

FUTURE SERVICE RESTRICTIONS INSTRUMENT 2017

Powers exercised

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (the “Act”):
 - (a) section 137A (The FCA’s general rules);
 - (b) section 137T (General supplementary powers);
 - (c) section 138D (Action for damages); and
 - (d) section 139A (Power of the FCA to give guidance); and
 - (2) in relation to the Glossary of definitions, the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the FCA’s Handbook.
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 3 January 2018, immediately after the Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument 2017.

Amendments to the Handbook

- D. The Glossary of definitions is amended in accordance with Annex A to this instrument.
- E. The Conduct of Business sourcebook (COBS) is amended in accordance with Annex B to this instrument.

Citation

- F. This instrument may be cited as the Future Service Restrictions Instrument 2017.

By order of the Board
22 June 2017

Annex A

Amendments to the Glossary of definitions

Insert the following new definitions in the appropriate alphabetical position. The text is not underlined.

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| <i>future service restriction</i> | <p>any provision in an agreement between a <i>firm</i> and a <i>client</i> which, in addition to the products or services to which the agreement relates, grants the <i>firm</i> or an <i>affiliated company</i> of the <i>firm</i>:</p> <ol style="list-style-type: none"> (1) the right to provide any future <i>primary market and M&A services</i> to the <i>client</i>; or (2) the right to provide future <i>primary market and M&A services</i> to the <i>client</i> before the <i>client</i> is able to accept any offer from a third party to provide those services. |
| <i>primary market and M&A services</i> | <p>(in <i>COBS</i> 11A.2) services that constitute <i>designated investment business</i> or <i>MiFID business</i> and that are either:</p> <ol style="list-style-type: none"> (1) services provided to an <i>issuer</i> comprising structuring, underwriting and/or placing an issue of <i>shares</i>, <i>warrants</i>, <i>certificates representing certain securities</i> or <i>debentures</i>; or (2) advice and services relating to mergers and the purchase or disposal of undertakings. |

Annex B

Amendments to the Conduct of Business sourcebook (COBS)

In this Annex, underlining indicates new text and striking through indicates deleted text, unless otherwise stated.

After *COBS* 11A.1, insert the following. The text is new and is not underlined.

11A.2 Prohibition of future service restrictions

- 11A.2.1 R Unless exempted in *COBS* 11A.2.2R, a *firm* must not enter into an agreement in writing with a *client* that contains a *future service restriction*.
- 11A.2.2 R *COBS* 11A.2.1R does not apply to *future service restrictions* that:
- (1) are included in an agreement in writing for the *firm* to provide a bridging loan; and
 - (2) only involve the *firm* providing the *primary market and M&A services* to which the bridging loan relates.
- 11A.2.3 R For the purposes of *COBS* 11A.2.2R, “bridging loan” means a loan provided to a client for the purpose of providing short-term financing, and with the commercial intention that it be replaced with another form of financing (such as a *debenture* issue or a *share* issue).
- 11A.2.4 G A loan could be considered a bridging loan for the purposes of *COBS* 11A.2.3 when, for example:
- (1) it is expressly documented that the intention of both parties is that the loan offers a temporary solution until the client is able to obtain longer-term financing from the capital markets or other future financing;
 - (2) it has a short term, typically of less than four years from signing, or the client is otherwise discouraged from retaining the loan as longer term financing, for example by stepping up the interest rates after an initial short period; and
 - (3) the terms provide that the proceeds from the future financing are used as mandatory pre-payment on the loan.
- 11A.2.5 G
- (1) Agreements for the provision of a specified or certain *primary market and M&A service* by the *firm* to the *client* are not prohibited by *COBS* 11A.2.1R, even where that service will take place in the future.
 - (2) *COBS* 11A.2.1R prohibits *future service restrictions* related to *primary market and M&A services* which may be required in the

future but which, at the date of the agreement, are not yet specified or certain. *Future service restrictions* are prohibited because they prevent a *client* from freely deciding, as and when the need for *primary market and M&A services* arises, which *firm* to appoint to provide those services.

- 11A.2.6 G (1) The *future service restrictions* prohibited by COBS 11A.2.1R relate to services that will be provided in the future.
- (2) An example of restrictions that would therefore not be caught are those which relate to the recuperation of *fees* for work already undertaken by a *firm* in relation to a particular service or transaction when the *client* decides to use another financial institution for the same service or transaction ('tailgunner clauses').
- 11A.2.7 G (1) *Future service restrictions* bind the *client* to use the *firm* (or an *affiliated company*).
- (2) Provisions in an agreement that only give a *firm* the right or opportunity to:
- (a) pitch for future business; or
 - (b) be considered in good faith alongside other providers for future business; or
 - (c) match quotations from other providers, but which do not prevent the *client* from selecting the other providers,
- are not *future service restrictions*. In these cases, the *client* is not obliged to use the *firm* (or an *affiliated company*).

Amend the following as shown.

18.3 Corporate finance business

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Corporate finance business - non-MiFID business

- 18.3.3 R Only the provisions of COBS in the table apply to *corporate finance business* carried on by a *firm* which is not *MiFID or equivalent third country business*.

COBS	Description
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11.7A	Personal account dealing
<u>11A.2</u>	<u>Prohibition of future service restrictions</u>
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