

## OPERATING AN ELECTRONIC SYSTEM IN RELATION TO LENDING (PEER-TO-PEER LENDING) INSTRUMENT 2019

### Powers exercised

- A. The Financial Conduct Authority (“the FCA”) 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 137A (General rule-making power);
  - (2) section 137R (Financial promotion);
  - (3) section 137T (General supplementary powers); and
  - (4) section 139A (Power of the FCA to give guidance).
- 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 9 December 2019.

### Amendments to the Handbook

- D. The modules of the Financial Conduct Authority’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Senior Management Arrangements, Systems and Controls sourcebook (SYSC)	Annex B
Conduct of Business sourcebook (COBS)	Annex C

### Citation

- E. This instrument may be cited as the Operating an Electronic System in Relation to Lending (Peer-to-Peer Lending) Instrument 2019.

By order of the Board  
30 May 2019

## Annex A

### Amendments to the Glossary of definitions

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

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

<i>credit risk assessment</i>	the assessment required by <i>COBS</i> 18.12.5R.
<i>contingency fund</i>	(in relation to an <i>operator of an electronic system in relation to lending</i> ) a fund, trust, <i>body corporate</i> , segregated account or any other arrangement used for the purpose of making payments to a lender when a borrower does not meet its obligations under a <i>P2P agreement</i> .
<i>contingency fund policy</i>	the policy required by <i>COBS</i> 18.12.35R.
<i>outcomes statement</i>	the statement required by <i>COBS</i> 18.12.21R.
<i>P2P portfolio</i>	a collection of agreements that consist wholly of <i>P2P agreements</i> or a combination of <i>P2P agreements</i> and <i>non-P2P agreements</i> facilitated by an <i>operator of an electronic system in relation to lending</i> with the aim of achieving a <i>target rate</i> for a lender.
<i>P2P resolution manual</i>	the manual required by <i>SYSC</i> 4.1.8DBR.
<i>risk management framework</i>	the framework required by <i>COBS</i> 18.12.18R.
<i>target rate</i>	the overall rate of return, however expressed, that an <i>operator of an electronic system in relation to lending</i> offers, in whatever manner, to aim to achieve for a lender using a <i>P2P portfolio</i> .

Amend the following definitions as shown.

<i>default</i>	<ol style="list-style-type: none"> <li>(1) (in relation to the <i>IRB approach</i> and for the purposes of <i>BIPRU</i>) has the meaning in <i>BIPRU</i> 4.3 (The <i>IRB approach</i>: Provisions common to different exposure classes).</li> <li>(2) (in <i>MIPRU</i>) for any credit obligation a borrower has with a <i>firm</i>, an event where: <ol style="list-style-type: none"> <li>(a) the borrower is past the contractual payment due date by more than 90 days; and</li> </ol> </li> </ol>
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- (b) the *firm* reasonably considers that the borrower is unlikely to pay or otherwise fulfil its credit obligations to the *firm*.
- (3) (in relation to an operator of an electronic system in relation to lending) an event where:
- (a) in respect of a P2P agreement that is not secured on property, the borrower is past the contractual payment due date by more than 90 days; or
- (b) in respect of a P2P agreement that is secured on property, the borrower is past the contractual payment due date by more than 180 days.
- management body*
- (1) (other than in (2) or (3)) (in accordance with article 3(7) of CRD and article 4.1(36) of MiFID) the *governing body* and *senior personnel* who are empowered to set the *person's* strategy, objectives and overall direction, and which oversee and monitor management decision-making in the following:
- (a) a *common platform firm* (in relation to the requirements imposed by or under MiFID or MiFIR); or
- (b) a *recognised investment exchange*; or
- (c) a *data reporting services provider*.
- (2) (in COLL and in SYSC 19E and in accordance with article 2(1)(s) of the UCITS Directive), the *governing body* of a *management company* or *depository* of a *UCITS scheme* or an *EEA UCITS scheme*, as applicable, with ultimate decision-making authority comprising the supervisory and the managerial function or only the managerial function, if the two functions are separated.
- (3) (in relation to an operator of an electronic system in relation to lending) the governing body with ultimate decision-making authority comprising the supervisory and the managerial function or, if the two functions are separated, only the managerial function.
- price*
- (1) (in COLL) (in relation to a *unit* in an *authorised fund*) the price of the *unit* calculated in accordance with COLL 6.3 (Valuation and pricing).
- (2) (in COBS) (in relation to an operator of an electronic system in relation to lending):

- (a) at origination of a loan in relation to which a P2P agreement is made, the interest rate to be paid by the borrower to the lender in respect of that P2P agreement;
- (b) in relation to any transaction after the origination of a loan in relation to which a P2P agreement is made, the amount to be paid (or, where the context requires, that was paid), for the present value of the principal and the interest rate to be paid by the borrower, in respect of that P2P agreement.

*supervisory function*

- (1) any function within a *common platform firm* that is responsible for the supervision of its *senior personnel*.
- (2) (in relation to a *management company* and in accordance with article 3(6) of the *UCITS implementing Directive*) the *relevant persons* or body or bodies responsible for the supervision of its *senior personnel* and for the assessment and periodic review of the adequacy and effectiveness of the risk management process and of the policies, arrangements and procedures put in place to comply with its obligations under the *UCITS Directive*.
- (3) (in relation to an operator of an electronic system in relation to lending) any function within the firm that is responsible for the supervision of its senior personnel.

**Annex B**

**Amendments to the Senior Management, Systems and Controls sourcebook (SYSC)**

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

**1 Annex 1 Detailed application of SYSC**

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Part 3

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Table A: Application of the common platform requirements in SYSC 4 to SYSC 10

Provision	COLUMN A	COLUMN A+	COLUMN A++	COLUMN B
SYSC 4	Application to a common platform firm other than to a UCITS investment firm	Application to a UCITS management company	Application to a full-scope UK AIFM of an authorised AIF	Application to all other firms apart from insurers, UK ISPVs, managing agents, the Society, full-scope UK AIFMs of unauthorised AIFs, MiFID optional exemption firms, and third country firms
...	...	...	...	...
SYSC 4.1.8G	...	...	...	...
<u>SYSC 4.1.8AR</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>
<u>SYSC 4.1.8CG</u>	<u>Applies as guidance only to an operator of</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as guidance only to an operator of an</u>

	<u>an electronic system in relation to lending</u>			<u>electronic system in relation to lending</u>
<u>SYSC 4.1.8DG</u>	<u>Applies as guidance only to an operator of an electronic system in relation to lending</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as guidance only to an operator of an electronic system in relation to lending</u>
<u>SYSC 4.1.8DAG</u>	<u>Applies as guidance only to an operator of an electronic system in relation to lending</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as guidance only to an operator of an electronic system in relation to lending</u>
<u>SYSC 4.1.8DBR</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>
<u>SYSC 4.1.8DCR</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>
<u>SYSC 4.1.8DDR</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>	<u>Not applicable</u>	<u>Not applicable</u>	<u>Applies as a rule only to an operator of an electronic system in relation to lending</u>
...	...	...	...	...
<u>SYSC 4.3.1R</u>	...	...	...	...
<u>SYSC 4.3.2R</u>	Not applicable	Rule	Not applicable	Guidance – (but: (a) applies as a

				<i>rule to an operator of an electronic system in relation to lending; and (b) not applicable to incoming EEA firms, incoming Treaty firms or UCITS qualifiers}</i>
SYSC 4.3.2AG	Not applicable	Not applicable	Not applicable	Guidance (but not applicable to incoming EEA firms, incoming Treaty firms, <del>or</del> UCITS qualifiers, or an operator of an electronic system in relation to lending)
...	...	...	...	...

[*Editor's note:* the text in this table takes no account of the amendments in PS19/5 'Brexit Policy Statement: Feedback on CP18/28, CP18/29, CP18/34, CP18/36 and CP19/2' (February 2019).]

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Provision	COLUMN A	COLUMN A+	COLUMN A++	COLUMN B
SYSC 6	Application to a common platform firm other than to a UCITS investment firm	Application to a UCITS management company	Application to a full-scope UK AIFM of an authorised AIF	Application to all other firms apart from insurers, UK ISPVs, managing agents, the Society, full-scope UK AIFMs of unauthorised AIFs, MiFID optional exemption firms, and third country firms
...	..	...	...	...

SYSC 6.1.1AG	...	...	...	...
SYSC 6.1.2R	Not applicable	Rule	Not applicable	Guidance, <u>but applies as a rule to an operator of an electronic system in relation to lending</u>
SYSC 6.1.2AG	Not applicable	Not applicable	Not applicable	Guidance, <u>but does not apply to an operator of an electronic system in relation to lending</u>
SYSC 6.1.3R	Not applicable	Rule	Not applicable	<p>Guidance, <u>but applies as a rule to an operator of an electronic system in relation to lending.</u></p> <p><u>For firms other than an operator of an electronic system in relation to lending, this</u> <del>This</del> provision shall be read with the following additional sentence at the start. “Depending on the nature, scale and complexity of its business, it may be appropriate for a <i>firm</i> to have a separate compliance function. Where a <i>firm</i> has a separate compliance function, the <i>firm</i> should also take into account SYSC 6.1.3R and SYSC 6.1.4R as</p>



				guidance.”
SYSC 6.1.3AG	Not applicable	Not applicable	Not applicable	Guidance, <u>but does not apply to an operator of an electronic system in relation to lending</u>
SYSC 6.1.4R	Not applicable	Rule	Not applicable	(1), (3) and (4): Guidance;  (2):  - Rule for <i>firms</i> which carry on <i>designated investment business</i> with or for <i>retail clients</i> or <i>professional clients</i> .  - Guidance for all other <i>firms</i> .  <u>Applies as a rule to an operator of an electronic system in relation to lending.</u>
SYSC 6.1.4-AG	...	...	...	...
...	...	...	...	...
SYSC 6.1.5R	Not applicable	Rule	Not applicable	- Guidance, <u>but applies as a rule to an operator of an electronic system in relation to lending</u>  - “ <i>investment services and activities</i> ” shall be read as “ <i>financial services and activities</i> ”
SYSC 6.1.6G	Not applicable	Not applicable	Not applicable	Guidance, <u>but</u>

				<u>does not apply to an operator of an electronic system in relation to lending</u>
SYSC 6.1.7R	...	...	...	...
SYSC 6.1.8G	Not applicable	Not applicable	Not applicable	Only applies to an operator of an electronic system in relation to lending
SYSC 6.2.1R	Not applicable	Rule	Not applicable	<u>Guidance, but applies as a rule to an operator of an electronic system in relation to lending</u>
SYSC 6.2.1AG	Not applicable	Not applicable	Not applicable	<u>Guidance, but does not apply to an operator of an electronic system in relation to lending</u>
...	...	...	...	...

Provision	COLUMN A	COLUMN A+	COLUMN A++	COLUMN B
SYSC 7	Application to a common platform firm other than to a UCITS investment firm	Application to a UCITS management company	Application to a full-scope UK AIFM of an authorised AIF	Application to all other firms apart from insurers, UK ISPVs, managing agents, the Society, full-scope UK AIFMs of unauthorised AIFs, MiFID optional exemption firms, <sup>2</sup> and third country firms
...	...	...	...	...
SYSC 7.1.1G	...	...	...	...

SYSC 7.1.2R	Not applicable	Rule for a <i>UCITS investment firm</i> in relation to its non- <i>MiFID business</i> ; otherwise guidance	Not applicable	Guidance, <u>but applies as a rule to an operator of an electronic system in relation to lending</u>
SYSC 7.1.2AG	Not applicable	Not applicable to a <i>UCITS investment firm</i> ; otherwise guidance	Not applicable	Guidance, <u>but does not apply to an operator of an electronic system in relation to lending</u>
SYSC 7.1.2BG	...	...	...	...
SYSC 7.1.3R	Not applicable	Rule for a <i>UCITS investment firm</i> in relation to its non- <i>MiFID business</i> ; otherwise guidance	Not applicable	Guidance, <u>but applies as a rule for an operator of an electronic system in relation to lending</u>
SYSC 7.1.4R	Rule	Rule for a <i>UCITS investment firm</i> ; otherwise guidance	Not applicable	Guidance, <u>but applies as a rule to an operator of an electronic system in relation to lending</u>
SYSC 7.1.4AG	...	...	...	...
...	...	...	...	...
SYSC 7.1.5R	Not applicable	Rule for a <i>UCITS investment firm</i> in relation to its non- <i>MiFID business</i> ; otherwise guidance	Not applicable	Guidance, <u>but applies as a rule to an operator of an electronic system in relation to lending</u>
SYSC 7.1.6R	Not applicable	Rule for a <i>UCITS investment firm</i>	Not applicable	Guidance, <u>but applies as a rule to an operator of an</u>

		in relation to its non-MiFID business; otherwise guidance		<i>electronic system in relation to lending</i>
SYSC 7.1.7R	Not applicable	Rule for a UCITS investment firm in relation to its non-MiFID business; otherwise guidance	Not applicable	Guidance, but applies as a rule to an operator of an electronic system in relation to lending
SYSC 7.1.7AG	Not applicable	Rule for a UCITS investment firm; otherwise guidance	Not applicable	Guidance, but does not apply to an operator of an electronic system in relation to lending
...	...	...	...	...

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Table B: Application of the common platform requirements in SYSC 4 to 10 to MiFID optional exemption firms and third country firms

Provision	COLUMN A MiFID optional exemption firms	COLUMN B Third country firms
SYSC 4 (Note 1)		
...	...	...
SYSC 4.1.8G	...	...
<u>SYSC 4.1.8AR</u>	<u>Rule</u>	<u>Rule</u>
<u>SYSC 4.1.8CG</u>	<u>Guidance</u>	<u>Guidance</u>
<u>SYSC 4.1.8DG</u>	<u>Guidance</u>	<u>Guidance</u>
<u>SYSC 4.1.8DAG</u>	<u>Guidance</u>	<u>Guidance</u>
<u>SYSC 4.1.8DBR</u>	<u>Rule</u>	<u>Rule</u>

<u>SYSC 4.1.8DCR</u>	<u>Rule</u>	<u>Rule</u>
<u>SYSC 4.1.8DDR</u>	<u>Rule</u>	<u>Rule</u>
...	...	...
<p>Note = SYSC 4.1.8AR to SYSC 4.1.8DDR apply as a <i>rule</i> or <i>guidance</i>, as indicated above, <u>only to an operator of an electronic system in relation to lending.</u></p>		

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**4 General organisational requirements**

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**4.1 General requirements**

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4.1.8 G ...

Operators of electronic systems in relation to lending: arrangements to administer loans in the event of platform failure

4.1.8A R (1) ~~An operator of an electronic system in relation to lending must take reasonable steps to ensure that~~ have arrangements are in place to ensure that *P2P agreements* facilitated by it will ~~continue to be~~ have a reasonable likelihood of being managed and administered, in accordance with the contract terms between the firm and its relevant borrower and lender customers, if at any time it ceases to ~~carry on the activity of operating an electronic system in relation to lending~~ manage and administer those P2P agreements.

(2) Under (1), and wherever the requirement in (1) is referenced in the FCA’s rules and guidance, the reference to P2P agreements includes any non-P2P agreement included in a P2P portfolio.

(3) The arrangements under (1) must not be designed to prefer any particular customers or class of customers for whom it manages and administers P2P agreements or non-P2P agreements.

4.1.8B R ~~Any arrangements made under SYSC 4.1.8AR must be notified to lenders under P2P agreements: [deleted]~~

~~(1) when such arrangements are made; or~~

~~(2) if later, when the lender first becomes a lender under a P2P agreement with that operator; or~~

- (3) ~~if the arrangements are changed, when that change is made; and~~
- (4) ~~if the arrangement involves another *firm* taking over the management and administration of *P2P agreements* if the operator ceases to *operate the electronic system in relation to lending*, the notification to lenders must inform lenders of the identity of the *firm* with which the arrangements have been made and how that *firm* will hold the lenders' money.~~

4.1.8C G Arrangements to ensure *P2P agreements* facilitated by the *firm* continue to be managed and administered that are required to be put in place under SYSC 4.1.8AR may include any one or more of the following:

- (1) entering into an arrangement with another *firm* that has the appropriate *permissions* to take over the management and administration of *P2P agreements* if the operator ceases to *operate the electronic system in relation to lending* and, where appropriate;
  - or
  - (a) obtaining prior and informed consent from *lender clients* to fund the continued cost of management and administration of their respective loans, for example through increased commissions; and/or
  - (b) obtaining prior and informed consent from *lender clients* and *borrower clients* for the transfer of the service of managing and administration of *P2P agreements* from the *firm* to that other *firm*; or
- (2) holding sufficient collateral ~~in a segregated account~~ to cover the cost of management and administration while the loan book is wound down, ensuring that the collateral is held through a structure that is ring-fenced in the event of the *firm's* insolvency; or
- (3) ~~entering into an arrangement for another *firm* to act as guarantor for the *P2P agreements* which includes a legally enforceable arrangement to meet the costs of the guarantee in full; or [deleted]~~
- (4) managing the loan book in a way that ensures that income from *P2P agreements* facilitated by the *firm* is sufficient to cover the costs of managing and administering those agreements during the winding down process, taking into account the reduction of the loan pool and fee income from it.

4.1.8D G (1) When designing its arrangements, a *firm* should take into account insolvency the general law to ensure that the insolvency of the *firm* does not prejudice the operation of arrangements that the *firm* has put in place.

(2) A *firm* should consider the need to obtain professional advice on the adequacy of its arrangements. For example, a *firm* may benefit from

obtaining legal advice or advice from a qualified insolvency practitioner on the likelihood of its arrangements securing the required outcome for continuity of management and administration of P2P agreements.

- (3) In assessing the adequacy of its arrangements, a firm should consider, in particular:
- (a) whether any terms included in relevant contracts as part of its arrangements are enforceable, for example terms in customer, service and supplier contracts;
  - (b) the extent to which other practical obstacles could foreseeably prevent the implementation of the arrangements or frustrate the required outcome, including whether the firm will be likely to have sufficient financial resources to fund the implementation of the arrangements at the relevant time;
  - (c) whether the arrangements make adequate provision for any activities that are ancillary to the management and administration of P2P agreements upon which the required outcome is, or could be, dependent;
  - (d) whether, having regard to SYSC 4.1.8AR(3), its arrangements are designed so as not to produce a better outcome for its customers who are party to non-P2P agreements than for customers who are party to P2P agreements;
  - (e) whether its arrangements take into account any relevant security arrangements in relation to loans; and
  - (f) whether its arrangements take into account any relevant tax arrangements for lender clients.
- (4) Firms are reminded of the disclosure requirements in COBS 18.12.28R (Information concerning platform failure).
- (5) Firms may find it useful to refer to the FCA's Wind-down Planning Guide (WDPG) when designing their arrangements.

4.1.8DA      G In line with Principle 11 and SUP 15.3.8G (Communication with the appropriate regulator in accordance with Principle 11), a firm should notify the FCA in writing if it is contemplating:

- (1) ceasing to manage and administer P2P agreements facilitated by it;
- (2) implementing its arrangements under SYSC 4.1.8AR; or
- (3) implementing any other arrangements that have a similar purpose.

4.1.8DB      R An operator of an electronic system in relation to lending must produce and keep up to date a P2P resolution manual which contains information

about the *firm* that, in the event of the *firm's* insolvency, would assist in resolving the *firm's* business of management and administration of *P2P agreements* that it has facilitated. For these purposes, the reference to *P2P agreements* includes any *non-P2P agreement* included in a *P2P portfolio*. It must, as a minimum, include a written explanation of each of the following:

- (1) how the *firm* conducts the business of management and administration of *P2P agreements* that it has facilitated, what the day-to-day operation of that business entails and what resources would be needed to continue that business if the *firm* ceased to carry it on, including a specification of:
  - (a) critical staff and their respective roles;
  - (b) critical premises;
  - (c) the *firm's* IT systems, including details of data storage and data recovery arrangements;
  - (d) the *firm's* record-keeping systems, including how records are organised;
  - (e) all relevant bank accounts and payment facilities;
  - (f) all relevant *persons* outside of the *firm*, and their respective roles, including any outsourced service providers;
  - (g) all relevant legal documentation, including customer, service and supplier contracts;
  - (h) the *firm's* group, using a structure chart showing:
    - (i) the legal entities in the group;
    - (ii) the ownership structure of those entities; and
    - (iii) the jurisdiction of those entities; and
  - (i) how the *firm* holds and manages any security for loans;
- (2) the steps that would need to be implemented under the arrangements in place under SYSC 4.1.8AR in order for *P2P agreements* facilitated by the *firm* to continue to be managed and administered;
- (3) any terms in contracts that may need to be relied on to ensure *P2P agreements* facilitated by it will continue to be managed and administered under those arrangements; and
- (4) how the *firm's* systems can produce the detail specified in COBS 18.12.31R (Ongoing disclosures) for each *P2P agreement* facilitated by it.



4.1.8DC R An operator of an electronic system in relation to lending must put in place arrangements to ensure that its P2P resolution manual would be immediately available to:

- (1) an administrator, receiver, trustee, liquidator or analogous officer appointed in respect of it or any material part of its property; and
- (2) the FCA, on request.

4.1.8DD R A operator of an electronic system in relation to lending must store its P2P resolution manual in the same place as its CASS resolution pack, if CASS 10 (CASS resolution pack) applies to it.

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### **4.3 Responsibility of senior personnel**

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4.3.2 R A firm that is a management company or an operator of an electronic system in relation to lending, must ensure that:

- (1) its *senior personnel* receive on a frequent basis, and at least annually, written reports on the matters covered by SYSC 6.1.2R to ~~SYSC~~ 6.1.5R, SYSC 6.2.1R, SYSC 7.1.2R, SYSC 7.1.3R and SYSC 7.1.5R to ~~SYSC~~ 7.1.7R, indicating in particular whether the appropriate remedial measures have been taken in the event of any deficiencies; and
- (2) the *supervisory function*, if any, receives on a regular basis written reports on the same matters.

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## **6 Compliance, internal audit and financial crime**

### **6.1 Compliance**

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6.1.2 R A firm that is a management company or an operator of an electronic system in relation to lending must, taking into account the nature, scale and complexity of its business, and the nature and range of financial services and activities undertaken in the course of that business, establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the firm to comply with its obligations under the regulatory system, as well as associated risks, and put in place adequate measures and procedures designed to minimise such risks and to enable the FCA to exercise its powers effectively under the regulatory system and, in respect of a management company, to enable any other

competent authority to exercise its powers effectively under the *UCITS Directive*.

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#### Compliance function

- 6.1.3 R A firm that is a management company or an operator of an electronic system in relation to lending must maintain a permanent and effective compliance function which operates independently and which has the following responsibilities:
- (1) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with SYSC 6.1.2R, and the actions taken to address any deficiencies in the *firm's* compliance with its obligations; and
  - (2) to advise and assist the *relevant persons* responsible for carrying out *regulated activities* to comply with the *firm's* obligations under the *regulatory system*.

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- 6.1.4 R In order to enable the compliance function to discharge its responsibilities properly and independently, a firm that is a management company or an operator of an electronic system in relation to lending must ensure that the following conditions are satisfied:
- (1) the compliance function must have the necessary authority, resources, expertise and access to all relevant information;
  - (2) a compliance officer must be appointed and must be responsible for the compliance function and for any reporting as to compliance required by SYSC 4.3.2R;
  - (3) the *relevant persons* involved in the compliance functions must not be involved in the performance of the services or activities they monitor;
  - (4) the method of determining the remuneration of the *relevant persons* involved in the compliance function must not compromise their objectivity and must not be likely to do so.

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- 6.1.5 R A firm that is a management company or an operator of an electronic

system in relation to lending need not comply with SYSC 6.1.4R(3) or SYSC 6.1.4R(4) if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of financial services and activities, the requirements under those *rules* are not proportionate and that its compliance function continues to be effective.

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6.1.8 **G** The exemptions in SYSC 6.1.5R are unlikely to apply to a firm that is an operator of an electronic system in relation to lending where that firm offers lenders a P2P portfolio with a target rate.

## 6.2 Internal audit

6.2.1 **R** A firm that is a management company or an operator of an electronic system in relation to lending must, where appropriate and proportionate in view of the nature, scale and complexity of its business and the nature and range of its financial services and activities, undertaken in the course of that business, establish and maintain an internal audit function which is separate and independent from the other functions and activities of the *firm* and which has the following responsibilities:

- (1) to establish, implement and maintain an audit plan to examine and evaluate the adequacy and effectiveness of the *firm's* systems, internal control mechanisms and arrangements;
- (2) to issue recommendations based on the result of work carried out in accordance with (1);
- (3) to verify compliance with those recommendations;
- (4) to report in relation to internal audit matters in accordance with SYSC 4.3.2R.

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## 7 Risk control

### 7.1 Risk control

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7.1.2 **R** A firm that is a UCITS investment firm or an operator of an electronic system in relation to lending must establish, implement and maintain adequate risk management policies and procedures, including effective procedures for risk assessment, which identify the risks relating to the *firm's* activities, processes and systems, and where appropriate, set the level of risk tolerated by the *firm*.

...

Risk management

7.1.3 R A firm that is a UCITS investment firm or an operator of an electronic system in relation to lending must adopt effective arrangements, processes and mechanisms to manage the risk relating to the *firm's* activities, processes and systems, in light of that level of risk tolerance.

7.1.4 R The *management body* of a *common platform firm* or of an operator of an electronic system in relation to lending must approve and periodically review the strategies and policies for taking up, managing, monitoring and mitigating the risks the *firm* is or might be exposed to, including those posed by the macroeconomic environment in which it operates in relation to the status of the business cycle.

...

...

7.1.5 R A firm that is a UCITS investment firm or an operator of an electronic system in relation to lending must monitor the following:

- (1) the adequacy and effectiveness of the *firm's* risk management policies and procedures;
- (2) the level of compliance by the *firm* and its *relevant persons* with the arrangements, processes and mechanisms adopted in accordance with SYSC 7.1.3R;
- (3) the adequacy and effectiveness of measures taken to address any deficiencies in those policies, procedures, arrangements, processes and mechanisms, including failures by the *relevant persons* to comply with such arrangements or processes and mechanisms or follow such policies and procedures.

7.1.6 R A firm that is a UCITS investment firm or an operator of an electronic system in relation to lending must, where appropriate and proportionate in view of the nature, scale and complexity of its business and the nature and range of the *investment services and activities* undertaken in the course of that business, establish and maintain a risk management function that operates independently and carries out the following tasks:

- (1) implementation of the policies and procedures referred to in SYSC 7.1.2R to SYSC 7.1.5R; and
- (2) provision of reports and advice to *senior personnel* in accordance with SYSC 4.3.2R.

7.1.7 R Where a firm that is a UCITS investment firm or an operator of an electronic system in relation to lending is not required under SYSC 7.1.6R

to maintain a risk management function that functions independently, it must nevertheless be able to demonstrate that the policies and procedures which it has adopted in accordance with SYSC 7.1.2R to SYSC 7.1.5R satisfy the requirements of those *rules* and are consistently effective.

...

## Sch 1 Record keeping requirements

...

### Sch 1.2

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
...				
SYSC 3.2.20R	...	...	...	...
<u>SYSC 4.1.8DBR</u>	<u>The firm's most recent P2P resolution manual</u>	<u>As stated in rule</u>	<u>When the P2P resolution manual is made or updated</u>	<u>None specified (but see SYSC 4.1.8DCR)</u>
...				

## Annex C

## Amendments to the Conduct of Business sourcebook (COBS)

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

#### 4 Communicating with clients, including financial promotions

...

#### 4.7 Direct offer financial promotions

...

##### Non-readily realisable securities and P2P agreements

4.7.7 R (1) Unless permitted by *COBS* 4.7.8R, a *firm* must not *communicate* or *approve a direct~~offer~~ financial promotion* relating to a *non-readily realisable security*, a *P2P* agreement or a *P2P* portfolio to or for *communication* to a *retail client* without the conditions in (2) and (3) being satisfied.

(2) The first condition is that the *retail client* recipient of the *direct offer financial promotion* is one of the following:

- (a) certified as a ‘high net worth investor’ in accordance with *COBS* 4.7.9R;
- (b) certified as a ‘sophisticated investor’ in accordance with *COBS* 4.7.9R;
- (c) self-certified as a ‘sophisticated investor’ in accordance with *COBS* 4.7.9R; or
- (d) certified as a ‘restricted investor’ in accordance with *COBS* 4.7.10R.

(3) The second condition is that the *firm* itself or:

- (a) the *person* who will *arrange* or *deal* in relation to the *non-readily realisable security*; or
- (b) the *person* who will facilitate the *retail client* becoming a *lender* under a *P2P* agreement or a *P2P* portfolio,

will comply with the *rules* on appropriateness (see *COBS* 10 and 10A) or equivalent requirements for any application or order that the *firm* or *person* is aware, or ought reasonably to be aware, is in

response to the *direct offer financial promotion*.

- 4.7.8 R A firm may communicate or approve a *direct-offer financial promotion* relating to a *non-readily realisable security*, a *P2P agreement* or a *P2P portfolio* to or for *communication* to a *retail client* if:
- (1) the firm itself will comply with the suitability rules (COBS 9 and 9A) in relation to the *investment* promoted; or
  - (2) the *retail client* has confirmed before the promotion is made that they are a *retail client* of another firm that will comply with the suitability rules (COBS 9 and 9A) in relation to the *investment* promoted; or
  - (3) the *retail client* is a *corporate finance contact* or a *venture capital contact*.
- 4.7.9 R (1) A certified high net worth investor, a certified sophisticated investor or 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 terms set out in the applicable *rule* listed below; and as modified by (2); ~~substituting “non-readily realisable securities” for “non-mainstream pooled investments”~~:
- (1 a) certified high net worth investor: COBS 4.12.6R;
  - (2 b) certified sophisticated investor: COBS 4.12.7R;
  - (3 c) self-certified sophisticated investor: COBS 4.12.8R.
- (2) Each of the statements in (1), when used in relation to *non-readily realisable securities*, *P2P agreements* or a *P2P portfolio*, must, as appropriate, be modified as follows:
- (a) in all of the statements, any references to “non-mainstream pooled investments” must be replaced with references to “non-readily realisable securities” or “P2P agreements or P2P portfolios”, as applicable;
  - (b) in the statement in COBS 4.12.8R, the reference to “unlisted company” must be replaced with a reference to “P2P agreement or P2P portfolio”; and
  - (c) in the statement in COBS 4.12.8R, the reference to “private equity sector, or in the provision of finance for small and medium enterprises” must be replaced with a reference to “provision of finance, resulting in an understanding of the P2P agreements or P2P portfolios to which the promotions will relate.”

4.7.10 R A certified restricted 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, substituting “P2P agreements or P2P portfolios” for “non-readily realisable securities”, as appropriate:

...

...

4.7.12 G Where a firm communicates or approves direct offer financial promotions relating to both non-readily realisable securities and P2P agreements or P2P portfolios, the condition in COBS 4.7.7R(2) may be satisfied by the retail client signing a combined statement that meets the requirements in COBS 4.7.9R or COBS 4.7.10R, as applicable, in respect of both non-readily realisable securities and P2P agreements or P2P portfolios.

4.7.13 G In relation to a P2P agreement or a P2P portfolio, a firm may communicate to a retail client information about a P2P agreement or a P2P portfolio before needing to satisfy the conditions in COBS 4.7.7R(2) and (3), provided that the defining elements of a direct offer financial promotion are not present in that communication. This information may comprise, without limitation, mandatory disclosures applicable to that firm, such as those set out in COBS 18.12.24R to 18.12.28R, including information about:

- (1) the identity of the borrower(s);
- (2) the price or target rate, provided they are accompanied by a fair description of the anticipated actual return, taking into account fees, default rates and taxation;
- (3) the term;
- (4) the risk categorisation; and
- (5) a description of any security interest, insurance, guarantee or other risk mitigation measures adopted by the firm.

...

## 10 **Appropriateness (for non-MiFID and non-insurance-based investment products non-advised services) (non-MiFID and non-insurance-based investment products provisions)**

### 10.1 **Application**

...

10.1.2 R This chapter applies to a firm which arranges or deals in relation to a non-readily realisable security, derivative or a warrant with or for a retail client, other than in the course of MiFID or equivalent third country



*business, or facilitates a retail client becoming a lender under a P2P agreement and the firm is aware, or ought reasonably to be aware, that the application or order is in response to a direct offer financial promotion.*

...

## 10.2 Assessing appropriateness: the obligations

...

### P2P agreements

- 10.2.9 G (1) When determining whether a client has the necessary knowledge to understand the risks involved in relation to a P2P agreement or a P2P portfolio, a firm should consider asking the client multiple-choice questions that avoid binary (yes/no) answers and cover, at least, the following matters:
- (a) the nature of the client's contractual relationships with the borrower and the firm;
  - (b) the client's exposure to the credit risk of the borrower;
  - (c) that all capital invested in a P2P agreement or P2P portfolio is at risk;
  - (d) that P2P agreements or P2P portfolios are not covered by FSCS;
  - (e) that returns may vary over time;
  - (f) that entering into a P2P agreement or investing in a P2P portfolio is not comparable to depositing money in a savings account;
  - (g) the characteristics of any:
    - (i) security interest, insurance or guarantee taken in relation to the P2P agreements or P2P portfolio;  
or
    - (ii) risk diversification facilitated by the firm; or
    - (iii) contingency fund offered by the firm, or
    - (iv) any other risk mitigation measure adopted by the firm;
  - (h) that any of the measures in (g) adopted by the firm cannot guarantee that the client will not suffer a loss in relation to the capital invested;

- (i) that where a *firm* has not adopted any risk mitigation measures (such as those in (g)), the extent of any capital losses is likely to be greater than if risk mitigation measures were adopted by the *firm*;
- (j) illiquidity in the context of a *P2P agreement* or *P2P portfolio*, including the risk that the lender may be unable to exit a *P2P agreement* before maturity even where the *firm* operates a secondary market;
- (k) the role of the *firm* and the scope of its services, including what the *firm* does and does not do on behalf of lenders; and
- (l) the risks to the management and administration of a *P2P agreement* or *P2P portfolio* in the event of the *firm*'s becoming insolvent or otherwise failing.

...

## 14 Providing product information to clients

...

### 14.3 Information about designated investments (non-MiFID provisions)

...

#### Firms advising on P2P agreements

- 14.3.7A G Examples of information a *firm* *advising on P2P agreements or P2P portfolios* should provide to explain the specific nature and risks of a *P2P agreement* or a *P2P portfolio* include:

...

- 14.3.7B G ~~The *guidance* in COBS 14.3.7AG is relevant both to *firms* which are operators of electronic systems in relation to lending and *firms* advising on *P2P agreements*.~~

When complying with the information requirements set out in this chapter and other parts of the *FCA Handbook*, *firms* advising on a *P2P agreement* or a *P2P portfolio* may also wish to consider providing to *retail clients* any other information that an *operator of an electronic system in relation to lending* must disclose in accordance with COBS 18.12.

...

Insert the following new section, COBS 18.12, after COBS 18.11 (Authorised professional

firms). The text is not underlined.

## 18.12 Operating an electronic system in relation to lending

### Application

- 18.12.1 R This section applies to *an operator of an electronic system in relation to lending*, but only in relation to a *person* becoming a lender under a *P2P agreement*.
- 18.12.2 R This section does not apply in relation to a current account agreement where:
- (1) there is a possibility that the account holder may be allowed to overdraw on the current account without a pre-arranged overdraft or to exceed a pre-arranged overdraft limit; and
  - (2) if the account holder did so, this would be a *P2P agreement* (overrunning).

### Purpose

- 18.12.3 G The purpose of this chapter is to ensure that, where applicable, a *firm*:
- (1) prices and values *P2P agreements* fairly and appropriately;
  - (2) will prevent lenders being exposed to risk outside of the parameters advertised at the time of investment;
  - (3) has a reasonable basis to conclude that a *target rate* can be reasonably achieved; and
  - (4) can support the statements made in its disclosures and financial promotions.

### Interpretation

- 18.12.4 R In the remainder of this section:
- (1) references to a *P2P agreement* include *non-P2P agreements* included in a *P2P portfolio*;
  - (2) unless the context otherwise requires, references to “lender” also include a prospective lender;
  - (3) a *firm* is treated as having determined the *price* of a *P2P agreement* in cases other than where the lender and the borrower have entered into a genuine negotiation to determine the *price* of that *P2P agreement*; and

- (4) references to repayment refer to repayment of capital or payment of interest or other charges (excluding any charge for non-compliance with a *P2P agreement*).

#### Credit risk assessment

- 18.12.5 R Where a *firm* determines the *price* of a *P2P agreement*, it must undertake a reasonable assessment of the credit risk of the borrower before the *P2P agreement* is made.
- 18.12.6 R A *firm* must base its *credit risk assessment* on sufficient information:
- (1) of which it is aware at the time the *credit risk assessment* is carried out;
  - (2) obtained, where appropriate, from the borrower, and, where necessary, any other relevant sources of information.

#### The subject matter of the credit risk assessment

- 18.12.7 R The *firm* must consider the risk that the borrower will not make one or more repayments under the *P2P agreement* by the due date.

#### Scope, extent and proportionality of the credit risk assessment

- 18.12.8 R
- (1) The extent and scope of the *credit risk assessment*, and the steps that the *firm* must take to satisfy the requirement that the assessment is a reasonable one and based on sufficient information, is dependent upon, and proportionate to, the individual circumstances of each case.
  - (2) The *firm* must consider:
    - (a) the types of information to use in the *credit risk assessment*;
    - (b) the content and level of detail of the information to use;
    - (c) whether the information in the *firm's* possession is sufficient;
    - (d) whether and to what extent to obtain additional information from the borrower;
    - (e) whether and to what extent to obtain information from any other sources;
    - (f) whether and to what extent to verify the accuracy of the information that is used; and
    - (g) the degree of evaluation and analysis of the information

that is used,

having regard to the factors listed in (3) where applicable to the agreement.

- (3) The factors to which the *firm* must have regard when complying with (2) and deciding what steps are needed to make the *credit risk assessment* a reasonable one include each of the following where applicable to the agreement:
- (a) the type of *credit*;
  - (b) the amount of the *credit* or the *credit limit*;
  - (c) the duration (or likely duration) of the *credit*;
  - (d) the frequency of the repayments;
  - (e) the amount of the repayments;
  - (f) the annual percentage rate of charge; and
  - (g) any other costs, including any charge for non-compliance with the agreement, which will or may be payable by or on behalf of the borrower in connection with the agreement.

- 18.12.9 G The *firm* may have regard, where appropriate, to information obtained:
- (1) in the course of previous dealings with the borrower but should consider whether the passage of time could have affected the validity of the information and whether it is appropriate to update it;
  - (2) as part of conducting a *credit-worthiness assessment* in relation to a *P2P agreement* in accordance with *CONC 5.5A*; or
  - (3) as part of assessing affordability in relation to a *P2P agreement* comprising a *home finance transaction*, in accordance with *MCOB 11* as modified by *MCOB 15*.

#### Policies and procedures for credit risk assessment

- 18.12.10 R A *firm* must:
- (1) establish, implement and maintain clear and effective policies and procedures:
    - (a) to enable it to carry out *credit risk assessments*; and
    - (b) setting out the principal factors it will take into account in carrying out *credit risk assessments*;

- (2) set out in writing the policies and procedures in (1), and (other than in the case of a *sole trader*) have them approved by its *governing body* or *senior personnel*;
- (3) assess and periodically review:
  - (a) the effectiveness of the policies and procedures in (1); and
  - (b) the *firm's* compliance with those policies and procedures and with its obligations under *COBS* 18.12.5R to 18.12.8R;
- (4) following the review in (3), take appropriate measures to address any deficiencies in the policies and procedures or in the *firm's* compliance with its obligations;
- (5) maintain a record of each transaction where a *P2P agreement* is entered into sufficient to demonstrate that:
  - (a) a *credit risk assessment* was carried out where required; and
  - (b) the *credit risk assessment* was reasonable and was undertaken in accordance with *COBS* 18.12.5R to 18.12.8R,

and in each case to enable the *FCA* to monitor the *firm's* compliance with its obligations under *COBS* 18.12.5R to 18.12.8R; and
- (6) (other than in the case of a *sole trader*) establish, implement and maintain robust governance arrangements and internal control mechanisms designed to ensure the *firm's* compliance with (1) to (5).

#### Pricing, allocation and portfolio composition

- 18.12.11 R Where a *firm* determines the *price* of a *P2P agreement* it must ensure that the *price* is fair and appropriate.
- 18.12.12 R To determine a fair and appropriate *price* for a *P2P agreement* the *firm* must at least ensure:
  - (1) the *price* is reflective of the risk profile of the loan; and
  - (2) the *firm* has taken into account:
    - (a) the time value of money; and
    - (b) the credit spread of the *P2P agreement*.

- 18.12.13 R Where a *firm* selects which *P2P agreements* to facilitate for a lender, it must facilitate only those *P2P agreements* which are in line with the disclosures made pursuant to *COBS 18.12.27R*.
- 18.12.14 R Where a *firm* is assembling or managing a *P2P portfolio*, it must ensure that it includes in that *P2P portfolio* only those *P2P agreements* it has determined with reasonable certainty will enable the lender to achieve the *target rate*.
- 18.12.15 G To be able to comply with *COBS 18.12.14R*, a *firm* should use appropriate data and robust modelling. The data may be the *firm's* own or may be sourced from third parties. Modelling could include the *firm's credit risk assessment* of all borrowers under *P2P agreements* included in the *P2P portfolio*, taking into account the expected losses and the variability of losses through the cycle, and the *price* of such agreements as calculated in accordance with *COBS 18.12.12R*.
- 18.12.16 R Where a *firm* determines the *price* of a *P2P agreement* it must review the valuation of each *P2P agreement* in at least the following circumstances:
- (1) when the *P2P agreement* is originated;
  - (2) where the *firm* considers that the borrower is unlikely to pay its obligations under the *P2P agreement* in full, without the *firm* enforcing any relevant security interest or taking other steps with analogous effect;
  - (3) following a *default*; and
  - (4) where the *firm* is facilitating an exit for a lender before the maturity date of the *P2P agreement*.
- 18.12.17 R Where a *firm* that determines the *price* of *P2P agreements* is facilitating an exit for a lender before the maturity date of a *P2P agreement*, the *firm* must ensure that the price offered for exiting the *P2P agreement* is fair and appropriate.

#### Risk management framework

- 18.12.18 R (1) Where any of *COBS 18.12.11R* to *18.12.17R* apply, a *firm* must have and use a *risk management framework* that is designed to achieve compliance with those *rules*.
- (2) The *firm's risk management framework* must at least:
- (a) be appropriate to the nature, scale and complexity of its business;
  - (b) take into account any *credit risk assessment*, *credit-worthiness assessment* or assessment of affordability under *MCOB*;

- (c) categorise *P2P agreements* by their risk, taking into account the probability of default and the loss given default; and
  - (d) set out the circumstances in which the *firm* will review the valuation of each *P2P agreement*.
- (3) The *firm* must set out in writing the *risk management framework*, and have it approved by its *governing body* or *senior personnel*.
- 18.12.19 G Where *COBS* 18.12.11R to 18.12.17R do not apply to a *firm*, it would be good practice for the *firm* to consider whether, depending on its business model, it should apply the requirements in *COBS* 18.12.18R(1) to (3).

#### Monitoring of the risk management framework

- 18.12.20 R A *firm* with a *risk management framework* must:
- (1) assess, monitor and periodically review the adequacy and effectiveness of the *risk management framework*, including by assessing outcomes against expectations;
  - (2) pursuant to (1), take appropriate measures to address any deficiencies in the *risk management framework*;
  - (3) maintain a record of each transaction where it has used the *risk management framework* to facilitate a *P2P agreement* sufficient to demonstrate that:
    - (a) the *price* of the *P2P agreement* was fair and appropriate in line with the *risk management framework*;
    - (b) where the *firm* selected which *P2P agreements* to facilitate for a lender, that its selection was in line with the *risk management framework*;
    - (c) any inclusion in a *P2P portfolio* was in line with the *risk management framework*,

and in each case to enable the *FCA* to monitor the *firm's* compliance with its obligations regarding the *risk management framework*;
  - (4) establish, implement and maintain robust governance arrangements and internal control mechanisms designed to ensure the *firm's* compliance with (1) to (3); and
  - (5) allocate to an *approved person* overall responsibility within the *firm* for the establishment and maintenance of an effective *risk management framework* and record that allocation.



## Publication of an outcomes statement

- 18.12.21 R Where a *firm* determines the *price* of *P2P agreements* in any financial year of the *firm*, it must publish an *outcomes statement* within four *months* of the end of each financial year.
- 18.12.22 R A *firm* must ensure that each *outcomes statement* remains publicly available for at least 10 years from publication.

## Content of an outcomes statement

- 18.12.23 R An *outcomes statement* must include, as applicable, for the financial year of the *firm*:
- (1) the expected and actual *default* rate of all *P2P agreements* the *firm* has facilitated by risk category, by reference to the risk categories set out in the *risk management framework*, in line with the requirements in *COBS 4.6* on past and future performance;
  - (2) a summary of the assumptions used in determining expected future *default* rates; and
  - (3) where the *firm* offered a *target rate*, the actual return achieved.

## Information: role of an operator of an electronic system in relation to lending

- 18.12.24 R A *firm* must provide to a lender a description of its role in facilitating *P2P agreements*. That description must include:
- (1) the nature and extent of due diligence the *firm* undertakes in respect of borrowers;
  - (2) a description of how loan risk is assessed, including a description of the criteria that must be met by the borrower before the *firm* considers the borrower eligible for a *P2P agreement*;
  - (3) whether the *firm* will play a role in determining the *price* of a *P2P agreement* and, if so, what role;
  - (4) where lenders do not have the choice to enter into specific *P2P agreements*, what role the *firm* will play in selecting *P2P agreements* for the lender;
  - (5) where a *firm* offers a *P2P portfolio* to lenders, what role it will play in assembling or managing that *P2P portfolio*;
  - (6) an explanation of the *firm's* procedure for dealing with a loan in late payment or default;
  - (7) an explanation of how any tax liability for lenders arising from investment in *P2P agreements* will be calculated;

- (8) whether the *firm* will play a role in facilitating a secondary market in *P2P agreements* and, if so, what role, including:
- (a) the procedure for a lender to access their money before the term of the *P2P agreement* has expired and the risk to their investment of doing so; and
  - (b) whether the *firm* displays *P2P agreements* that lenders wish to exit and that other lenders may choose to enter into; or
  - (c) whether the *firm* decides if the *P2P agreement* should be transferred to another lender without involving either lender in that decision.

Information: Financial Services Compensation Scheme

- 18.12.25 R A *firm* must provide confirmation to a lender that there is no recourse to the Financial Services Compensation Scheme.

Information: P2P agreements where the lender selects the agreements

- 18.12.26 R Where a lender has the choice to enter into specific *P2P agreements*, a *firm* must provide the lender with at least the following information about each *P2P agreement*:
- (1) where the *firm* determines the *price of P2P agreements*, the *price of the P2P agreement*;
  - (2) where not provided under (1), the annual percentage rate that will be paid by the borrower in respect of that *P2P agreement*, where applicable to that agreement;
  - (3) when the *P2P agreement* is due to mature;
  - (4) the frequency of the repayments to be made by the borrower;
  - (5) the amounts of the repayments to be made by the borrower;
  - (6) the total amount payable by the borrower;
  - (7) a fair description of the likely actual return, taking into account fees, *default* rates and taxation;
  - (8) where the *firm* determines the *price of P2P agreements*, details of the *credit risk assessment*, *credit-worthiness assessment* or assessment of affordability under *MCOB* carried out;
  - (9) whether the *P2P agreement* is backed by an asset (for example, secured against property developments) and if so, details of that asset;

- (10) fees to be paid by the borrower or the lender, including any deduction from the interest to be paid by the borrower;
- (11) where the *firm* determines the *price* of *P2P agreements*, the risk categorisation of that *P2P agreement* and an explanation of that risk categorisation, by reference to the risk categories set out in the *risk management framework*; and
- (12) where any of the terms in respect of which information must be provided under sub-paragraphs (1) to (7) is set by auction, a description of the auction process and of how those terms will be determined.

Information: P2P agreements where the firm selects the agreements

- 18.12.27 R Where a *firm* selects which *P2P agreements* to facilitate for a lender, including where a *firm* offers a *P2P portfolio* to a lender, the *firm* must provide the lender with the following information about the *P2P agreements* it may facilitate for the lender:
- (1) the minimum and maximum interest rate that will be payable under any *P2P agreement* that may be facilitated for the lender;
  - (2) the minimum and maximum maturity date of any *P2P agreement* that may be facilitated for the lender;
  - (3) a fair description of the likely actual return, taking into account fees, *default* rates and taxation;
  - (4) fees to be paid by the borrower or the lender, including any deduction from the interest to be paid by the borrower; and
  - (5) the range and distribution of risk categories that the *P2P agreements* may fall into and an explanation of those risk categories by reference to the risk categories set out in the *risk management framework*.

Information concerning platform failure

- 18.12.28 R
- (1) A *firm* must notify each lender of the *firm's* arrangements made under SYSC 4.1.8AR to ensure that *P2P agreements* facilitated by it will continue to be managed and administered in accordance with the contract terms between the *firm* and the lender.
  - (2) Where a *firm's* arrangements made under SYSC 4.1.8AR include particular terms in its contracts with lenders, or include obtaining particular prior consents from lenders, the *firm* must clearly identify these arrangements and explain how they operate.
  - (3) Where a *firm's* arrangements made under SYSC 4.1.8AR involve another *person* taking over the management and administration of

*P2P agreements* if the *firm* ceases to *operate the electronic system in relation to lending*, the notification must inform lenders of:

- (a) the identity of the *person* with which the arrangements have been made;
  - (b) how that *person* will hold the lenders' money; and
  - (c) whether that *person* is authorised by the *FCA* and, if it is, which relevant *Part 4A permissions* it holds.
- (4) A *firm* must also explain to each lender the particular risks to the management and administration of *P2P agreements* in the event of its own *failure*, including:
- (a) the possibility that *P2P agreements* may cease to be managed and administered before they mature;
  - (b) the possibility that any *person* involved in the continued management and administration of *P2P agreements* after the *firm* fails may not be subject to the same regulatory regime and requirements as the *firm*, and the resulting possibility that regulatory protections may be reduced or no longer available; and
  - (c) the likelihood that the majority of balances due to the lender are those due from borrowers rather than from the *firm* itself, so if the *firm fails* a lender's entitlement to any *client money* held by the *firm* would not include those balances that the *firm* has not yet received from borrowers.

#### The timing rules

- 18.12.29 R (1) The information to be provided in accordance with *COBS* 18.12.24R to 18.12.25R and 18.12.27R to 18.12.28R must be provided in good time before a *firm* carries on the relevant business for a lender.
- (2) The information to be provided in accordance with *COBS* 18.12.26R must be provided each time before a *firm* facilitates a person becoming a lender under a *P2P agreement*, and in good time before doing so.
- (3) Where any of the terms in respect of which information must be provided under *COBS* 18.12.26R(1) to (7) are set by auction, that information must be provided as soon as reasonably practicable after those terms have been set as a result of the auction.

#### Keeping the client up to date

- 18.12.30 R (1) A *firm* must notify a lender in good time about any material change to the information provided under the *rules* in *COBS* 18.12.24R and 18.12.28R.
- (2) The notification in (1) must be given in a *durable medium* if the information to which it relates was given in a *durable medium*.

## Ongoing disclosures

- 18.12.31 R A *firm* must ensure that, at any point in time, a lender is able to access details of each *P2P agreement* they have entered into which was facilitated by that *firm*, including:
- (1) the *price* of the *P2P agreement*;
  - (2) where not provided under (1), the annual percentage rate that will be paid by the borrower in respect of that *P2P agreement*, where applicable to that agreement;
  - (3) the outstanding capital and interest payments in respect of that *P2P agreement*;
  - (4) when the *P2P agreement* is due to mature;
  - (5) any fees paid in respect of that *P2P agreement* by the lender or the borrower;
  - (6) if the *firm* has carried out a valuation of the *P2P agreement*:
    - (a) the most recent valuation;
    - (b) the valuation date; and
    - (c) an explanation of why the *firm* conducted the valuation;
  - (7) a fair description of the likely actual return, taking into account fees, *default* rates and taxation;
  - (8) where the *firm* determines the price of *P2P agreements*, details of the *credit risk assessment*, *credit-worthiness assessment* or assessment of affordability carried out under *MCOB*;
  - (9) whether the *P2P agreement* is backed by an asset (for example, secured against property developments) and if so, details of that asset;
  - (10) where the *firm*:
    - (a) determines the *price* of *P2P agreements*;
    - (b) selects which *P2P agreements* to facilitate for a lender; or

(c) offers a *target rate*,

the risk categorisation of that *P2P agreement* and an explanation of that risk categorisation, by reference to the risk categories set out in the *risk management framework*;

- (11) whether the *firm* considers that the borrower is unlikely to pay its obligations under the *P2P agreement* in full without the *firm* enforcing any relevant security interest or taking other steps with analogous effect and, if so, information to that effect; and
- (12) whether a *default* by the borrower under a *P2P agreement* has occurred and, if so, information to that effect.

Information: form

- 18.12.32 R The *documents* and information provided in accordance with *COBS* 18.12.24R to 18.12.28R and *COBS* 18.12.31R must be in a *durable medium* or available on a website (where that does not constitute a *durable medium*) that meets the *website conditions*.

Contingency funds: standardised risk warning

- 18.12.33 R (1) In addition to any other risk warnings that must be given by a *firm*, a *firm* must provide the following risk warning to a lender when it offers a *contingency fund*, modified as necessary to reflect the terminology used by the *firm* to refer to a *contingency fund*:

**“The contingency fund we offer does not give you a right to a payment so you may not receive a pay-out even if you suffer loss. The fund has absolute discretion as to the amount that may be paid, including making no payment at all. Therefore, investors should not rely on possible pay-outs from the contingency fund when considering whether or how much to invest.”**

- (2) The *firm* must provide the risk warning in a prominent place on every page of each website and mobile application of the *firm* available to lenders containing any reference to a *contingency fund*.
- (3) Where the lender has not approached the *firm* through a website or mobile application, the risk warning must be provided in a *durable medium* in good time before the *firm* carries on any business for that lender.

- 18.12.34 R The standardised risk warning must be:
- (1) prominent; and
- (2) contained within its own border and with bold text as indicated.

## Contingency funds: published policy

- 18.12.35 R (1) A *firm* which offers a *contingency fund* to lenders must have a *contingency fund policy*.
- (2) The *contingency fund policy* must contain the following information:
- (a) an explanation of the source of the money paid into the fund;
  - (b) an explanation of how the fund is governed;
  - (c) an explanation of who the money belongs to;
  - (d) the considerations the fund operator takes into account when deciding whether or how to exercise its discretion to pay out from the fund, including examples. This should include:
    - (i) whether or not the fund has sufficient money to pay; and
    - (ii) that the fund operator has absolute discretion in any event not to pay or to decide the amount of the payment;
  - (e) an explanation of the process for considering whether to make a discretionary payment from the fund; and
  - (f) a description of how that money will be treated in the event of the *firm's* insolvency.
- (3) The *contingency fund policy* must be provided on every page of each website and mobile application of the *firm* available to lenders and must be:
- (a) prominent;
  - (b) in an unrestricted part of the website or mobile application; and
  - (c) accessible via a link contained in the standardised risk warning in *COBS* 18.12.33R.
- (4) Where the lender has not approached the *firm* through a website or mobile application this information must be provided in a *durable medium* in good time before the *firm* carries on any business for that lender.
- 18.12.36 G When deciding whether to pay out from the *contingency fund*, a *firm* should take into account fairness to lenders and whether the lender made

an active choice about whether or not to participate in the *contingency fund*.

Contingency funds: information when the fund is used

- 18.12.37 R (1) A *firm* must notify a lender if they receive payment from a *contingency fund*.
- (2) This notification must state the amount paid to the lender from the *contingency fund*.
- (3) This notification must be provided either:
- (a) at the time the payment is made; or
  - (b) on an aggregated basis at least once every three *months*.

Contingency funds: information about how the fund is performing

- 18.12.38 R A *firm* which offers a *contingency fund* must make public on a quarterly basis the following facts about how the fund is performing:
- (1) the size of the fund compared to total amounts outstanding on *P2P agreements* relevant to the *contingency fund*;
  - (2) what proportion of outstanding borrowing under *P2P agreements* has been paid using the *contingency fund*; and
  - (3) a *firm* must:
    - (a) only include the actual amount of money held in the *contingency fund* at the relevant time, net of any liabilities or pay outs agreed but not yet paid; and
    - (b) not include any amounts due to be paid into the *contingency fund* that have not yet been paid into it.

Past performance

- 18.12.39 R A *firm* must ensure that information that contains an indication of past performance only contains information that is reflective of the actual payments received by lenders from borrowers under *P2P agreements*.
- 18.12.40 G One of the consequences of *COBS* 18.12.39R is that payments made to lenders from a *contingency fund* should not be reflected in any information that contains an indication of past performance. Firms should also take into account the effect of commissions, fees and other charges.