a) ...
- (b) ...
- (c) drawing attention to favourable tax treatment without stating that this might not continue in the future; and
- (d) drawing attention to an *investment* or service's past performance, or placing emphasis on past performance, relative to other information given about the product in the *financial promotion*.

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### Specific non-real time financial promotions: past performance

3.8.11 R A *specific non-real time financial promotion* which gives information about the past performance of ~~specified~~ a specified investments or of a *firm* must include:

- (1) suitable text which states unambiguously, and without reservation, that past performance should not be seen as an indication of future performance:
  - (a) ~~that is specifically designed as suitable for the type of *financial promotion* being promoted and its target audience; and~~ that is specifically designed for the type of *financial promotion* concerned and its target audience; and
  - (b) ~~which draws attention to the fact that past performance will not necessarily be repeated~~ which is presented legibly in the main text of the *financial promotion*; and
- (2) information relating to a relevant and sufficient period of past performance to provide a fair and balanced indication of the performance.

3.8.12 G (1) The purpose of COB 3.8.11R is to:

- (a) ...
- (b) ~~to encourage *firms* to draft warnings which are tailored to fit the design of the *financial promotion* and the audience to which they are primarily directed. Therefore, so,~~ for example, text used in a warning included in a specialist magazine may not be ~~useful~~ appropriate in a *financial promotion* in the popular press.
- (2) Any of the following may mean that a *specific non-real time financial promotion* does not meet the requirement of COB 3.8.4 R(1) of being fair, clear and not misleading:

(a) ...

...

(e) a comparison with *deposits* without an indication in clear terms, and with equal prominence, that the *investment*

does not include the security of capital which is ~~afforded~~  
~~under~~ characteristic of a deposit with a bank or building  
society.

- (3) *Firms* need to take special care when presenting euro-based information as new factors should be taken into account in the calculation ~~and/or~~ comparison of the performance of some products. There may be some techniques of presenting past performance data which can no longer be used ~~because when if~~ the factoring in of euro conversion is factored into the calculation it produces a misleading result. *Guidance* cannot deal with all the circumstances in which performance data are used, and it is therefore important for *firms* to look at the end result and the context in which the information is presented to ensure it does not breach *COB* 3.8.4 R(1) (clear, fair and not misleading).
- (4) ....
- (5) *Firms* are reminded of the *guidance* in *COB* 3.6.4G(2) about ensuring that specific non-real time financial promotions remain compliant with *COB* 3. To meet *COB* 3.8.11R(2), a specific non-real time financial promotion that contains past performance information and is intended for use over a period of time should make clear:
- (a) the period of time to which the past performance information relates;
  - (b) where relevant, the fact that this information may not be current; and
  - (c) if (b) applies, an explanation of where up-to-date past performance information may be found.
- (6) Where a specific non-real time financial promotion, such as a brochure or a promotion on the Internet, includes past performance information that is presented over a number of pages, the past performance warning required by *COB* 3.8.11R(1) should be included on each page on which past performance information is presented.

- (7) Information about past performance should normally be based on the actual performance of a fund or funds for the entire period. Where past performance information for the actual fund does not exist, a *firm* may only include hypothetical past performance information in the promotion if the result will be clear, fair and not misleading. Past performance information that is based entirely on hypothetical past performance information will be acceptable only where it relates to a fund that is not and has not been actively managed, and where prices on the relevant markets are unlikely to have been influenced by the operation of the fund had it been in existence.
- (8) In (7), hypothetical past performance information means information that has been constructed about the performance of a fund during a period for which no actual performance information is available, using the terms of the product and historical financial information. This would not include past performance information that is based on the actual performance of a fund (for example, where the pricing structure or other terms surrounding a product change but the underlying fund remains the same; where an existing fund is merging with another; or where a fund is cloned.)

### **Standardised past performance information**

- 3.8.13 R *A specific non-real time financial promotion, which refers to past performance of a packaged product, must include information about the performance of the packaged product which covers the previous five years (or the whole period if the packaged product has been offered for less than this), ending with the date on which the firm confirms compliance with the rules in this chapter under COB 3.6.1R (or as near as is reasonably practicable).*
- (1) If a firm includes in a *specific non-real time financial promotion* information referring to the past performance of a *packaged product*, it must also include:
- (a) in the case of a *scheme*, unit-linked *life policy* 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 *COB 3.8.13AR*; or
- (b) in the case of a *packaged product* which is not within (a) that:

(i) does not have a fixed term, the performance over the previous five years (or the whole period if the product has been offered for less than this); or

(ii) has a fixed term, the performance over the whole period of the product term;

ending with the date on which the *firm* confirms compliance with the *rules* in this chapter under COB 3.6.1R(or as near as is reasonably practicable).

(2) The information included in accordance with COB 3.8.13R(1) should be no less prominent than any other past performance information.

(3) A specific non-real time financial promotion must not contain any past performance information, including hypothetical past performance information, unless past performance information exists for the previous twelve months (or where COB 3.8.13R(1)(a) applies, for the previous four full quarters).

(4) For the purposes of COB 3.8.13R(1)(a), *firms* 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.

3.8.13A R Table

Specimen table of disclosure of discrete past performance  
This table belongs to COB 3.8.13 R.

Percentage growth

<u>[Fund name]</u>	<u>Quarter /Year – Quarter / Year pgr%</u>	<u>Quarter /Year – Quarter/ Year pgr%</u>	<u>Quarter /Year – Quarter/ Year pgr%</u>	<u>Quarter/ Year – Quarter/ Year pgr%</u>	<u>Quarter/ Year – Quarter/ Year pgr%</u>
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Notes:

1. The table must 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 confirms compliance with the rules in this chapter under COB 3.6.1R.

2. For products with performance data for less than five 12-month periods firms should clearly indicate that performance data does not exist for the relevant periods.

3. No allowance must be made for tax recoveries on income for *pension contracts, individual savings accounts 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 must allow for any net distributions to be reinvested.

6. The price at P1 must be adjusted for any charges since the date of P0 which are based on a proportion of the fund and are levied by the cancellation of units.

- 3.8.14 G (1) The information required by *COB 3.8.13R(1)(b)* should be given on:
- (a) ...
  - (b) an offer to offer, bid to bid or offer to bid basis (which should be stated) where there is a comparison of performance with an index or with movements in the price of *units*; or
  - (c) ....
- (2) ....
- (3) ....

- 3.8.15 R Information about past performance in a *specific non-real time financial promotion* must not be presented in such a manner as to suggest that:
- (1) it constitutes a *projection* illustrating the possible future value of an investment contract or fund; or
  - (2) similar returns will be achieved in the future.
- 3.8.16 G In determining whether *COB* 3.8.15R has been satisfied, the *FSA* will take into account:
- (1) the way in which the information about past performance has been presented;
  - (2) how it is positioned in the *financial promotion*; and
  - (3) the wording which accompanies it.

Paragraph headings, or the positioning of information about past performance and current yields next to each other, can sometimes contribute to an overall impression that past performance and future prospects are linked.

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