

*[Editor's note: This instrument is made immediately after the Markets and Organisational Requirements (MiFID 2) Instrument 2017. The text in this instrument therefore takes into account the changes to the Handbook made by the Markets and Organisational Requirements (MiFID 2) Instrument 2017.]*

## **CONDUCT, PERIMETER GUIDANCE AND MISCELLANEOUS PROVISIONS (MiFID 2) 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 64A (Rules of conduct);
    - (b) section 69 (Statement of policy);
    - (c) section 73A (Part 6 Rules);
    - (d) section 84 (Matters which may be dealt with by prospectus rules);
    - (e) section 89A (Transparency rules);
    - (f) section 96 (Obligations of issuers of listed securities);
    - (g) section 137A (The FCA’s general rules);
    - (h) section 137B (FCA general rules: clients’ money, right to rescind etc);
    - (i) section 137H (General rules about remuneration);
    - (j) section 137R (Financial promotion rules);
    - (k) section 137T (General supplementary powers);
    - (l) section 138C (Evidential provisions);
    - (m) section 138D (Action for damages);
    - (n) section 138N (Temporary product intervention rules: statement of policy);
    - (o) section 139A (Power of the FCA to give guidance);
    - (p) section 226 (Compulsory jurisdiction);
    - (q) section 247 (Trust scheme rules);
    - (r) section 248 (Scheme particulars rules);
    - (s) section 261I (Contractual scheme rules);
    - (t) section 261J (Contractual scheme particulars rules);
    - (u) section 293 (Power to make notification rules in respect of recognised bodies);
    - (v) paragraph 23 (Fees) of Part 3 (Penalties and Fees) of Schedule 1ZA (The Financial Conduct Authority);
    - (w) paragraph 19 (Establishment) of Schedule 3 (EEA Passport Rights);
    - (x) paragraph 20 (Services) of Schedule 3 (EEA Passport Rights); and
    - (y) sub-paragraphs (1), (3) and (4) of paragraph 13 (FCA’s rules) of Schedule 17 (The Ombudsman Scheme);
  - (2) regulation 6(1) of the Open-Ended Investment Companies Regulations 2001, (SI 2001/1228);

- (3) paragraph 15 (Record-keeping and reporting requirements relating to relevant complaints) of the Financial Services and Markets Act 2000 (Transitional Provisions) (Ombudsman Scheme and Complaints Scheme) Order 2001, (SI 2001/2326);
- (4) paragraph 9 (Record-keeping and reporting requirements relating to relevant transitional complaints) of the Financial Services and Markets Act 2000 (Transitional Provisions) (Complaints relating to General Insurance and Mortgages) Order 2004, (SI 2004/454);
- (5) the power in regulation 11 of the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges and Clearing Houses) Regulations 2001/995, as inserted by the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017, (SI 2017/701);
- (6) the powers of direction, guidance and related provisions in or under the following provisions of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017, (SI 2017/701):
  - (a) regulation 27 (Power to require information);
  - (b) paragraph 7 of Schedule 1 (Guidance);
  - (c) paragraph 8 of Schedule 1 (Reporting requirements);
  - (d) paragraph 14 of Schedule 1 (Statements of policy); and
  - (e) paragraph 22 of Schedule 1 (Application of Part 26 of the Act);
- (7) the powers of direction, guidance and related provisions in or under the following provisions in or under the following provisions of the Data Reporting Services Regulations 2017, (SI 2017/699):
  - (a) regulation 20 (Guidance);
  - (b) regulation 21 (Reporting requirements);
  - (c) regulation 27 (Statement of policy); and
  - (d) regulation 37 (Application of Part 26 of the Act); and
- (8) the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the 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. Save for the provisions set out in (1) to (5), this instrument comes into force on 3 January 2018, immediately after those parts of the Markets and Organisational Requirements (MiFID 2) Instrument 2017 which also come into force on the same day:
- (1) GEN TP 1.3 in Annex E (General provisions), which relates to the making of notifications and applications and the undertaking of administrative

procedures in relation to MiFID, equivalent third country or optional exemption business to be carried on from 3 January 2018, which comes into force on 3 July 2017;

- (2) MAR 10.4.1G and MAR 10.4.11G, which relates to provision of position limit reports to the FCA, which come into force on 3 July 2017;
- (3) SUP 17A2.1AG and SUP 17A.2.1BG, which relates to provision of reference data to the FCA, which come into force on 3 July 2017;
- (4) SUP 12.7.1R in Annex J (Supervision manual), which relates to the appointment of appointed representatives and tied agents, which comes into force on 3 July 2017; and
- (5) DEPP in Annex K (Decision Procedure and Penalties Manual), which comes into force on 3 July 2017.

### Amendments to the Handbook

- D. The modules of the FCA's Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes in this instrument listed in column (2) below.

(1)	(2)
Principles for Businesses (PRIN)	Annex A
Senior Management Arrangements, Systems and Controls sourcebook (SYSC)	Annex B
The Fit and Proper test for Approved Persons and specified significant-harm functions (FIT)	Annex C
Training and Competence (TC)	Annex D
General Provisions (GEN)	Annex E
Conduct of Business sourcebook (COBS)	Annex F
Banking: Conduct of Business sourcebook (BCOBS)	Annex G
Client Assets sourcebook (CASS)	Annex H
Market Conduct sourcebook (MAR)	Annex I
Supervision manual (SUP)	Annex J
Decision Procedure and Penalties manual (DEPP)	Annex K
Dispute Resolution: Complaints sourcebook (DISP)	Annex L
Collective Investment Schemes sourcebook (COLL)	Annex M
Investment Funds sourcebook (FUND)	Annex N
Professional Firms sourcebook (PROF)	Annex O
Recognised Investment Exchanges sourcebook (REC)	Annex P
Listing Rules sourcebook (LR)	Annex Q
Prospectus Rules sourcebook (PR)	Annex R
Disclosure Guidance and Transparency Rules sourcebook (DTR)	Annex S

### Making the Product Intervention and Product Governance sourcebook (PROD)

- E. The Financial Conduct Authority makes the rules and gives the guidance in Annex T to this instrument.

#### **Amendments to material outside the Handbook**

- F. The Perimeter Guidance manual (PERG) is amended in accordance with Annex U to this instrument.

#### **Notes**

- G. In the Annexes to this instrument, the notes (indicated by “**Note:**”) are included for the convenience of readers but do not form part of the legislative text.

#### **European Union Legislation**

- H. Although European Union legislation is reproduced in this instrument, only European Union legislation reproduced in the electronic Official Journal of the European Union is deemed authentic.

#### **Citation**

- I. This instrument may be cited as the Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument 2017.

By order of the Board  
30 June 2017

## Annex A

## Amendments to the Principles for Business (PRIN)

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

**1 Introduction**

**1.1 Application and purpose**

...

**1 Annex 1R Non-designated investment business - clients that a firm may treat as an eligible counterparty for the purposes of PRIN**

...			
1.2	A <i>firm</i> may classify a <i>client</i> (other than another <i>firm</i> , <i>regulated collective investment scheme</i> , or an <i>overseas financial services institution</i> ) as an <i>eligible counterparty</i> for the purposes of <i>PRIN</i> under 1.1(7) if:		
	(1)	the <i>client</i> at the time he is classified is one of the following:	
		...	
		(c)	<del>a local authority or public authority; [deleted]</del>
		...	
	...		

**Annex B**

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

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

**1 Application and purpose**

**1.1A Application**

...

**1 Annex Detailed application of SYSC**

**1**

...

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

...

Provision <i>SYSC 5</i>	COLUMN A Application to a common platform firm other than to a UCITS investment firm	COLUMN A+ Application to a UCITS management company	COLUMN A++ Application to a full-scope UK AIFM of an authorised AIF	COLUMN B Application to all other firms apart from insurers, managing agents, the Society, full-scope UK AIFMs of unauthorised AIFs, MiFID optional exemption firms and third country firms

...	...	...	...	...
<u>SYSC 5.1.5AG</u>	...	...	...	...
<u>SYSC 5.1.5AAR</u>	<u>Rule</u>	<u>Not applicable save in relation to a UCITS investment firm and its MiFID business</u>	<u>Not applicable</u>	<u>Rule applicable to the branch of an incoming EEA firm in relation to its MiFID business</u>  <u>Other firms:</u> <u>Not applicable</u>
<u>SYSC 5.1.5ABR</u>	<u>Rule</u>	<u>Not applicable save in relation to a UCITS investment firm and its MiFID business</u>	<u>Not applicable</u>	<u>Rule applicable to the branch of an incoming EEA firm in relation to its MiFID business</u>  <u>Other firms:</u> <u>Not applicable</u>
<u>SYSC 5.1.5ACG</u>	<u>Guidance</u>	<u>Not applicable save in relation to a UCITS investment</u>	<u>Not applicable</u>	<u>Guidance applicable to the branch of</u>

		<u>firm and its MiFID business</u>		<u>an incoming EEA firm in relation to its MiFID business</u>  <u>Other firms:</u>  <u>Not applicable</u>
<u>SYSC 5.1.5ADG</u>	<u>Guidance</u>	<u>Not applicable save in relation to a UCITS investment firm and its MiFID business</u>	<u>Not applicable</u>	<u>Guidance applicable to the branch of an incoming EEA firm in relation to its MiFID business</u>  <u>Other firms:</u>  <u>Not applicable</u>
<u>SYSC 5.1.5AEG</u>	<u>Guidance</u>	<u>Not applicable save in relation to a UCITS investment firm and its MiFID business</u>	<u>Not applicable</u>	<u>Guidance applicable to the branch of an incoming EEA firm in relation to its MiFID business</u>



				<u>Other firms:</u> <u>Not applicable</u>
...				
Provision SYSC 10	COLUMN A Application to a common platform firm other than to a UCITS investment firm	COLUMN A+ Application to a UCITS management company	COLUMN A++ Application to a full-scope UK AIFM of an authorised AIF	COLUMN B Application to all other firms apart from insurers, managing agents the Society, full-scope UK AIFMs of unauthorised AIFs, article 3 MiFID firms and third country firms
...				
SYSC 10.1.4R	Not applicable	Rule	Not applicable	Guidance – but applies as a rule in relation to the production or arrangement of investment research in accordance with COBS 12.2, or the

				production or dissemination of non-independent research, in accordance with <i>COBS</i> <del>12.3</del> <u>12.2</u>
...				
<i>SYSC</i> 10.1.6R	Not applicable	Rule	Not applicable	Guidance – but applies as a rule in relation to the production or arrangement of investment research <del>in accordance with</del> <i>COBS</i> <del>12.2</del> , or the production or dissemination of non-independent research, in accordance with <i>COBS</i> <del>12.3</del> <u>12.2</u>
...				
<i>SYSC</i> 10.1.10R	Not applicable	Rule	Not	Guidance

			applicable	– but applies as a rule in relation to the production or arrangement of investment research in accordance with <del>COBS 12.2</del> , or the production or dissemination of non-independent research, in accordance with <del>COBS 12.3</del> <u>12.2</u>
SYSC 10.1.11R	Not applicable	Rule	Not applicable	Guidance – but applies as a rule in relation to the production or arrangement of investment research in accordance with <del>COBS 12.2</del> , or the production or dissemination

				ion of non-independent research, in accordance with <i>COBS</i> <del>12.3</del> <u>12.2</u>
...				

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
...		
<b>SYSC 5</b>		
...	...	...
<i>SYSC 5.1.5AG</i>	...	...
<u><i>SYSC 5.1.5AAR</i></u>	<u>Not applicable</u>	<u>Rule</u>
<u><i>SYSC 5.1.5ABR</i></u>	<u>Not applicable</u>	<u>Rule</u>
<u><i>SYSC 5.1.5ACG</i></u>	<u>Not applicable</u>	<u>Guidance</u>
<u><i>SYSC 5.1.5ADG</i></u>	<u>Not applicable</u>	<u>Guidance</u>
<u><i>SYSC 5.1.5AEG</i></u>	<u>Not applicable</u>	<u>Guidance</u>
...	...	...
<b>SYSC 10</b>		
...		
<i>SYSC 10.1.4R</i>	Rule	<u>Guidance – but applies as a rule in relation to the production or arrangement of investment research, or the</u>

		<u>production or dissemination of non-independent research, in accordance with COBS 12.2</u>
...		
SYSC 10.1.6R	Rule	Guidance – <u>but applies as a rule in relation to the production or arrangement of investment research, or the production or dissemination of non-independent research, in accordance with COBS 12.2</u>
...		
SYSC 10.1.10R	Rule	Guidance – <u>but applies as a rule in relation to the production or arrangement of investment research, or the production or dissemination of non-independent research, in accordance with COBS 12.2</u>
SYSC 10.1.11R	Rule	Guidance – <u>but applies as a rule in relation to the production or arrangement of investment research, or the production or dissemination of non-independent research, in accordance with COBS 12.2</u>
...		

## 5 Employees, agents and other relevant persons

### 5.1 Skills, knowledge and expertise

...

Application to a common platform firm

#### 5.1.-2 G For a *common platform firm*:

(1) ...

(2) the *rules* and *guidance* apply as set out in the table below:

Subject	Applicable rule or guidance
<u>Competent employees rule, knowledge and competence and Segregation segregation of functions</u>	<i>SYSC 5.1.2G to SYSC 5.1.5AG, SYSC 5.1.5AAR, SYSC 5.1.5ABR, SYSC 5.1.5ACG to SYSC 5.1.5AEG, SYSC 5.1.7R, SYSC 5.1.8G to SYSC 5.1.11G</i>
...	

...

...

~~Segregation of functions~~ Competent employees rule

...

- 5.1.5A G If a *firm* requires *employees* who are not subject to a qualification requirement in *TC* to pass a relevant examination from the list of ~~recommended examinations~~ appropriate qualifications maintained by the ~~Financial Skills Partnership~~ *FCA*, or for the purposes of meeting its obligations under SYSC 5.1.5ABR, the *FCA* will take that into account when assessing whether the *firm* has ensured that the *employee* satisfies the knowledge component of the *competent employees rule*.

...

Knowledge and competence

- 5.1.5AA R *SYSC 5.1.5ABR* applies to a *common platform firm* and a *third country firm*:
- (1) in relation to its *MiFID* or equivalent *third country business*;
  - (2) in respect of any natural persons (“relevant individuals”) who, on behalf of the *firm*:
    - (a) make *personal recommendations* to *clients* in relation to *financial instruments* or *structured deposits*; or
    - (b) provide information to *retail clients* or *professional clients* about *financial instruments*, *structured deposits*, *investment services* or *ancillary services*; or

who are otherwise responsible for the supervision of a relevant individual who has not acquired the necessary knowledge and competence to act in a capacity prescribed in (a) or (b).

**[Note: article 25(1) of *MiFID*]**

5.1.5AB R A firm must ensure, and be able to demonstrate to the FCA, at the FCA's request, that any relevant individuals possess the necessary knowledge and competence so as to ensure that the firm is able to meet its obligations under:

- (1) those rules which implement articles 24 and 25 of MiFID (including those rules which implement related provisions under the MiFID Delegated Directive); and
- (2) related provisions of the MiFID Org Regulation.

[**Note:** article 25(1) of MiFID]

5.1.5AC G The rules which implement articles 24 and 25 of MiFID can be found in COBS and PROD and are identified with a 'Note:'.

5.1.5AD G ESMA has issued guidelines specifying the criteria for the assessment of knowledge and competence for the purposes of SYSC 5.1.5ABR. The ESMA guidelines can be found at <https://www.esma.europa.eu/document/guidelines-assessment-knowledge-and-competence>.

5.1.5AE G (1) The FCA expects a firm to act consistently with the ESMA guidelines referred to in SYSC 5.1.5ADG in relation to its MiFID or equivalent third country business.

- (2) The FCA is required to publish various information on its website in relation to firms' assessment of relevant individuals' knowledge and competence. That information can be found at

[*Editor's note:* The content of the link to follow - <https://www.fca.org.uk/firms/training-competence> ].

- (3) A firm to which the Training and Competence sourcebook (TC) applies may satisfy its knowledge and competence obligations under SYSC 5.1.5ABR in relation to a relevant individual by way of compliance with its obligations in TC.

Segregation of functions

5.1.6 R ...

...

## 10 Conflicts of interest

### 10.1 Application

...

Application of conflicts of interest rules to non-common platform firms when producing investment research or non-independent research

- 10.1.16 R The *rules* relating to:
- (1) types of conflict (see SYSC 10.1.4R);
  - (2) records of conflicts (see SYSC 10.1.6R); and
  - (3) *conflicts of interest policies* (see SYSC 10.1.10R and SYSC 10.1.11R);
- also apply to a *firm* which is not a *common platform firm* when it produces, or arranges for the production of, *investment research* that is intended or likely to be subsequently disseminated to *clients* of the *firm* or to the public ~~in accordance with COBS 12.2~~, and when it produces or disseminates *non-independent research* ~~in accordance with COBS 12.3~~ in accordance with COBS 12.2.

...

After SYSC 10 (Conflicts of interest) insert the following new chapter. All the text is new and is not underlined.

## **10A Recording telephone conversations and electronic communications**

### **10A.1 Application**

Application

- 10A.1.1 R Subject to the exemptions in SYSC 10A.1.4R, this chapter applies to a *firm*:
- (1) that is a:
    - (a) *UK MiFID investment firm*; or
    - (b) *full-scope UK AIFM*; or
    - (c) *small authorised UK AIFM* or *residual CIS operator*; or
    - (d) *incoming EEA AIFM*; or
    - (e) *UCITS management company*; or
    - (f) *MiFID optional exemption firm*, performing activities covered by the exemption; or
    - (g) *EEA MiFID investment firm*; or
    - (h) *third country investment firm*; or
    - (i) that carries on activities referred to in the *general application rule* related to:



- (i) *commodity futures*; or
- (ii) *commodity options*; or
- (iii) *contracts for differences* related to an underlying *commodity*; or
- (iv) other *futures* or *contracts for differences* which are not related to *commodities*, *financial instruments* or cash,

which are not *MiFID* or *equivalent third country business* and *energy market activity* or *oil market activity*, but excluding the following *firms*:

- (v) a *depository* when acting as such; and
  - (vi) an *authorised professional firm* with respect to its *non-mainstream regulated* activities; or
- (j) that carries on *energy market activity* or *oil market activity*; and
- (2) that carries out any of the following activities, in *investments* that are *financial instruments*:
- (a) *arranging (bringing about) deals in investments*;
  - (b) *dealing in investments as agent*;
  - (c) *dealing in investments as principal*;
  - (d) *managing investments*;
  - (e) *managing a UCITS* to the extent that this comprises the function of investment management referred to in Annex II of the *UCITS Directive*;
  - (f) *managing an AIF* to the extent that this comprises the function of portfolio management referred to in Annex I of the *AIFMD*;
  - (g) *establishing, operating or winding up a collective investment scheme* to the extent that this comprises *scheme management activity*,

only with respect to a *firm's* activities carried on from an establishment (including a *branch*) maintained by the *firm* in the *United Kingdom*.

[**Note:** article 16(7) and 16(11) of *MiFID*]

- 10A.1.2 G Where this chapter applies to a *third country investment firm*, it applies in conjunction with *GEN 2.2.22AR*, to ensure that such *firms* are not treated in a more favourable way than an *EEA firm*.
- 10A.1.3 R For a *firm* in *SYSC 10A.1.1R(1)* (other than a *MiFID investment firm* or a *third country investment firm*) *MiFIR*, and any *EU Regulation* adopted under *MiFIR* or *MiFID*, apply to the extent relevant to the subject matter of this chapter as if it were a *MiFID investment firm* providing *investment services* or performing *investment activities* in accordance with article 16(7) of *MiFID*.
- 10A.1.4 R This chapter does not apply to the carrying on of:
- (1) activities between *operators* and *depositories*, of the same fund (when acting in that capacity); or
  - (2) *energy market activity* and *oil market activity* which is not *MiFID* or *equivalent third country business* but which, if the *firm* carrying it on were not *authorised*, would not be a *regulated activity* because of article 16 of the *Regulated Activities Order* (Dealing in contractually based investments) or article 22 of the *Regulated Activities Order* (Deals with or through authorised persons etc.); or
  - (3) any activity referred to in *SYSC 10A.1.1R(2)*, to the extent that it is carried out by a *firm* that is not a *MiFID investment firm*, *MiFID optional exemption firm* or *third country investment firm*, in *financial instruments* that are not:
    - (a) admitted to trading on a *trading venue*; or
    - (b) traded on a *trading venue*; or
    - (c) instruments for which a request has been made for admission to trading on a *trading venue*; or
    - (d) instruments covered by paragraph (a), (b) or (c), but the price or value of which depends on, or has an effect on, the price or value of a *financial instrument* referred to in those paragraphs; or
  - (4) activities which comprise:
    - (a) underwriting of *financial instruments* on a firm commitment basis; or
    - (b) placing of *financial instruments* with or without a firm commitment basis,

within the meaning of section A(6) or A(7) of Annex 1 of *MiFID*.
  - (5) *ancillary services*.

- 10A.1.5 G *Firms* should refer to article 76 of the *MiFID Org Regulation*, which contains additional requirements on recording of telephone conversations or electronic communications, in addition to this chapter.

Obligations for telephone and electronic communications

- 10A.1.6 R A *firm* must take all reasonable steps to record telephone conversations, and keep a copy of electronic communications, that relate to the activities in *financial instruments* referred to in SYSC 10A.1.1R(2) (and that are not excluded by SYSC 10A.1.4R), and that are made with, sent from, or received on, equipment:

- (1) provided by the *firm* to an *employee* or contractor; or
- (2) the use of which by an *employee* or contractor has been accepted or permitted by the *firm*.

[**Note:** article 16(7) of *MiFID*, third subparagraph]

- 10A.1.7 R A *firm* must take all reasonable steps to prevent an *employee* or contractor from making, sending, or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the *firm* is unable to record or copy.

[**Note:** article 16(7) of *MiFID*, eighth subparagraph]

- 10A.1.8 R The telephone conversations and electronic communications referred to in SYSC 10A.1.6R include those that are intended to result in the performance of the activities in *financial instruments* referred to in SYSC 10A.1.1R(2), even if those conversations or communications do not in fact result in the performance of such activities.

[**Note:** article 16(7) of *MiFID*, second subparagraph]

- 10A.1.9 R A *MiFID optional exemption firm* that provides services solely or mainly to *retail clients* is not required to comply with the requirements of SYSC 10A.1.6R, SYSC 10A.1.7R and SYSC 10A.1.11R in relation to telephone conversations, subject to compliance with the following requirements:

- (1) a telephone conversation that would be subject to SYSC 10A.1.6R must be recorded instead using a written minute or note; and
- (2) the minute or note must include all relevant, and at least the following, information:
  - (a) date and time of the conversation;
  - (b) identity of the individual participants in the conversation;
  - (c) initiator of the conversation; and

- (d) relevant information about the client order, including the price, volume, type of order and when it will be transmitted or executed.

10A.1.10 G A *MiFID optional exemption firm* that chooses to take advantage of the provisions in SYSC 10A.1.9R should set out its decision in its recording policy. Further, any minute or note made in accordance with SYSC 10A.1.9R should contain all relevant substantive details of the conversation, as well as the information set out in SYSC 10A.1.9R(4)(a)-(d). *MiFID optional exemption firms* should note that the effect of SYSC 10A.1.3R is to require their compliance, as relevant, with article 76 of the *MiFID Org Regulation*, including that records must be:

- (1) stored in a *durable medium* which allows them to be replayed or copied; and
- (2) retained in a format that does not allow the original record to be altered or deleted.

#### Notification

10A.1.11 R A *firm* must notify new and existing *clients* that telephone communications or conversations between the *firm* and its *clients* that result or may result in activities in *financial instruments* referred to in SYSC 10A.1.1R(2) (and that are not excluded by SYSC 10A.1.4R) will be recorded. The notification must be made before the provision of any *investment services* to new and existing *clients*.

[**Note:** article 16(7) of *MiFID*, fourth subparagraph]

10A.1.12 G A notification referred to in SYSC 10A.1.11R is only required to be made by the *firm* once, at the following times:

- (1) to a new *client* prior to the provision of any *investment services*; and
- (2) to an existing *client* prior to the provision of any *investment services* following:
  - (a) the commencement of these *rules*; or
  - (b) the *firm* otherwise becoming subject to these *rules*, after the date of commencement.

[**Note:** article 16(7) of *MiFID*, fifth subparagraph]

#### Obligation for other communications

10A.1.13 R *Client* instructions given otherwise than by telephone must be made in a *durable medium* such as by mail, faxes, emails or documentation of *client* instructions issued at meetings. In particular, the content of relevant face-to-face conversations with a *client* may be recorded by using written minutes or

notes.

[**Note:** article 16(7) of *MiFID*, seventh subparagraph]

#### Record-keeping

10A.1.14 R The records kept in accordance with this chapter must be:

- (1) provided by the *firm* to the *client* involved upon request; and
- (2) kept for a period of five years and, where requested by the *FCA*, for a period of up to seven years.

[**Note:** article 16(7) of *MiFID*, ninth subparagraph]

Insert the following new row in SYSC Sch 1 (Record keeping requirements) in numerical order.

#### Sch 1 Record keeping requirements

...

#### Sch 1.2G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
...				
SYSC 10.1.6R	...	...	...	...
<u>SYSC 10A.1.6R</u>	<u>Telephone conversations and electronic communications in relation to stipulated activities in financial instruments (see SYSC 10A.1.1R)</u>	<u>Those activities in financial instruments</u>	<u>At the time of the conversation or communication</u>	<u>Five years from the date of the conversation or communication unless the FCA requests a period of seven years</u>
...	...	...	...	...

## Annex C

## Amendments to the Fit and Proper test for Approved Persons and specified significant-harm functions (FIT)

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

### 1 General

...

### 1.2 Introduction

...

1.2.4A G (1) Under Article ~~5~~ 21(1)(d) of the *MiFID ~~Implementing Directive~~ Org Regulation* and articles ~~34~~ 34 and ~~32~~ 35 of *MiFID*, the requirement to employ personnel with the knowledge, skills and expertise necessary for the discharge of the responsibilities allocated to them is reserved to the *firm's Home State*. Therefore, in assessing the fitness and propriety of:

~~(1)~~ a *person* to perform a *controlled function*; or

(a)

~~(2)~~ a *certification employee*;

(b)

solely in relation to the *MiFID business* of an *incoming EEA firm*, the ~~appropriate regulator~~ FCA will not have regard to that *person's* competence and capability.

(2) Where the ~~controlled function~~ function relates to:

(a) matters outside the scope of *MiFID*, for example ~~money laundering~~ responsibilities (see CF11) or activities related to a *specified benchmark* (see the benchmark submission function (CF 40)), the *benchmark administration function* (and CF 50) ~~;~~ and the *benchmark submission and administration* FCA-specified significant-harm functions (see SYSC 5.2.33R) ~~;~~ or ~~to~~

(b) business outside the scope of the *MiFID business* of an *incoming EEA firm*, for example *insurance mediation activities* in relation to *life policies* ~~;~~ or

(c) matters within the responsibility of the FCA as the Host State regulator, for example *money laundering responsibilities* (see the money laundering reporting function (CF11 and SMF17))

or (3) below;

the *FCA* will have regard to a ~~candidate's~~ *person's* competence and capability as well as ~~his~~ their honesty, integrity, reputation and financial soundness.

- (3) The *FCA* will have regard to a natural *person's* competence and capability to the extent they give a *personal recommendation* or *information about financial instruments, structured deposits, investment services* or *ancillary services* on behalf of a *UK branch* of:
- (a) an *investment firm* authorised under *MiFID*;
  - (b) an *AIFM investment firm* carrying out activities under article 6(4) of the *AIFMD* (provision of additional services);
  - (c) a *UCITS investment firm* carrying out activities under article 6(3) of the *UCITS Directive* (provision of additional services); or
  - (d) a *credit institution*.
- (4) (3) is the result of the combined effect of articles 25(1) (Assessment of suitability and appropriateness and reporting to clients) and 35(8) (Establishment of a branch) of *MiFID*.
- (5) (1) to (4) are also relevant to the matters an *EEA relevant authorised person* should take into account when assessing any *staff being assessed under FIT*. Where, under (1) to (4):
- (a) the *FCA* will have regard to a *person's* competence and capability, so should a *firm* when assessing any *staff being assessed under FIT*; and
  - (b) the *FCA* will not have regard to a *person's* competence and capability, a *firm* need not do so either when assessing any *staff being assessed under FIT*.

...

## Annex D

### Amendments to the Training and Competence sourcebook (TC)

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

#### 1 Application and Purpose

##### 1.1 Who, what and where?

Who and what?

1.1.1 R ...

1.1.1A R The application of this sourcebook is modified for a *MiFID investment firm* and a *third country investment firm* by the provisions in TC 4.1 where its *employee* carries on an activity in TC App 1 which is also an activity in TC 4.1.2R.

1.1.1B G ESMA has issued guidelines specifying criteria for the assessment of knowledge and competence. The ESMA guidelines can be found at <https://www.esma.europa.eu/document/guidelines-assessment-knowledge-and-competence>.

...

Purpose

1.1.3 G The *competent employees rule* is the main ~~Handbook~~ requirement relating to the competence of *employees*. The purpose of this sourcebook is to support the FCA's supervisory function by supplementing the *competent employees rule* for retail activities.

...

Insert the following new chapter after TC 3 (Record keeping). All the text is new and is not underlined.

#### 4 Specified modified requirements

##### 4.1 Specified requirements for MiFID investment firms and for third country investment firms

4.1.1 R For a *firm* in relation to its *MiFID or equivalent third country business* the *rules* set out in column 1 of the table in TC 4.1.4R below are amended as



set out in column 2.

4.1.2 R In this section, references to relevant individuals are natural persons who, on behalf of the *firm*:

- (1) make *personal recommendations to retail clients* in relation to *financial instruments* ; or
- (2) provide information to *retail clients* about *financial instruments*, *investment services* or *ancillary services*; or

who are otherwise responsible for the supervision of a relevant individual who has not acquired the necessary knowledge and competence to act in a capacity prescribed in (1) or (2).

4.1.3 R References in *TC 4.1.4R* to a relevant individual’s knowledge and competence are to the knowledge and competence necessary to ensure that the *firm*, on behalf of which the relevant individual acts, is able to meet its obligations under:

- (1) those *rules* which implement articles 24 and 25 of *MiFID* (including those *rules* which implement related provisions under the *MiFID Delegated Directive*); and
- (2) related provisions of the *MiFID Org Regulation*.

4.1.4 R Unless the context requires otherwise the *rules* in column 1 of the table are amended as set out in column 2:

Column 1	Column 2
Relevant rule	Amendments
TC 2.1.1R(1)	<p>Insert the following at the end of <i>TC 2.1.1R(1)</i>:</p> <p>“In addition, a <i>firm</i> must not assess a relevant individual as competent unless the <i>firm</i> has satisfied itself that the relevant individual possesses the knowledge and competence to enable the <i>firm</i> to meet its obligations under <i>SYSC 5.1.5ABR</i>. This means that the relevant individual has also:</p> <p>(a) obtained appropriate experience which means that the relevant individual has successfully demonstrated the ability to carry on the activities through previous work experience. This work must have been performed, on a full-time equivalent basis, for a minimum period of 6 <i>months</i>; and</p> <p>(b) attained an appropriate qualification which means a qualification or other test or training</p>

	<p>course that meets the criteria set out by the <i>ESMA</i> guidelines.</p> <p>The level of knowledge and competence needed to fulfil the <i>firm's</i> obligations reflects the scope and degree of the activities, as described in <i>TC 4.1.2R</i> above, carried out by the relevant individual.”</p>
TC 2.1.2R	<p>The provision is amended by adding after <i>TC 2.1.2R</i>:</p> <p>“A relevant individual, who has not acquired the necessary knowledge or competence to carry out the activities in <i>TC 4.1.2R</i> above, cannot provide those activities under supervision for a period exceeding 48 <i>months</i>.”</p>
TC 2.1.5R(1)	<p>The provision is amended by adding after <i>TC 2.1.5R</i>:</p> <p>“Where a relevant individual has not acquired the necessary knowledge and competence to carry out the activities described in <i>TC 4.1.2R</i> above:</p> <p>(a) the <i>firm</i> must ensure that the individual supervising the relevant individual:</p> <ul style="list-style-type: none"> <li>(i) has been assessed as competent to provide such <i>personal recommendation</i> or information;</li> <li>(ii) has the necessary skills and resources to act as a competent supervisor; and</li> <li>(iii) takes responsibility for the <i>personal recommendation</i> or information, referred to in <i>TC 4.1.2R</i> above, provided by the relevant individual under supervision as if the supervisor is providing the <i>personal recommendation</i> including any <i>suitability report (COBS 9)</i> or information; and</li> </ul> <p>(b) the <i>firm</i> must ensure that the supervision provided to a relevant individual is tailored to the services provided by the individual.”</p>

- 4.1.3 G Rules in this section relate to the requirements in *SYSC 5.1.5ABR*.
- 4.1.4 G For relevant individuals of an *incoming EEA firm*, with an establishment maintained by that *firm* (or its *appointed representative*) in the *United Kingdom*, the matters covered by *SYSC 5.1.5ABR* are matters reserved for the *United Kingdom* as the *Host State regulator*.

Amend the following as shown.

## App 2.1 TCs Territorial Scope subject to the limitation in TC Appendix 3

App  
2.1.1R

	<i>UK domestic firm</i>	<i>Incoming EEA firm</i>	<i>Overseas firm (other than an incoming EEA firm)</i>
<i>MiFID business and equivalent third country business</i>	<p><i>TC applies in respect of employees who carry on activities from an establishment maintained by the firm (or its appointed representative) in the United Kingdom</i></p> <p>and</p> <p><i>TC also applies insofar as if an activity is carried on from an establishment maintained by the firm (or its appointed representative or, where applicable, its tied agent) in, and within the territory of, another EEA State, TC applies although matters which would otherwise be covered by SYSC 5.1.5ABR are matters reserved for the Host State regulator</i></p>	<i>TC does not apply</i>	<p><i>TC applies in respect of employees who carry on activities from an establishment maintained by the firm (or its appointed representative) in the United Kingdom</i></p>
...			

...

**TP 1 Designated Investment Business: Assessments of competence before commencement**

1.1	R	(1)	...
		...	
<u>1.1A</u>	<u>G</u>	<p><u>Notwithstanding TC TP1 1.1R, a firm that is subject to SYSC 5.1.5ABR in respect of such an employee should have regard to the guidelines ESMA has issued specifying the criteria for the assessment of knowledge and competence. The ESMA guidelines can be found at <a href="https://www.esma.europa.eu/document/guidelines-assessment-knowledge-and-competence">https://www.esma.europa.eu/document/guidelines-assessment-knowledge-and-competence</a>.</u></p>	

## Annex E

## Amendments to the General Provisions (GEN)

In this Annex, underlining indicates new text.

## 1 FCA approval and emergencies

...

### 1.2 Referring to approval by the FCA

...

#### 1.2.2A R ...

(1A) Paragraph (1) does not apply to a firm to the extent that it is incompatible with the United Kingdom's obligations under article 44(8) of the MiFID Org Regulation.

...

...

#### 1.2.4 G A firm that carries on MiFID, equivalent third country or optional exemption business should have regard to the requirement in article 44(8) of the MiFID Org Regulation which is reproduced at COBS 4.5A.16EU.

...

## 4 Statutory status disclosure

...

### 4.2 Purpose

...

#### 4.2.2 G There are other pre-contract information requirements outside this chapter, including:

...

(2) for *designated investment business*, in *COBS 8* and *COBS 8A* (Client agreements), *COBS 5* (Distance Communications), *COBS 6* (Information about the firm, its services and remuneration), *COBS 13* and *14* (which relate to product information) and *CASS* (Client assets);

...

...

**TP 1 Transitional provisions**

...

## TP 1.3 (3) Transitional Provisions applying to GEN only

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
...					
<u>15</u>	<u>Rules and directions implementing MiFID II</u>	<u>R</u>	<u>A firm that is required or wishes to make any notification, application or undertake any other administrative procedure enabling it to carry on MiFID, equivalent third country or optional exemption business in the UK from 3 January 2018, may do so before that date subject to the requirements of any applicable statutory provision, rule, direction or EU regulation that will be in force on 3 January 2018.</u>	<u>3 July 2017 to 2 January 2018</u>	<u>3 July 2017</u>
<u>16</u>	<u>Rules and directions implementing MiFID II</u>	<u>G</u>	<u>(1) The purpose of this transitional provision is to help a firm to take the necessary administrative or regulatory steps to enable them to carry on investment services or activities in the UK from 3 January 2018.</u> <u>(2) This could take the</u>	<u>3 July 2017 to 2 January 2018</u>	<u>3 July 2017</u>

			<p><u>form, for example, of making notifications to the FCA in the case of algorithmic trading notifications (see MAR 7A.3.6R), before 3 January 2018.</u></p> <p><u>(3) It also enables a firm wishing to classify clients in accordance with the client categorisation requirements in COBS 3 (to take effect on 3 January 2018) to take steps towards doing so before 3 January 2018.</u></p>		
--	--	--	--	--	--

...

## TP 2 Transitional Provisions applying across the FCA Handbook and the PRA Rulebook

...

Table 2: Transitional Provisions applying across the FCA Handbook and the PRA Rulebook

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
...					
4	Paragraph 3 [deleted]	G	For example, a <i>firm</i> which <i>executes</i> an aggregated order shortly before <i>cutover</i> must comply with <i>COBS 11.3.8R</i> (Requirement for fair allocation) if the allocation occurs after <i>cutover</i> .	From <i>cutover</i>	<i>Cutover</i>
...					
18	Every provision in	G	References in the <i>FCA</i>	From 3 January	3 January

	<u>the FCA Handbook</u>		<u>Handbook to Directive 2004/39, where not otherwise amended, shall be interpreted as references to <i>MiFID II</i> or <i>MiFIR</i> or the corresponding provisions in or under <i>MiFID II</i> or <i>MiFIR</i>, except where the context indicates otherwise.</u>	<u>2018</u>	<u>2018</u>
--	-------------------------	--	---	-------------	-------------



## Annex F

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

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

## 1 Application

1.1 ~~The general application rule~~ General application

~~[Note: ESMA has issued guidelines under article 16(3) of the ESMA Regulation on certain aspects of the MiFID suitability requirements which also includes guidelines on conduct of business obligations. See <http://www.esma.europa.eu/content/Guidelines-certain-aspects-MiFID-suitability-requirements>.]~~

Designated investment business and long-term insurance business in relation to life policies

## 1.1.1 R ...

Deposits (including structured deposits)

- 1.1.1A R This sourcebook ~~does not apply~~ applies to a *firm* with respect to ~~the activity of accepting deposits~~ activities carried on in relation to deposits from an establishment maintained by it, or its *appointed representative*, in the *United Kingdom*, ~~except for COBS 4.6 (Past, simulated past and future performance), COBS 4.7.1R (Direct offer financial promotions), COBS 4.10 (Systems and controls and approving and communicating financial promotions), COBS 13 (Preparing product information), COBS 14 (Providing product information to clients) and COBS 15 (Cancellation) which apply as set out in those provisions, COBS 4.1 and the Banking: Conduct of Business sourcebook (BCOBS).~~ only as follows:

	<u>Section / chapter</u>	<u>Application in relation to deposits</u>
(1)	<u>Rules in this sourcebook which implement articles 24, 25, 26, 28 and 30 of MiFID (and related provisions of the MiFID Delegated Directive) (see COBS 1.1.1ADG.</u>	<u>A MiFID investment firm, a third country investment firm and a MiFID optional exemption firm when selling, or advising a client in relation to, a structured deposit.</u>
(2)	<u>COBS 4.6 (Past, simulated past and future performance)</u>	<u>Communication or approval of a financial promotion relating to a structured deposit that is addressed to, or disseminated in</u>

		such a way that it is likely to be received by, a <i>retail client</i> .
(3)	<u>COBS 4.7 (Direct offer financial promotions)</u>	<u>Communication or approval of a financial promotion relating to a cash deposit ISA, cash-only lifetime ISA or cash deposit CTF that is addressed to, or disseminated in such a way that it is likely to be received by, a retail client.</u>
(4)	<u>COBS 4.10 (Systems and controls and approving and communicating financial promotions)</u>	<u>To the extent that other rules in COBS 4 apply.</u>
(5)	<u>COBS 13 (Preparing product information)</u>	<u>Producing a cash-deposit ISA, cash-only lifetime ISA or cash-deposit CTF.</u>
(6)	<u>COBS 14 (Providing product information to clients)</u>	<u>Selling, personally recommending or arranging the sale of a cash-deposit ISA, cash-only lifetime ISA or cash-deposit CTF to a retail client.</u>
(7)	<u>COBS 15 (Cancellation)</u>	<u>A cancellable contract between a consumer and a firm.</u>

Structured deposits: further provisions

1.1.1AA R Except in *COBS 6.2B*, in the *rules* referred to in *COBS 1.1.1AR(1)* (and in any related *guidance*), references to:

- (1) investment services and designated investment business include selling, or advising clients in relation to, structured deposits; and
- (2) financial instruments and designated investments include structured deposits.

1.1.1AB EU Article 1(2) of the *MiFID Org Regulation* specifies how its provisions should be read where they apply to firms selling, or advising on, *structured deposits*.

1(2) References to investment firms shall encompass credit institutions and references to financial instruments shall encompass structured deposits in relation to all the requirements referred to in Article 1(3) and 1(4) of Directive 2014/65/EU and their implementing provisions as set out under this Regulation.

1.1.1AC R A third country investment firm and a MiFID optional exemption firm must also comply with the provisions of the MiFID Org Regulation which relate to the articles of MiFID referred to in COBS 1.1.1AR(2), as modified by article 1(2) of the MiFID Org Regulation, when selling, or advising a client in relation to, a structured deposit.

1.1.1AD G The provisions of MiFID and the MiFID Delegated Directive referred to in COBS 1.1.1AR(2) can be found in the chapters of COBS in the following table and are followed by a 'Note:'.

<u>COBS chapter</u>	<u>Description</u>
<u>COBS 2</u>	<u>Conduct of business obligations</u>
<u>COBS 3</u>	<u>Client categorisation</u>
<u>COBS 4</u>	<u>Communicating with clients, including financial promotions</u>
<u>COBS 6</u>	<u>Information about the firm, its services and remuneration</u>
<u>COBS 8A</u>	<u>Client agreements</u>
<u>COBS 9A</u>	<u>Suitability (MiFID provisions)</u>
<u>COBS 10A</u>	<u>Appropriateness (for non-advised services) (MiFID provisions)</u>
<u>COBS 11</u>	<u>Dealing and managing</u>
<u>COBS 14</u>	<u>Providing product information to clients</u>
<u>COBS 16A</u>	<u>Reporting information to clients (MiFID provisions)</u>

**[Note: article 1(4) of MiFID]**

#### Electronic money

1.1.1B R ...

#### Auction regulation bidding

1.1.1C R ~~The following rules in COBS apply 5 (Distance communications) applies to a firm in relation to its carrying on of auction regulation bidding :~~

- ~~(1) COBS 5 (Distance communications);~~
- ~~(2) (for a firm that has exercised an opt-in to CASS in accordance with CASS 1.4.9R in relation only to those clients for which it holds client money or safe custody assets in accordance with CASS) COBS 3~~

~~(Client categorisation), COBS 6.1.7R (Information concerning safeguarding of designated investments belonging to clients and client money), COBS 6.1.11R (Timing of disclosure) and COBS 16.4 (Statements of client designated investments or client money).~~

#### Modifications to the general application rule

- 1.1.2 R The ~~general application rule~~ application of this sourcebook is modified in COBS 1 Annex 1 according to the activities of a *firm* (Part 1) and its location (Part 2).
- 1.1.3 R The ~~general rule~~ application of this sourcebook is also modified in the chapters to this sourcebook for particular purposes, including those relating to the type of *firm*, its activities or location, and for purposes relating to connected activities.
- ...

After COBS 1.1 (General application) insert the following new section. All the text is new and is not underlined.

## 1.2 Markets in Financial Instruments Directive

### References in COBS to the MiFID Org Regulation

- 1.2.1 G (1) This sourcebook contains a number of provisions which transpose *MiFID*.
- (2) In order to help *firms* which are subject to the requirements of *MiFID* to understand the full extent of those requirements, this sourcebook also reproduces a number of provisions of the directly applicable *MiFID Org Regulation*, marked with the status letters “EU”. The authentic provisions of the *MiFID Org Regulation* are directly applicable to *firms* in relation to their *MiFID business*.
- (3) This sourcebook does not reproduce the *MiFID Org Regulation* in its entirety. A *firm* to which provisions of the *MiFID Org Regulation* applies should refer to the electronic version of the Official Journal of the European Union for:
- (a) the authentic version of the applicable articles of the *MiFID Org Regulation*; and
- (b) a comprehensive statement of its obligations under the *MiFID Org Regulation*.
- 1.2.2 G (1) In some cases, this sourcebook applies provisions of the *MiFID Org Regulation* to *firms* in relation to business other than their *MiFID*

*business* as if those provisions were *rules*.

- (2) *Third country investment firms* should also have regard to the *rule* in GEN 2.2.22AR which concerns the application of the *MiFID Org Regulation* to such *firms*.

1.2.3 R (1) Where this sourcebook, or the rule in GEN 2.2.22AR, applies provisions of the *MiFID Org Regulation* as if they were *rules*, (2) applies to enable *firms* to correctly interpret and understand the application of those provisions.

- (2) In this sourcebook, a word or phrase found in a provision marked “EU” and referred to in column (1) of the table below has the meaning indicated in the corresponding row of column (2) of the table.

(1)	(2)
“ancillary services”	<i>ancillary service</i>
“client” and “potential client”	<i>client</i>
“competent authority”	<i>FCA</i>
“conditions specified in Article 3(2)”	<i>website conditions</i>
“derivative”	as defined in article 4(1)(49) of <i>MiFID</i>
“Directive 2009/65/EC”	<i>UCITS Directive</i>
“Directive 2014/65/EU”	<i>MiFID</i>
“distributing units in collective investment undertakings”	distributing <i>units</i> in a <i>UCITS</i>
“durable medium”	<i>durable medium</i>
“eligible counterparty”	<i>eligible counterparty</i>
“financial analyst”	<i>financial analyst</i>
“financial instrument”	<i>financial instrument</i> and (if the context requires) <i>designated investment</i> and <i>structured deposit</i>
“funds”	<i>client money</i> that a <i>firm</i> receives or holds for, or on behalf of, a <i>client</i> in the course of, or in connection with, its <i>MiFID</i>

	<i>business</i> and (if the context requires) its <i>equivalent business of a third country investment firm</i> .
“group”	as defined in article 4(1)(34) of <i>MiFID</i>
“investments”	<i>financial instrument</i> and (if the context requires) <i>designated investment</i> and <i>structured deposit</i>
“investment advice”	<i>personal recommendation</i>
“investment firm” and “firm”	<i>firm</i>
“investment research”	<i>investment research</i>
“investment service” and “investment services and activities”	<i>investment service</i> and <i>investment services and/or activities</i> or (if the context requires) <i>designated investment business</i>
“market maker”	<i>market maker</i>
“periodic statement”	<i>periodic statement</i>
“PRIIPs KID”	<i>key information document</i>
“portfolio management” and “portfolio management service”	<i>portfolio management</i>
“professional client”	<i>professional client</i>
“professional client covered by Section 1 of Annex II to Directive 2014/65/EU”	<i>per se professional client</i>
“professional client in accordance with Section 2 of Annex II to Directive 2014/65/EU”	<i>elective professional client</i>
“Regulation (EU) No. 1286/2014”	<i>PRIIPs Regulation</i>
“relevant person”	<i>relevant person</i>
“retail client”	<i>retail client</i>

“shall”	must
“tied agent”	<i>tied agent</i>
“UCITS KIID”	<i>key investor information document</i>

- (3) In this sourcebook, where a reproduced provision of an article of the *MiFID Org Regulation* refers to another part of the *MiFID Org Regulation*, that other provision must also be read with reference to the table in (2).

- 1.2.4 G *Firms* to which provisions of the *MiFID Org Regulation* are applied as if they were *rules* should use the text of any preamble to the relevant provision marked “EU” to assist in interpreting any such references or cross-references.

#### Interpretation – “in good time”

- 1.2.5 G (1) Certain of the provisions in this sourcebook which implement *MiFID* require *firms* to provide *clients* with information “in good time”.
- (2) In determining what constitutes the provision of information “in good time”, a *firm* should take into account, having regard to the urgency of the situation, the *client’s* need for sufficient time to read and understand the information before taking an investment decision.
- (3) A *client* is likely to require more time to review information given on a complex or unfamiliar product or service, or a product or service a *client* has no experience with, than a *client* considering a simpler or more familiar product or service, or where the *client* has relevant prior experience.

[**Note:** recital 83 of *MiFID*]

#### ESMA Guidelines

[**Note:** *ESMA* has issued a number of guidelines under article 16(3) of the *ESMA Regulation* in relation to certain aspects of *MiFID*. These include:

guidelines on certain aspects of the *MiFID* suitability requirements which also include guidelines on conduct of business obligations. See

[[https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387_en.pdf)];

guidelines on cross-selling practices. See

[[https://www.esma.europa.eu/sites/default/files/library/2016-574\\_en\\_guidelines\\_on\\_cross-selling\\_practices.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-574_en_guidelines_on_cross-selling_practices.pdf)]; and

guidelines on complex debt instruments and *structured deposits*. See [[https://www.esma.europa.eu/sites/default/files/library/2015-1787\\_-](https://www.esma.europa.eu/sites/default/files/library/2015-1787_-)

[\\_guidelines\\_on\\_complex\\_debt\\_instruments\\_and\\_structured\\_deposits.pdf](#) ].

Amend the following as shown.

## 1 Annex 1 Application (see COBS 1.1.2R)

Part 1: What?

Modifications to the general application ~~rule~~ of COBS according to activities

<b>1.</b>	<b>Eligible counterparty business</b>	
1.1	R	The <i>COBS</i> provisions shown below do not apply to <i>eligible counterparty business</i> .
	<b>COBS provision</b>	<b>Description</b>
	<i>COBS</i> 2 (other than <u><i>COBS</i> 2.1.1AR, <i>COBS</i> 2.2A and <i>COBS</i> 2.4</u> )	Conduct of business obligations
	<i>COBS</i> 4 (other than <u><i>COBS</i> 4.2, <i>COBS</i> 4.4.1R, <i>COBS</i> 4.5A.9EU and <del><i>COBS</i> 4.4.2G</del> <i>COBS</i> 4.7.-1AEU</u> )	Communicating with clients, including financial promotions
	<i>COBS</i> 6.1	Information about the firm, its services and remuneration ( <u>non-MiFID provisions</u> )
	<u><i>COBS</i> 6.1ZA.2.12R</u>	<u>Information about costs and charges of different services or products (MiFID provisions)</u>
	<u><i>COBS</i> 6.1ZA.2.18R</u>	<u>Compensation information (MiFID provisions)</u>
	<i>COBS</i> 8	Client agreements ( <u>non-MiFID provisions</u> )
	<u><i>COBS</i> 8A (other than <i>COBS</i> 8A.1.5EU to <i>COBS</i> 8A.1.8G)</u>	<u>Client agreements (MiFID provisions)</u>
	<i>COBS</i> 10	Appropriateness (for <u>non-MiFID non-advised services</u> ) (non-MiFID provisions)
	<u><i>COBS</i> 10A</u>	<u>Appropriateness (for non-advised services) (MiFID provisions)</u>



	<del>COBS 11.2</del> <u>11.2A</u> , <u>COBS 11.2B</u> and <u>COBS 11.3</u> and <del>COBS 11.6</del>	Best execution, <u>quality of execution</u> and <u>client order handling</u> and <del>use of dealing commission</del>
	<del>COBS 12.3.1R to COBS 12.3.3R</del> <u>COBS 12.2.18EU</u>	Labelling of non-independent research
	<u>COBS 14.3</u>	Information about designated investments ( <u>non-MiFID provisions</u> )
	<u>COBS 16</u>	Reporting information to clients ( <u>non-MiFID provisions</u> )
[ <del>Note: article 24(1)</del> paragraphs 1 and 2 of article 30(1) of <i>MiFID</i> ]		
<b>2.</b>	<b>Transactions between an MTF operator and its users</b>	
2.1	R	The <del>COBS provisions in paragraph 1.1R and COBS 11.4 (Client limit orders)</del> ( <u>applicable to <i>MiFID</i> business</u> ) shown below do not apply to a transaction between an operator of an <i>MTF</i> and a member or participant in relation to the use of the <i>MTF</i> .
	<b><u>COBS provision</u></b>	<b><u>Description</u></b>
	<u>COBS 2</u> (other than <u>COBS 2.4</u> )	<u>Conduct of business obligations</u>
	<u>COBS 4</u> (other than <u>COBS 4.4.1R</u> )	<u>Communicating with clients, including financial promotions</u>
	<u>COBS 6.1ZA</u>	<u>Information about the firm and compensation information (MiFID provisions)</u>
	<u>COBS 8A</u>	<u>Client agreements (MiFID provisions)</u>
	<u>COBS 10A</u>	<u>Appropriateness (for non-advised services) (MiFID provisions)</u>
	<u>COBS 11.2A</u> , <u>COBS 11.2B</u> , <u>COBS 11.3</u> and <u>COBS 11.4</u>	<u>Best execution, quality of execution, client order handling and client limit orders</u>
	<u>COBS 14.3A</u>	<u>Information about financial instruments (MiFID provisions)</u>
	<u>COBS 16A</u>	<u>Reporting information to clients (MiFID provisions)</u>

	[ <b>Note:</b> article 14( <del>3</del> ) 19(4) of <i>MiFID</i> ]	
<b>3.</b>	<b>Transactions concluded on an MTF</b>	
3.1	R	The <i>COBS</i> provisions in paragraph <del>1.1R 2.1R</del> and <del><i>COBS</i> 11.4 (client limit orders)</del> do not apply to transactions concluded under the rules governing an <i>MTF</i> between members or participants of the <i>MTF</i> . However, the member or participant must comply with those provisions in respect of its <i>clients</i> if, acting on its <i>clients'</i> behalf, it is executing their orders on an <i>MTF</i> .
	[ <b>Note:</b> article 14( <del>3</del> ) 19(4) of <i>MiFID</i> ]	
<b>3A.</b>	<b>Operators of OTFs</b>	
3A.1	G	<u>A firm which operates an organised trading facility should refer to MAR 5A.3.9R which specifies how the provisions in this sourcebook apply to that activity.</u>
<b>4.</b>	<b>Transactions concluded on a regulated market</b>	
4.1	R	In relation to transactions concluded on a <i>regulated market</i> , members and participants of the <i>regulated market</i> are not required to apply to each other the <i>COBS</i> provisions in paragraph <del>1.1R 2.1R</del> and <del><i>COBS</i> 11.4 (Client limit orders)</del> . However, the member or participant must comply with those provisions in respect of its <i>clients</i> if, acting on its <i>clients'</i> behalf, it is executing their orders on a <i>regulated market</i> .
	[ <b>Note:</b> article 42( <del>4</del> ) 53(4) of <i>MiFID</i> ]	
<b>5.</b>	<b>Consumer credit products</b>	
5.1	R	If a <i>firm</i> , in relation to its <i>MiFID</i> business, offers an <i>investment service</i> as part of a financial product that is subject to other provisions of <i>EU</i> <del>legislation or common European standards law</del> related to <i>credit institutions</i> and consumer credits with respect to <del>risk assessments of clients and/or</del> information requirements, that service is not subject to the rules in this sourcebook that implement <del>Article 19</del> <u>articles 24(3), (4) and (5) of <i>MiFID</i>.</u>
	[ <b>Note:</b> <del>article 19(9)</del> article 24(6) of <i>MiFID</i> ]	
5.2	G	This exclusion for consumer credit products is intended to apply on a narrow basis in relation to cases in which the <i>investment service</i> is a part of another financial product. It does not apply where the <i>investment service</i> is the essential or leading part of the financial product. It also does not apply where the service provided is a combination of an <i>investment service</i> and an <i>ancillary service</i> (for example, granting a credit for the execution of an order where the credit is instrumental to the buying or the selling of a <i>financial instrument</i> .) The exclusion also does not apply in relation to the sale of a <i>financial instrument</i> for the purpose

		of enabling a <i>client</i> to invest money to repay his obligations under a loan, mortgage or home reversion.
<b>5A.</b>	<b><u>Mortgages and mortgage bonds</u></b>	
5A.1	R	<u>The rule in paragraph 5A.2R applies in relation to an MCD credit agreement with a consumer which is subject to the provisions concerning the creditworthiness assessment of consumers in Chapter 6 of the MCD (as transposed in MCOB 11 and MCOB 11A).</u>
5A.2	R	<u>If an agreement with a consumer within paragraph 5A.1R has as a pre-requisite the provision to that same consumer of an investment service in relation to mortgage bonds satisfying the conditions in paragraph 5A.3R in order for the loan to be payable, refinanced or redeemed, that investment service is not subject to the rules in this sourcebook which implement article 25 of MiFID.</u>
5A.3	R	<u>The conditions in paragraph 5A.2R are that the mortgage bonds:</u>
		(1) <u>are specifically issued to secure the financing of the MCD credit agreement in paragraph 5A.1R; and</u>
		(2) <u>have terms which are identical to the MCD credit agreement in paragraph 5A.1R.</u>
		<b>[Note: article 25(7) of MiFID]</b>
...		

Part 2: Where?

Modifications to the general application rule according to location

...

Part 3: Guidance

<b>1.</b>	<b>The main extensions, <u>modifications</u> and restrictions to the general application rule</b>	
1.1	G	The <del>general application rule</del> <u>general application of this sourcebook</u> is modified in Parts 1 and 2 of Annex 1 and in certain chapters of the <i>Handbook</i> . The modification may be an extension of <del>this rule</del> <u>the general application</u> . For example, COBS 4 (Communicating with clients, including financial promotions) has extended the <u>general</u> application <del>of the rule</del> .
1.2	G	The provisions of the <i>Single Market Directives</i> and other directives also extensively modify the <del>general application rule</del> <u>general application of this sourcebook</u> , particularly in relation to territorial scope. <del>However, for the majority of circumstances, the general application rule is likely to apply.</del>

1.3	G	<u>In particular, certain chapters of this sourcebook apply only to firms in relation to their MiFID, equivalent third country or optional exemption business while others apply only to firms' designated investment business which is not MiFID, equivalent third country or optional exemption business.</u>
1.4	G	<u>COBS 18 (Specialist regimes) contains specialist regimes which modify the application of the provisions in this sourcebook for particular types of firm and business. To the extent that they are in conflict, the rules in COBS 18 on the application of the provisions in this sourcebook should be understood as overriding any other provision (whether in COBS 1 or an individual chapter) on the application of COBS. For the avoidance of doubt, nothing in COBS 18 modifies the effect of the EEA territorial scope rule.</u>
<b>2.</b>	<b>The Single Market Directives and other directives</b>	
...		
2.2	G	... If the answer to all three questions is 'yes', the <i>EEA territorial scope rule</i> may change the effect of the <del>general application rule</del> <u>general application of this sourcebook.</u>
...		
<b>3.</b>	<b>MiFID: effect on territorial scope</b>	
3.1	G	<i>PERG 13</i> contains general <i>guidance</i> on the <i>persons</i> and businesses to which <i>MiFID</i> applies.
3.2	G	This <i>guidance</i> concerns the <i>rules</i> within the scope of <i>MiFID</i> including those <i>rules</i> which are in the same subject area as the implementing <i>rules</i> . A <i>rule</i> is within the scope of <i>MiFID</i> if it is followed by a 'Note:' indicating the article of <i>MiFID</i> or the <del><i>MiFID implementing Directive</i></del> <u><i>MiFID Delegated Directive</i></u> which it implements.
3.3	G	For a <i>UK MiFID investment firm</i> , <i>rules</i> in this sourcebook that are within the scope of <i>MiFID</i> generally apply to its <i>MiFID business</i> carried on from an establishment in the <i>United Kingdom</i> . They also generally apply to its <i>MiFID business</i> carried on from an establishment in another <i>EEA State</i> , but only where that business is not carried on within the territory of that State. (See articles <del>31(1)</del> <u>34(1)</u> , and <del>32(1)</del> <u>35(1)</u> and <del>(7)</del> <u>35(8)</u> of <i>MiFID</i> )
3.4	G	For an <i>EEA MiFID investment firm</i> , <i>rules</i> in this sourcebook that are within the scope of <i>MiFID</i> generally apply only to its <i>MiFID business</i> if that business is carried on from an establishment in, and within the territory of, the <i>United Kingdom</i> . (See article <del>32(1)</del> <u>35(1)</u> and <del>(7)</del> <u>35(8)</u> of <i>MiFID</i> )
3.5	G	However, the <i>rules</i> on <i>investment research</i> and <i>non-independent research</i> ( <i>COBS 12.2</i> and <del>12.3</del> , except for <i>COBS 12.2.18EU</i> ) and the <i>rules</i> on

		<i>personal transactions (COBS 11.7 11.7A)</i> apply on a “home state” basis. This means that they apply to the establishments of a <i>UK MiFID investment firm</i> in the <i>United Kingdom</i> and another <i>EEA State</i> and do not apply to an <i>EEA MiFID investment firm</i> .	
3.6	G	<u><i>Firms to which MiFID applies or which are subject to requirements in MiFID (including MiFID optional exemption firms) should also have regard to the rules and guidance in COBS 1.2.</i></u>	
...			
<b>9.</b>	<b>UCITS Directive: effect on territorial scope</b>		
9.1	G	The <i>UCITS Directive</i> covers undertakings for collective investment in transferable securities ( <i>UCITS</i> ) meeting the requirements of the Directive, and their <i>management companies</i> and <i>depositaries</i> . The <i>rules</i> in this sourcebook within the Directive’s scope (all of which will apply to a <i>management company</i> ) are those in:	
		...	
		(6)	<u><i>COBS 11.2 11.2B (Best execution for UCITS management companies);</i></u>
		...	
...			
9.1D	G	<i>EEA UCITS management companies</i> should be aware that there is a special narrower application of <i>COBS</i> for <i>scheme management activity</i> provided for by <u><i>COBS 18.5B (Residual CIS operators, UCITS management companies and AIFMs)</i></u> .	
...			
<b>10.</b>	<b>AIFMD: effect on territorial scope</b>		
...			
10.4	G	<i>Incoming EEA AIFM branches</i> should be aware that there is a special narrower application of <i>COBS</i> for <i>AIFM investment management functions</i> provided for by <u><i>COBS 18.5A (Residual CIS operators, UCITS management companies and Full-scope UK AIFMs and incoming EEA AIFM branches)</i></u> .	

## 2 Conduct of business obligations

### 2.1 Acting honestly, fairly and professionally

The client’s best interests rule

- 2.1.1 R (1) A *firm* must act honestly, fairly and professionally in accordance with the best interests of its *client* (the *client's best interests rule*).
- (2) This *rule* applies in relation to *designated investment business* carried on:
- (a) for a *retail client*; and
- (b) in relation to ~~*MiFID or equivalent third country business*~~ *MiFID, equivalent third country or optional exemption business*, for any other *client*.

...

[~~Note: article 19(1) 24(1) of MiFID~~] and article 14(1)(a) and (b) of the *UCITS Directive*]

Business with eligible counterparties

- 2.1.1A R In relation to its *eligible counterparty business*, a *firm* must act honestly, fairly and professionally, taking into account the nature of the *eligible counterparty* and its business.

[~~Note: article 30(1) of MiFID~~]

...

AIFMs' best interests rules

- 2.1.4 R ...

...

**2.2 Information disclosure before providing services (non-MiFID provisions)**

Application

- 2.2.-1 R (1) ~~This section applies in relation to *MiFID or equivalent third country business*. [deleted]~~
- (2) This section applies in relation to ~~other~~ *designated investment business other than MiFID, equivalent third country or optional exemption business*, carried on for a *retail client*:
- (a) in relation to a *derivative*, a *warrant*, a *non-readily realisable security*, a *P2P agreement*, or *stock lending activity*, but as regards the matters in *COBS 2.2.1R(1)(b)* only; and
- (b) in relation to a *retail investment product*, but as regards the matters in *COBS 2.2.1R(1)(a)* and (d) only.

[~~Note: article 19(3) of MiFID~~]

- 2.2.-1A     G     COBS 2.2A (Information disclosure before providing services (MiFID provisions)) contains the information disclosure requirements applying to a firm carrying on MiFID, equivalent third country or optional exemption business.

Information disclosure before providing services

- 2.2.1       R     ...

~~[Note: article 19(3) of MiFID]~~

...

After COBS 2.2 (Information disclosure before providing services (non-MiFID provisions)) insert the following new section. All the text is new and is not underlined.

## **2.2A       Information disclosure before providing services (MiFID provisions)**

Application

- 2.2A.1     R     This section applies to a *firm* in relation to its *MiFID, equivalent third country or optional exemption business*.

Information disclosure in good time

- 2.2A.2     R     (1)    A *firm* must provide appropriate information in good time to a *client* with regard to:
- (a)    the *firm* and its services;
  - (b)    the *financial instruments* and proposed investment strategies;
  - (c)    execution venues; and
  - (d)    all costs and related charges.

[Note: article 24(4) of *MiFID*]

- (2)    That information may be provided in a standardised format.

- 2.2A.3     R     (1)    A *firm* must provide the information required by this section in a comprehensible form in such a manner that a *client* is reasonably able to understand the nature and risks of the *investment service* and of the specific type of *financial instrument* that is being offered and, consequently, to take investment decisions on an informed basis.

- (2)    That information may be provided in a standardised format.

[Note: article 24(5) of *MiFID*]

## Related rules

- 2.2A.4 G A *firm* to which the *rule* on providing appropriate information (*COBS* 2.2A.2R) applies should also consider the *rules* on disclosing information about a *firm*, its services, costs and associated charges and *financial instruments* in *COBS* 6.1ZA and *COBS* 14.3A.

## Disclosure of commitment to the Financial Reporting Council's Stewardship Code

- 2.2A.5 R A *firm* must comply with the *rule* in *COBS* 2.2.3R (Disclosure of commitment to the Financial Reporting Council's Stewardship Code).

### 2.3 **Inducements relating to business other than MiFID, equivalent third country or optional exemption business**

...

Application

- 2.3.-1A R This section does not apply to:
- (1) giving advice, or providing services, to an employer in connection with a *group personal pension scheme* or *group stakeholder pension scheme* where that scheme is a *qualifying scheme*; or
  - (2) a *firm* in relation to *MiFID*, *equivalent third country* or *optional exemption business* (but see *COBS* 2.3A (Inducements relating to *MiFID*, *equivalent third country* or *optional exemption business*)).

...

- 2.3.-1C G This section does not apply to the provision of *independent advice* or *restricted advice* on a *retail investment product* in the course of *MiFID*, *equivalent third country* or *optional exemption business*. A *firm* providing such a service should refer instead to *COBS* 2.3A (Inducements relating to *MiFID*, *equivalent third country* or *optional exemption business*) and *COBS* 6.1A (Adviser charging and remuneration).

## Rule on inducements

- 2.3.1 R A *firm* must not pay or accept any fee or commission, or provide or receive any non-monetary benefit, in relation to *designated investment business* ~~or, in the case of its *MiFID* or *equivalent third country business*, another *ancillary service*~~, carried on for a *client* other than:

...



- (2) a fee, commission or non-monetary benefit paid or provided to or by a third party or a *person* acting on behalf of a third party, if:

...

- (b) the existence, nature and amount of the fee, commission or benefit, or, where the amount cannot be ascertained, the method of calculating that amount, is clearly disclosed to the *client*, in a manner that is comprehensive, accurate and understandable, before the provision of the service;

- (i) this requirement only applies to business other than ~~*MiFID or equivalent third country business*~~ the carrying on by a UK UCITS management company or EEA UCITS management company of the collective portfolio management activities of investment management and administration for the relevant scheme if it includes:

...

- (ii) where this requirement applies to business other than ~~*MiFID or equivalent third country business*~~ the carrying on by a UK UCITS management company or EEA UCITS management company of the collective portfolio management activities of investment management and administration for the relevant scheme, a *firm* is not required to make a disclosure to the *client* in relation to a non-monetary benefit permitted under (a) and which falls within the table of reasonable non-monetary benefits in COBS 2.3.15G as though that table were part of this *rule* for this purpose only;

- (iii) ...

- (c) in relation to ~~*MiFID or equivalent third country business*~~ the carrying on by a UK UCITS management company or EEA UCITS management company of the collective portfolio management activities of investment management and administration for the relevant scheme or when carrying on a *regulated activity* in relation to a *retail investment product*, or when *advising on P2P agreements*, the payment of the fee or commission, or the provision of the non-monetary benefit is designed to enhance the quality of the service to the *client*; or

- (3) proper fees which enable or are necessary for the provision of ~~*designated investment business or ancillary services*~~, such as custody costs, settlement and exchange fees, regulatory levies or legal fees, and which, by their nature, cannot give rise to conflicts with the *firm's* duties to act honestly, fairly and professionally in accordance with the

best interests of its *clients*.

[~~Note: article 26 of the MiFID implementing Directive and articles 29(1) and 29(2) of the UCITS implementing Directive]~~

[~~Note: The European Securities and Markets Authority has issued recommendations on inducements under MiFID]~~

- 2.3.1A R *COBS 2.3.1R applies to a UK UCITS management company and EEA UCITS management company when providing collective portfolio management services, as if:*
- (1) references to a *client*, were references to any *UCITS* it manages; ~~and~~
  - (2) ~~in (2)(b) and (c) and (3) of that rule, references to MiFID or equivalent third country business were also references to the collective portfolio management activities of investment management and administration for the scheme.~~

[~~Note: article 29(1) of the UCITS implementing Directive]~~

- 2.3.2 R ...

[~~Note: article 26 of the MiFID implementing Directive and article 29(2) of the UCITS implementing Directive]~~

...

Guidance on inducements

...

- 2.3.4 G ~~*COBS 11.6 (Use of dealing commission) deals with the acceptance of certain inducements by investment managers and builds upon the requirements in this section. Investment managers should ensure they comply with this section and COBS 11.6. [deleted]*~~

- 2.3.4A G *A UCITS management company is subject to specific rules on inducements and research in COBS 18.5B when executing orders for financial instruments for, or on behalf of, the UCITS it manages (see COBS 18.5B.6R and COBS 18 Annex 1).*

...

- 2.3.6 G ~~*For the purposes of this section, the receipt by an investment firm of a commission in connection with a personal recommendation or a general recommendation, in circumstances where the advice or recommendation is not biased as a result of the receipt of commission, should be considered as designed to enhance the quality of the recommendation to the client. [deleted]*~~

[~~Note: recital 39 of MiFID implementing Directive]~~

...

2.3.7 G The fact that a fee, commission or non-monetary benefit is paid or provided to or by an *appointed representative* or, where applicable, by a *tiered agent*, does not prevent the application of the *rule* on inducements.

2.3.8 G ~~The *rule* on inducements is applicable to a *firm* and those acting on behalf of a *firm* in relation to the provision of an *investment service* or *ancillary service* to a *client*. Small gifts and minor hospitality received by an individual in their personal capacity below a level specified in the *firm's* conflict's of interest policy, will not be relevant for the purpose of the *rule* on inducements. [deleted]~~

...

Reasonable non-monetary benefits

...

2.3.16A G ...

Application of guidance on reasonable non-monetary benefits

2.3.16B R The *guidance* on reasonable non-monetary benefits in *COBS* 2.3.14G to *COBS* 2.3.16AG does not apply to a *firm* which:

- (1) makes *personal recommendations* to *retail clients* in relation to *retail investment products* or *P2P agreements*, and to which *COBS* 6.1A (Adviser charging and remuneration) applies; or
- (2) is a *retail investment product provider*, a *platform service provider* or a *firm* which is an *operator of an electronic system in relation to lending* to which *COBS* 6.1B (Retail investment product provider, operator of an electronic system relating to lending, and platform service provider requirements relating to adviser charging and remuneration) applies.

2.3.16C G However, *COBS* 6.1A and *COBS* 6.1B do permit minor non-monetary benefits which meet the relevant requirements set out in *COBS* 6.1A.5AR(2).

Record keeping: inducements

2.3.17 R ...

~~[Note: see article 51(3) of the *MiFID implementing Directive*]~~

Insert the new section COBS 2.3A after 2.3 (Inducements relating to business other than MiFID or equivalent third country business). The text is not underlined.

## **2.3A Inducements relating to MiFID, equivalent third country or optional exemption business**

Application

2.3A.1 R This section applies to a *firm* in relation to its *MiFID, equivalent third country or optional exemption business*.

Relationship with the adviser charging, product provider and platform service provider rules in COBS 6.1A, COBS 6.1B and COBS 6.1E

2.3A.2 G A *firm* which makes a *personal recommendation* to a *retail client* in the *United Kingdom* in relation to a *retail investment product* in the course of carrying on *MiFID, equivalent third country or optional exemption business* with or for that *client* is also required to comply with the *rules* in COBS 6.1A (Adviser charging and remuneration).

2.3A.3 G COBS 6.1A provides, amongst other things, that a *firm* must only be remunerated for a *personal recommendation* (and any other related services provided by the *firm*) by *adviser charges*.

2.3A.4 G Where:

(1) the *firm*:

(a) is a *retail investment product* provider or a *platform service provider*; and

(b) carries on *MiFID, equivalent third country or optional exemption business* in relation to those activities; and

(2) the *client* is a *retail client* in the *United Kingdom*,

the *firm* is required to comply with the *rules* in this section and in COBS 6.1B (Retail investment product provider, operator of an electronic system relating to lending, and platform service provider requirements relating to adviser charging and remuneration) and, where relevant, COBS 6.1E (Platform services: platform charges using a platform service for advising).

Rules on inducements relating to the provision of investment services and ancillary services

2.3A.5 R Except where COBS 2.3A.6R applies, a *firm* must not:

(1) pay to or accept from any party (other than the *client* or a *person* on behalf of the *client*) any fee or commission in connection with the provision of an *investment service* or an *ancillary service*; or

- (2) provide to or receive from any party (other than the *client* or a *person* on behalf of the *client*) any non-monetary benefit in connection with the provision of an *investment service* or an *ancillary service*.

[**Note:** article 24(9) of *MiFID*]

- 2.3A.6 R (1) *COBS* 2.3A.5R does not apply to:
- (a) a fee, commission or non-monetary benefit which:
    - (i) is designed to enhance the quality of the relevant service to the *client* (see *COBS* 2.3A.8R); and
    - (ii) does not impair compliance with the *firm's* duty to act honestly, fairly and professionally in the best interests of the *client*;
  - (b) a payment or benefit which enables or is necessary for the provision of an *investment service* by the *firm*, such as custody costs, settlement and exchange fees, regulatory levies or legal fees and which, by its nature, cannot give rise to conflicts with the *firm's* duty to act honestly, fairly and professionally in the best interests of the *client*; or
  - (c) third party *research* received in accordance with *COBS* 2.3B (see *COBS* 2.3B.3R).
- (2) Where a *firm* pays, provides, accepts or receives, a fee, commission or non-monetary benefit which falls within (1)(a), the *firm* must clearly disclose to the *client*:
- (a) the existence and nature of the payment or benefit; and
  - (b) the amount of the payment or benefit or, where the amount cannot be ascertained, the method for calculating that amount.
- (3) That information must be disclosed:
- (a) prior to the provision of the relevant service; and
  - (b) in a manner that is comprehensive, accurate and understandable (see also *COBS* 2.3A.10R (Disclosure of payments or benefits received from, or paid to, third parties)).
- (4) Where applicable, a *firm* must inform a *client* of the mechanisms for transferring to the *client* the fee, commission, monetary or non-monetary benefit received in relation to the provision of the relevant service.

[**Note:** article 24(9) of *MiFID*]

- 2.3A.7 E A *firm* which fails to comply with *COBS* 2.3A.5R is to be regarded as not fulfilling its obligations in relation to:
- (1) conflicts of interest (see *SYSC* 10); and
  - (2) acting honestly, fairly and professionally in accordance with the best interests of its *clients* (see *COBS* 2.1.1R).

[**Note:** article 24(9) of *MiFID*]

Fees, commissions or non-monetary benefits which are designed to enhance the quality of a service

- 2.3A.8 R (1) For the purposes of *COBS* 2.3A.6R(1)(a)(i), a fee, commission or non-monetary benefit is designed to enhance the quality of the relevant service to a *client* only if :
- (a) it is justified by the provision of an additional or higher level service to the *client* and is proportional to the level of inducements received;
  - (b) it does not directly benefit the recipient *firm*, its *shareholders* or *employees* without tangible benefit to the *client*;
  - (c) it is justified by the provision of an ongoing benefit to the *client* in relation to an ongoing inducement; and
  - (d) the provision of the service by the *firm* to the *client* is not biased or distorted as a result of the fee, commission or non-monetary benefit.
- (2) A *firm* must fulfil these conditions on an ongoing basis as long as the *firm* continues to pay or receive the fee, commission or non-monetary benefit.

[**Note:** article 11(2) and (3) of the *MiFID Delegated Directive*]

- 2.3A.9 R A fee, commission or non-monetary benefit may be justified for the purposes of *COBS* 2.3A.8R(1)(a) where, for example, the *firm* provides:
- (1) *restricted advice* on, and access to, a wide range of suitable *financial instruments* including an appropriate number of *financial instruments* from third party product providers having no close links with the *firm*;  
or
  - (2) *restricted advice* combined with:
    - (a) an offer to the *client*, at least on an annual basis, to assess the continuing suitability of the *financial instruments* in which the *client* has invested; or

- (b) another ongoing service that is likely to be of value to the *client* such as advice about the suggested optimal asset allocation of the *client*; or
- (3) access, at a competitive price, to a wide range of *financial instruments* that are likely to meet the needs of the *client*, including an appropriate number of *financial instruments* from third party product providers having no close links with the *firm*, together with either the provision of added-value tools, such as objective information tools helping the *client* to take investment decisions or enabling the *client* to monitor, model and adjust the range of *financial instruments* in which they have invested, or providing periodic reports of the performance and costs and charges associated with the *financial instruments*.

[**Note:** article 11(2) of the *MiFID Delegated Directive*]

[**Note:** further guidance on this is contained in the *FCA's* Finalised Guidance on 'Supervising retail investment advice: inducements and conflicts of interest' (FG14/1), available at: <https://www.fca.org.uk/publication/finalised-guidance/fg14-01.pdf>]

Disclosure of payments or benefits received from, or paid to, third parties

- 2.3A.10 R (1) Prior to the provision of the relevant service, the *firm* must disclose to the *client* the information set out in *COBS* 2.3A.6R(2) and, where applicable, *COBS* 2.3A.6R(4).
- (2) For these purposes, minor non-monetary benefits may be described in a generic way, but other non-monetary benefits received or paid by the *firm* in connection with a service provided to the *client* must be priced and disclosed separately.

[**Note:** article 11(5)(a) of the *MiFID Delegated Directive*]

- 2.3A.11 R Where a *firm* is unable to ascertain on an ex-ante basis the amount of any payment or benefit to be received or paid, and instead discloses to the *client* the method of calculating the relevant amount, the *firm* must also inform the *client* of the exact amount of the payment or benefit received or paid on an ex-post basis.

[**Note:** article 11(5)(b) of the *MiFID Delegated Directive*]

- 2.3A.12 R (1) Where inducements are received by the *firm* on an ongoing basis in relation to an *investment service* provided to a *client*, the *firm* must inform, at least annually, that *client* about the actual amount of payments or benefits received.
- (2) For these purposes, minor non-monetary benefits may be described in a generic way.

[**Note:** article 11(5)(c) of the *MiFID Delegated Directive*]

- 2.3A.13 R In implementing the requirements of *COBS 2.3A.10R* to *COBS 2.3A.12R*, a *firm* must take into account the costs and charges rules set out in article 24(4)(c) of *MiFID* and article 50 of the *MiFID Org Regulation* (see *COBS 6.1ZA.2.7R* to *6.1ZA.2.9R* and *6.1ZA.2.10EU*).

[**Note:** article 11(5) of the *MiFID Delegated Directive*]

- 2.3A.14 R Each *firm* involved in a distribution channel which provides an *investment service* or *ancillary service* must comply with its obligations to make disclosures to its *clients*.

[**Note:** article 11(5) of the *MiFID Delegated Directive*]

Inducements relating to the provision of independent advice, restricted advice and portfolio management services to retail clients in the United Kingdom

- 2.3A.15 R (1) This *rule* applies where a *firm* provides a *retail client* in the *United Kingdom* with:
- (a) *independent advice*; or
  - (b) *restricted advice*; or
  - (c) *portfolio management services*.
- (2) The *firm* must not accept any fees, commission, monetary or non-monetary benefits which are paid or provided by:
- (a) any third party; or
  - (b) a *person* acting on behalf of a third party,
- in relation to the provision of the relevant service to the *client*.
- (3) Paragraph (2) does not apply to:
- (a) acceptable minor non-monetary benefits (see *COBS 2.3A.19R*); or
  - (b) third party *research* received in accordance with *COBS 2.3B* (see *COBS 2.3B.3R*).

[**Note:** see articles 24(7)(b) and 24(8) of *MiFID*; article 12(2) of the *MiFID Delegated Directive*]

Inducements relating to the provision of independent advice and portfolio management services to retail clients outside the United Kingdom or to professional clients

- 2.3A.16 R (1) This *rule* applies where a *firm* provides *independent advice* or *portfolio management services* to:



- (a) a *retail client* outside the *United Kingdom*; or
  - (b) a *professional client*.
- (2) In relation to the provision of the relevant service to the *client*, the *firm* must not:
- (a) accept and retain any fees, commission or monetary benefits; or
  - (b) accept any non-monetary benefits other than acceptable minor non-monetary benefits (see *COBS 2.3A.19R*) or third party *research* received in accordance with *COBS 2.3B* (see *COBS 2.3B.3R*),

where these are paid or provided by any third party or a *person* acting on behalf of a third party.

- (3) With regard to paragraph (2), the *firm* must:
- (a) return to the *client* as soon as reasonably possible after receipt any fees, commission or any monetary benefits paid or provided by any third party or a *person* acting on behalf of a third party in relation to the services provided to that *client*;
  - (b) transfer in full to the *client* all fees, commission or monetary benefits received from third parties in relation to the services provided to the *client*;
  - (c) establish and implement a policy to ensure that any fees, commission or any monetary benefits paid or provided by any third party or a *person* acting on behalf of a third party in relation to the provision of the services to the *client* are allocated and transferred to that *client*; and
  - (d) inform the *client* about the fees, commission or any monetary benefits transferred to them, such as through the periodic reporting statements provided to the *client*.

[**Note:** articles 24(7)(b) and 24(8) of *MiFID*; article 12(1) and (2) of the *MiFID Delegated Directive*]

- 2.3A.17 G *SYSC 4.1* (General requirements) sets out further organisational requirements relating to *firms*.

Fees, commission, and non-monetary benefits paid or provided by a person on behalf of the client

- 2.3A.18 G Fees, commission or non-monetary benefits paid or provided by a *person* on behalf of the *client* are acceptable only if that *person* is aware that such payments have been made on that *client's* behalf and the amount and frequency of any payment is agreed between the *client* and the *firm* and not

determined by a third party. This could be the case where:

- (1) a *client* pays a *firm's* invoice directly or it is paid by an independent third party who has no connection with the *firm* regarding the *investment service* provided to the *client* and is acting only on the instructions of the *client*; or
- (2) cases where the *client* negotiates a fee for a service provided by a *firm* and pays that fee.

This would generally be the case for accountants or lawyers acting under a clear payment instruction from the *client* or where a *person* is acting as a mere conduit for the payment.

[**Note:** recital 75 to *MiFID*]

Acceptable minor non-monetary benefits

- 2.3A.19 R An acceptable minor non-monetary benefit is one which:
- (1) is clearly disclosed prior to the provision of the relevant service to the *client*, which the *firm* may describe in a generic way (where applicable, in accordance with article 11(5)(a) of the *MiFID Delegated Directive* (see *COBS 2.3A.10R*));
  - (2) is capable of enhancing the quality of service provided to the *client*;
  - (3) is of a scale and nature that it could not be judged to impair the *firm's* compliance with its duty to act honestly, fairly and professionally in the best interests of the *client*;
  - (4) is reasonable, proportionate and of a scale that is unlikely to influence the *firm's* behaviour in any way that is detrimental to the interests of the relevant *client*; and
  - (5) consists of:
    - (a) information or documentation relating to a *financial instrument* or an *investment service*, that is generic in nature or personalised to reflect the circumstances of an individual *client*;
    - (b) written material from a third party that is commissioned and paid for by a corporate *issuer* or potential *issuer* to promote a new issuance by the company, or where the third party *firm* is contractually engaged and paid by the *issuer* to produce such material on an ongoing basis, provided that the relationship is clearly disclosed in the material and that the material is made available at the same time to any *firms* wishing to receive it, or to the general public;
    - (c) participation in conferences, seminars and other training events on the benefits and features of a specific *financial instrument* or

an *investment service*;

- (d) hospitality of a reasonable de minimis value, such as food and drink during a business meeting or a conference, seminar or other training events mentioned under paragraph (c);
- (e) research relating to an issue of *shares, debentures, warrants or certificates representing certain securities* by an *issuer*, which is:
  - (i) produced:
    - (A) prior to the issue being completed; and
    - (B) by a *person* that is providing underwriting or placing services to the *issuer* on that issue; and
  - (ii) made available to prospective investors in the issue; or
- (f) research that is received so that the *firm* may evaluate the research provider's research service, provided that:
  - (i) it is received during a trial period that lasts no longer than three *months*;
  - (ii) no monetary or non-monetary consideration is due (whether during the trial period, before or after) to the research provider for providing the research during the trial period;
  - (iii) the trial period is not commenced with the research provider within 12 *months* from the termination of an arrangement for the provision of research (including any previous trial period) with the research provider; and
  - (iv) the *firm* makes and retains a record of the dates of any trial period accepted under this *rule*, as well as a record of how the conditions in (i) to (iii) were satisfied for each such trial period.

[**Note:** articles 24(7)(b) and 24(8) of *MiFID*; article 12(2) and (3) of the *MiFID Delegated Directive* and article 72(3) of the *MiFID Org Regulation*]

- 2.3A.20 G *COBS* 2.3A.8R sets out the conditions to be met if a fee, commission or non-monetary benefit is designed to enhance the quality of the service to a *client*. Those conditions are also likely to be relevant to *firms* considering whether a fee, commission or non-monetary benefit is capable of enhancing the quality of the service to a *client*.

[**Note:** articles 24(7) and (8) of *MiFID* refer to minor non-monetary benefits that are capable of enhancing the quality of service provided to the *client*]

- 2.3A.21 G A non-monetary benefit that involves a third party allocating valuable resources to the *firm* is not a minor non-monetary benefit and accordingly is considered to impair compliance with the *firm's* duty to act in the *client's* best interest.

[**Note:** recital 30 to the *MiFID Delegated Directive*]

- 2.3A.22 G For the purposes of *COBS* 2.3A.19R(4) and (5)(a), non-substantive material or services consisting of short term market commentary on the latest economic statistics or company results or information on upcoming releases or events which are provided by a third party and which:

- (1) contain only a brief unsubstantiated summary of the third party's own opinion on the information; and
- (2) do not include any substantive analysis (e.g. where the third party simply reiterates a view based on an existing recommendation or substantive research),

can be deemed to be information relating to a *financial instrument* or *investment service* of a scale and nature such that it constitutes an acceptable minor non-monetary benefit.

[**Note:** recital 29 to the *MiFID Delegated Directive*]

Paying commission on non-advised sales of packaged products

- 2.3A.23 G The following *guidance* and *evidential provisions* provide examples of arrangements the *FCA* believes will breach the *client's best interests rule* if a *firm* sells or *arranges* the sale of a *packaged product* for a *retail client*.

- 2.3A.24 E (1) If a *firm* is required to disclose commission (see *COBS* 6.4 (Disclosure of charges, remuneration and commission)) to a *client* in relation to the sale of a *packaged product* (other than in relation to arrangements between *firms* that are in the same *immediate group*) the *firm* should not enter into any of the following:

- (a) volume overrides, if commission paid in respect of several transactions is more than a simple multiple of the commission payable in respect of one transaction of the same kind; and
- (b) an agreement to indemnify the payment of commission on terms that would or might confer an additional financial benefit on the recipient in the event of the commission becoming repayable.

- (2) Contravention of (1) may be relied upon as tending to establish contravention of *COBS* 2.3A.5R.

- 2.3A.25 G If a *firm* enters into an arrangement with another *firm* under which it makes or receives a payment of commission in relation to the sale of a *packaged product* that is increased in excess of the amount disclosed to the *client*, the

*firm* is likely to have breached the *rules* on disclosure of charges, remuneration and commission (see *COBS* 6.4) and, where applicable, the *rules* on inducements in *COBS* 2.3A.6R(2) and (3), unless the increase is attributable to an increase in the *premiums* or contributions payable by that *client*.

Providing credit and other benefits to firms that advise retail clients on retail investment products

- 2.3A.26 G The following *guidance* and *evidential provisions* provide examples of arrangements the *FCA* believes will breach the *client's best interests rule* in relation to a *personal recommendation* of a *retail investment product* to a *retail client*.
- 2.3A.27 E (1) This *evidential provision* applies in relation to a holding in, or the provision of *credit* to, a *firm* which holds itself out as making *personal recommendations* to *retail clients* on *retail investment products*, except where the relevant transaction is between *persons* who are in the same *immediate group*.
- (2) A *retail investment product* provider should not take any step which would result in it:
- (a) having a direct or indirect holding of the capital or *voting power* of a *firm* in (1); or
  - (b) providing *credit* to a *firm* in (1) (other than continuing to facilitate the payment of an *adviser charge* or *consultancy charge* where it is no longer payable by the *retail client*, as described in *COBS* 6.1A.5G or *COBS* 6.1C.6G);
- unless all the conditions in (4) are satisfied. A *retail investment product* provider should also take reasonable steps to ensure that its *associates* do not take any step which would result in it having a holding as in (a) or providing *credit* as in (b).
- (3) A *firm* in (1) should not take any step which would result in a *retail investment product* provider having a holding as in (2)(a) or providing *credit* as in (2)(b), unless all the conditions in (4) are satisfied.
- (4) The conditions referred to in (2) and (3) are that:
- (a) the holding is acquired, or *credit* is provided, on commercial terms, that is terms objectively comparable to those on which an independent *person* unconnected to a *retail investment product* provider would, taking into account all relevant circumstances, be willing to acquire the holding or provide *credit*;
  - (b) the *firm* (or, if applicable, each of the *firms*) taking the step has reliable written evidence that (a) is satisfied;

- (c) there are no arrangements, in connection with the holding or *credit*, relating to the channelling of business from the *firm* in (1) to the *retail investment product* provider; and
  - (d) the *retail investment product* provider is not able, and none of its *associates* is able, because of the holding or *credit*, to exercise any influence over the *personal recommendations* made in relation to *retail investment products* given by the *firm*.
- (5) In this *evidential provision*, in applying (2) and (3) any holding of, or *credit* provided by, a *retail investment product* provider's *associate* is to be regarded as held by, or provided by, that *retail investment product* provider.
- (6) Contravention of (2) or (3) may be relied upon as tending to establish contravention of *COBS 2.3A.15R*.

2.3A.28 G Where a *retail investment product* provider, or its *associate*, provides *credit* to a *retail client* of a *firm* making *personal recommendations* in relation to *retail investment products*, this may create an indirect benefit for the *firm* and, to the extent that this is relevant, the provider of *retail investment products* may need to consider the examples in *COBS 2.3A.27E* as if it had provided the *credit* to the *firm*.

2.3A.29 G In considering the compliance of arrangements between members of the same *immediate group* with *COBS 2.3A.15R*, *firms* may wish to consider the *evidential provisions* in *COBS 2.3A.24E* and *COBS 2.3A.27E*, to the extent that these are relevant.

#### Guidance on inducements

2.3A.30 G A *firm* which fails to comply with the rules on inducements will not meet its obligations in relation to conflicts of interest (see *SYSC 10*) or the obligation to act honestly, professionally and fairly in accordance with the best interests of its *clients*.

[**Note:** article 24(9) of *MiFID*]

2.3A.31 G A *firm* is unlikely to meet its obligations relating to best execution (see *COBS 11.2A*), inducements (in this section), and conflicts of interest (see *SYSC 10*) where it receives payment, remuneration or commission from third parties (including those entities to whom or which it directs orders for execution) in relation to the execution of *client* orders. *Firms* should also have regard to the *FSA*'s Guidance on the practice of 'Payment for Order Flow'.

[**Note:** for the *FSA*'s Guidance on the practice of 'Payment for Order Flow' see: <http://www.fca.org.uk/publication/finalised-guidance/fg12-13.pdf>]

## Record keeping: inducements

- 2.3A.32 R A *firm* must hold evidence that any fees, commission or non-monetary benefits paid or received by the *firm* are designed to enhance the quality of the relevant service to the *client* by:
- (1) keeping an internal list of all fees, commission and non-monetary benefits received by the *firm* from a third party in relation to the provision of the service; and
  - (2) recording how the fees, commission and non-monetary benefits paid or received by the *firm*, or that the *firm* intends to use, enhance the quality of the services provided to the relevant *clients* and the steps taken in order not to impair the *firm's* compliance with the duty to act honestly, fairly and professionally in the best interests of the *client*.
- [**Note:** article 11(4) of the *MiFID Delegated Directive*]
- 2.3A.33 G In relation to the *MiFID business* of a *firm*, article 72 and Annex 1 of the *MiFID Org Regulation* also make provision for the keeping of records on inducements.
- [**Note:** article 72 and Annex 1 of the *MiFID Org Regulation*]
- 2.3A.34 R In relation to the *equivalent business of a third country investment firm* and *MiFID optional exemption business*, information disclosed to the *client* in accordance with *COBS 2.3A.6R*(2), (3) and (4) and *COBS 2.3A.10R* to *COBS 2.3A.12R* must be retained in a medium that allows the storage of information in a way accessible for future reference by the *FCA*, and in such a form and manner that:
- (1) the *FCA* is able to access it readily and to reconstitute each key stage of the processing of each transaction;
  - (2) it is possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained;
  - (3) it is not possible for the records otherwise to be manipulated or altered;
  - (4) it can be exploited through information technology or any other efficient method of exploitation when analysis of the data cannot be easily carried out due to the volume and nature of the data; and
  - (5) the *firm's* arrangements comply with the record keeping requirements irrespective of the technology used.

After *COBS 2.3A* (Inducements relating to *MiFID*, equivalent third country or optional exemption business) insert the following new sections *COBS 2.3B* (Inducements and

research) and 2.3C (Research and execution services). All the text is new and is not underlined.

## 2.3B Inducements and research

### Application

- 2.3B.1 R This section applies to a *firm* carrying on *MiFID*, *equivalent third country* or *optional exemption business*.
- 2.3B.2 G (1) A *firm* providing *independent advice*, *restricted advice* or *portfolio management* services to *retail clients* in the *United Kingdom*, or which provides *independent advice* or *portfolio management* services to *retail clients* outside the *United Kingdom* or to *professional clients* is prohibited from receiving inducements (other than acceptable minor non-monetary benefits) in relation to those services under *COBS 2.3A.15R* and *COBS 2.3A.16R*. Compliance with *COBS 2.3B* allows such a *firm* to receive third party *research* without breaching that prohibition.
- (2) In addition, *COBS 2.3B* enables *investment firms* other than those in (1) to receive *research* without subjecting it to an assessment under the inducements rule in *COBS 2.3A*, as *research* acquired in accordance with this section will not constitute an inducement.

### Receiving third party research without it constituting an inducement

- 2.3B.3 R Third party *research* that is received by a *firm* providing *investment services* or *ancillary services* to *clients* will not be an inducement under *COBS 2.3A.5R*, *COBS 2.3A.15R* or *COBS 2.3A.16R* if it is received in return for either of the following:
- (1) direct payments by the *firm* out of its own resources; or
- (2) payments from a separate *research* payment account controlled by the *firm*, provided that the *firm* meets the requirements in *COBS 2.3B.4R* relating to the operation of the account.

[**Note:** article 13(1)(a) and (b)(excl. (i) – (iv)) of the *MiFID Delegated Directive*]

### Conditions relating to the operation of the research payment account

- 2.3B.4 R The requirements referred to in *COBS 2.3B.3R(2)* for the operation of a *research* payment account are:
- (1) the *research* payment account must only be funded by a specific *research* charge to *clients*, which must:
- (a) only be based on a *research* budget set by the *firm* for the



purpose of establishing the amount needed for third party *research* in respect of *investment services* rendered to its *clients*; and

- (b) not be linked to the volume or value of transactions executed on behalf of *clients*;
- (2) (a) the *firm* must set and regularly assess a *research* budget as an internal administrative measure as part of establishing a *research* payment account and agreeing the *research* charge with its *clients*; and
  - (b) the *research* budget must comply with *COBS* 2.3B.7R, *COBS* 2.3B.8R(2) and *COBS* 2.3B.11R;
- (3) the *firm* must be fully responsible for the *research* payment account; and
- (4) the *firm* must regularly assess the quality of the *research* purchased, based on robust quality criteria, and its ability to contribute to better investment decisions for the *clients* who pay the *research* charge.

[**Note:** article 13(1)(b)(i-iv) and (2)(a) and (b) of the *MiFID Delegated Directive*]

- 2.3B.5 R A *firm* using a *research* payment account must provide the following information to *clients*:
- (1) before the provision of an *investment service* or *ancillary service* to *clients*, information about the budgeted amount for *research* and the amount of the estimated *research* charge for each of them; and
  - (2) annual information on the total costs that each of them has incurred for third party *research*.

[**Note:** article 13(1) second subparagraph of the *MiFID Delegated Directive*]

- 2.3B.6 G In accordance with *Principle 7* (communications with clients), a *firm* should inform *clients* in the annual information in *COBS* 2.3B.5R(2) that they are entitled to request the information set out in *COBS* 2.3B.20R(1).

- 2.3B.7 R A *firm* must ensure that:
- (1) the total amount of *research* charges collected from *clients* under *COBS* 2.3B.4R(1) does not exceed the *research* budget established under *COBS* 2.3B.4R(2) (and, where relevant, amended under *COBS* 2.3B.8R(2)); and
  - (2) the *research* budget and *research* payment account are not used to fund research generated internally by the *firm* itself.

[**Note:** article 13(4) and (6) of the *MiFID Delegated Directive*]

- 2.3B.8 R (1) A *firm* must agree with *clients*, in the *firm's* investment management agreement or general terms of business:
- (a) the *research* charge as budgeted by the *firm*; and
  - (b) the frequency with which the specific *research* charge will be deducted from the resources of the *client* over the year.
- (2) A *firm* must not increase its *research* budget unless it has provided, in advance, clear information to relevant *clients* about such intended increases.
- (3) If there is a surplus in a *research* payment account at the end of a period, the *firm* must have a process to:
- (a) rebate those funds to relevant *clients*; or
  - (b) offset it against the *research* budget and charge for relevant *clients* calculated for the following period.

[**Note:** article 13(5) of the *MiFID Delegated Directive*]

- (4) In calculating a rebate or offset as set out in (3), a *firm* must take reasonable steps to maintain a fair allocation of costs between *clients*.

- 2.3B.9 G Information on increases in the *research* budget under *COBS* 2.3B.8R(2) should be provided to relevant *clients* in good time before such increases are to take effect.
- 2.3B.10 G A *firm* that operates arrangements for collecting *research* charges by deducting charges from those *clients'* resources should ensure that those arrangements comply with *CASS* 8 (Mandates), as applicable.

#### Governance and oversight of research payment accounts

- 2.3B.11 R For the purposes of *COBS* 2.3B.4R(2), a *firm* must ensure that:
- (1) the *research* budget is managed solely by the *firm* and is based on a reasonable assessment of the need for third party *research*;
  - (2) the allocation of the *research* budget to purchase third party *research* is subject to appropriate controls and *senior management* oversight to ensure it is managed and used in the best interests of the *firm's* *clients*; and
  - (3) the controls under (2) include a clear audit trail of:
    - (a) payments made to *research* providers; and
    - (b) how the amounts paid were determined with reference to:
      - (i) the quality criteria required by *COBS* 2.3B.4R(4); and

- (ii) the *firm's* policy for using third party *research* established under *COBS* 2.3B.12R.

[**Note:** article 13(6) of the *MiFID Delegated Directive*]

- 2.3B.12 R (1) A *firm* using a *research* payment account must establish a written policy that sets out how the *firm* will:
- (a) comply with all elements of *COBS* 2.3B.4R(4); and
  - (b) address the extent to which *research* purchased through the *research* payment account may benefit *clients'* portfolios, including, where relevant, by taking into account investment strategies applicable to various types of portfolios, and the approach the *firm* will take to allocate such costs fairly to the various *clients'* portfolios.
- (2) A *firm* must provide the policy established under (1) to their *clients*.

[**Note:** article 13(8) of the *MiFID Delegated Directive*]

- 2.3B.13 G A *firm* should retain control over the overall spending for *research*, the collection of *client research* charges and the determination of payments.

[**Note:** recital (28) to the *MiFID Delegated Directive*]

- 2.3B.14 G In setting a budget under *COBS* 2.3B.4R(2), and in light of the obligation to fairly allocate costs under *COBS* 2.3B.12R(1)(b), a *firm* may wish to consider setting a budget for a group of *clients* who would benefit from the same *research*, for example because they have portfolios that are managed according to similar investment strategies. It may be appropriate to operate a dedicated *research* payment account for such a group.
- 2.3B.15 G Where a *firm* charges a *client* under *COBS* 2.3B.4R(1), that charge should be for an amount of *money* owed to the *firm*. Therefore, provided it is collected by the *firm* only when that charge becomes due and payable, that *money* will not be *client money* held by the *firm* for the *client* who owed that charge (see *CASS* 7.11.25R).

Other operational arrangements for research payment accounts

- 2.3B.16 R If a *firm* uses an operational arrangement for the collection of the charge under *COBS* 2.3B.4R(1) where that charge is not collected separately but alongside a transaction *commission*, the *firm* must still indicate a separately identifiable *research* charge and ensure that the arrangements comply fully with the conditions in *COBS* 2.3B.4R and *COBS* 2.3B.5R.

[**Note:** article 13(3) of the *MiFID Delegated Directive*]

- 2.3B.17 G A *firm* should ensure that the cost of *research* funded by *client* charges is not:

- (1) linked to the volume or value of services or benefits that are not *research*; or
- (2) used to cover anything other than *research*, such as charges for execution.

[**Note:** recital 27 to the *MiFID Delegated Directive*]

- 2.3B.18 R For the purposes of *COBS 2.3B.3R* and *COBS 2.3B.4R*, a *firm* may delegate the administration of the *research* payment account to a third party, provided that the arrangement facilitates payments to *research* providers, in the name of the *firm*, for the purchase of third party *research*, without any undue delay and in accordance with the *firm's* instruction.

[**Note:** article 13(7) of the *MiFID Delegated Directive*]

- 2.3B.19 G (1) In order that a *firm* retains sufficient control, and is responsible for, a *research* payment account when relying on a third party to administer it, the *firm* should consider whether its arrangements with that third party will ensure that:
- (a) the *firm* can collect *client research* charges relating to a specific *research* budget into a separate *research* payment account for that budget, as cleared funds, without undue delay (and, in any event, no later than 30 *days* after deduction from the *client's* account);
  - (b) the *firm* retains sole, full and absolute discretion over the use of the account and the making of payments or rebates;
  - (c) *research* payment account monies are ring-fenced and separately identifiable from the assets of the third party or, where the third party administrator is a *bank*, are held on deposit for the *firm*; and
  - (d) the third party provider has, or its creditors on insolvency have, no right of access or recourse to the *research* payment account for its own benefit, for example to offset other fees owed by the *firm* or for use as collateral.
- (2) The *firm* remains fully responsible for discharging all of its obligations to its *clients* set out in *COBS 2.3B* regardless of any arrangements it makes with third parties, and should ensure it acts in the best interests of its *clients* when deducting *research* charges from their accounts and procuring *research*.

Disclosure on request of payments made from a research payment account

- 2.3B.20 R (1) Where a *firm* operates a *research* payment account, it must provide on request to its *clients* a summary of:

- (a) the providers paid from this account;
  - (b) the total amount they were paid over a defined period;
  - (c) the benefits and services received by the *firm*; and
  - (d) how the total amount spent from the account compares to the budget set by the *firm* for that period, noting any rebate or carry-over if residual funds remain in the account.
- (2) A *firm* must also be able to provide the information in paragraph (1) to the *FCA* on request for all *research* payment accounts.

[**Note:** article 13(2) of the *MiFID Delegated Directive*]

#### Research for the purposes of research payment accounts

- 2.3B.21 R A *firm* must only use monies in a *research* payment account established under *COBS* 2.3B.3R(2) to pay for *research* or to pay a rebate to *clients* in accordance with *COBS* 2.3B.8R(3)(a).
- 2.3B.22 G A *firm* should also consider whether the goods or services it is looking to receive are acceptable minor non-monetary benefits under *COBS* 2.3A.19R or *COBS* 2.3A.22G, which can be received without breaching the inducements *rules* under *COBS* 2.3A.15R or *COBS* 2.3A.16R.
- 2.3B.23 G Examples of goods or services that the *FCA* does not regard as *research*, and as a result could not be paid for from *research* payment accounts, include:
- (1) post-trade analytics;
  - (2) price feeds or historical price data that have not been analysed or manipulated in order to present the *firm* with meaningful conclusions;
  - (3) services relating to the valuation or performance measurement of portfolios;
  - (4) seminar fees;
  - (5) *corporate access services*;
  - (6) subscriptions for publications;
  - (7) travel, accommodation or entertainment costs;
  - (8) order and execution management systems;
  - (9) membership fees to professional associations;
  - (10) direct *money* payments; and
  - (11) administration of a *research* payment account.

- 2.3B.24 G A *firm* should not enter into any arrangements relating to the receipt of, and payment for, third party *research*, whether acquired in accordance with *COBS* 2.3B.3R(1) or (2), that would compromise its ability to meet its best execution obligations as applicable under *COBS* 11.2A.

## 2.3C Research and execution services

### Application

- 2.3C.1 R This section applies to an *investment firm* providing execution services to:
- (1) a *firm* carrying on *MiFID*, *equivalent third country* or *optional exemption business*; or
  - (2) an *investment firm* authorised under *MiFID* that is not within (1); or
  - (3) a *UCITS management company*; or
  - (4) a *full-scope UK AIFM*; or
  - (5) a *small authorised UK AIFM*; or
  - (6) a *residual CIS operator*; or
  - (7) an *incoming EEA AIFM branch*.

Requirement on a firm that executes orders and provides research to price and supply services separately

- 2.3C.2 R A *firm* providing execution services must:
- (1) identify separate charges for its execution services that only reflect the cost of executing the transaction;
  - (2) subject each other benefit or service (other than an acceptable minor non-monetary benefit in *COBS* 2.3A.19R) which it provides to *persons* listed in *COBS* 2.3C.1R(1) to (6) to a separately identifiable charge; and
  - (3) ensure that the supply of, and charges for, other benefits or services under (2) is not influenced or conditioned by levels of payment for execution services.

[**Note:** article 13(9) of the *MiFID Delegated Directive*]

- 2.3C.3 R A *firm* providing both execution and *research* services must price and supply them separately.

- 2.3C.4 G Compliance with *COBS 2.3C.2R* is intended to enable a *firm* subject to *COBS 2.3A.15R* and *COBS 2.3A.16R* to comply with its obligation not to accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a *person* acting on behalf of a third party in relation to the provision of the service to *clients*.

[**Note:** recital 26 to the *MiFID Delegated Directive*]

Amend the following as shown.

## 2.4 Agent as client and reliance on others

- 2.4.1 R This section applies to a *firm* that is conducting *designated investment business* or *ancillary activities* or, in the case of ~~*MiFID or equivalent third country business*~~ *MiFID, equivalent third country or optional exemption business*, other *ancillary services*.
- 2.4.2 G This section is not relevant to, nor does it affect:
- (1) the question of who is the *firm's* counterparty for prudential purposes ~~and it does not affect;~~ or
  - (2) any obligation a *firm* may owe to any other *person* under the general law; or
  - (3) any obligation imposed on a *firm* by article 26 of *MiFIR* or *RTS 22*.

Agent as client

- 2.4.3 R ...
- (3) If there is an agreement under (2)(a) in relation to more than one C2 represented by C1, F may discharge any requirement to notify, obtain consent from, or enter into an agreement with each C2 by sending to, or receiving from, C1 a single communication expressed to cover each C2, except that the following will be required for each C2:
 

...

    - (b) separate confirmations under the requirements on occasional reporting (~~*COBS 16.3*~~ *16.2* or *COBS 16A.3*); and

...

Reliance on other investment firms: MiFID and equivalent business

2.4.4 R (1) This rule applies if a firm (F1), in the course of performing *MiFID* or equivalent third country business, receives an instruction to ~~perform~~ provide an investment or ancillary service on behalf of a client (C) through another firm (F2), if F2 is:

...

...

(3) F2 will remain responsible for:

(a) ...

(b) the ~~appropriateness~~ suitability for C of any advice or recommendations provided to C.

...

[**Note:** article ~~20~~ 26 of *MiFID*]

2.4.5 G (1) If F1 is required to perform a suitability assessment or an appropriateness assessment under *COBS 9 9A* or *COBS 10 10A*, it may rely upon a suitability assessment performed by F2, if F2 was subject to the requirements for assessing suitability in *COBS 9 9A* (excluding the *basic advice rules*) or equivalent requirements in another *EEA State* in performing that assessment.

(2) If F1 is required to perform an appropriateness assessment under *COBS 10 10A*, it may rely upon an appropriateness assessment performed by F2, if F2 was subject to the requirements for assessing appropriateness in *COBS 10.2 10A.2* or equivalent requirements in another *EEA State* in performing that assessment.

...

### 3 Client categorisation

#### 3.1 Application

...

3.1.2 G ...

3.1.2A R Subject to *COBS 3.1.3R* and *COBS 3.6.4CR*, in this chapter provisions marked “EU” apply to a firm’s business other than *MiFID* business as if they were rules.

...

#### Mixed business

3.1.4 R If a firm conducts business for a client involving both:



- (1) *MiFID or equivalent third country business*; and
- (2) other *regulated activities* subject to this chapter;

it must categorise that *client* for such business in accordance with the provisions in this chapter that apply to *MiFID or equivalent third country business, including those provisions applied to equivalent third country business as a result of COBS 3.1.2AR*.

- 3.1.5 G (1) For example, the requirement concerning mixed business will apply if a *MiFID investment firm or third country investment firm* advises a *client* on whether to invest in a *scheme* or a *life policy*. This is because the former is within the scope of *MiFID* and the latter is not. In such a case, the *MiFID client* categorisation requirements prevail.

...

## 3.2 Clients

### General definition

- 3.2.1 R (1) A *person* to whom a *firm* provides, intends to provide or has provided:
- (a) a service in the course of carrying on a *regulated activity*; or
  - (b) in the case of *MiFID or equivalent third country business*, an *ancillary service*,
- is a “client” of that *firm*;
- (2) A “client” includes a potential client.
- (3) In relation to the *financial promotion rules*, a *person* to whom a *financial promotion* is or is likely to be *communicated* is a “client” of a *firm* that *communicates* or *approves* it.
- (4) A client of an *appointed representative* or, if applicable, a *tied agent*, is a “client” of the *firm* for whom that *appointed representative*, or *tied agent*, acts or intends to act in the course of business for which that *firm* has accepted responsibility under the *Act* or *MiFID* (see sections 39 and 39A of the *Act* and *SUP 12.3.5R*).

[**Note:** article 4(1)(10)(9) of *MiFID*]

...

## 3.3 General notifications

- 3.3.1 R A *firm* must:

- (1) ~~notify a new *client* of its categorisation as a *retail client*, *professional client*, or *eligible counterparty* in accordance with this chapter; and~~
- (2) ~~prior to the provision of services, inform a *client* in a *durable medium* about:~~
  - (a) ~~any right that the *client* has to request a different categorisation; and~~
  - (b) ~~any limitations to the level of *client* protection that such a different categorisation would entail. [deleted]~~

~~[Note: paragraph 2 of section 1 of annex II to *MiFID* and articles 28(1) and (2) and the second paragraph of article 50(2) of the *MiFID implementing Directive*]~~

3.3.1A      EU      Articles 45(1) and (2) of the *MiFID Org Regulation* require *firms* to provide *clients* with specified information concerning *client* categorisation.

- 45 (1) Investment firms shall notify new clients, and existing clients that the investment firm has newly categorised as required by Directive 2014/65/EU, of their categorisation as a retail client, a professional client or an eligible counterparty in accordance with that Directive.
- (2) Investment firms shall inform clients in a durable medium about any right that client has to request a different categorisation and about any limitations to the level of client protection that a different categorisation would entail.

[Note: articles 45(1) and (2) of the *MiFID Org Regulation*]

3.3.1B      R      The information referred to in article 45(2) of the *MiFID Org Regulation* (as reproduced at *COBS 3.3.1AEU*) must be provided to *clients* prior to any provision of services.

[Note: paragraph 2 of section I of annex II to *MiFID*]

...

### **3.4      Retail clients**

3.4.1      R      *A retail client* is a *client* who is not a *professional client* or an *eligible counterparty*.

[Note: article 4(1)(12) (11) of *MiFID*]

...

### **3.5      Professional clients**

- 3.5.1 R *A professional client is a client that is either a per se professional client or an elective professional client.*

[~~Note:~~ article 4(1)(~~H~~) (10) of *MiFID*]

Per se professional clients

- 3.5.2 R Each of the following is a *per se professional client* unless and to the extent it is an *eligible counterparty* or is given a different categorisation under this chapter:

...

- (3) in relation to business that is not *MiFID or equivalent third country business* a large undertaking meeting any of the following conditions:

...

- (e) a trustee of an *occupational pension scheme* or *SSAS*, or a trustee or *operator* of a *personal pension scheme* or *stakeholder pension scheme* where the scheme has (or has had at any time during the previous two years):

...

- (ii) assets under management of at least £10 million (or its equivalent in any other currency at the relevant time);

- (f) ~~a local authority or public authority.~~

- (4) a national or regional government, including a public body that manages public debt at national or regional level, a central bank, an international or supranational institution (such as the World Bank, the IMF, the ECP, the EIB) or another similar international organisation;

...

- 3.5.2A R ~~In relation to *MiFID or equivalent third country business* a local authority or a public authority is not likely to be a regional government for the purposes of *COBS 3.5.2R(4)*. In the *FCA's* opinion, a local authority may be a *per se professional client* for those purposes if it meets the test for large undertakings in *COBS 3.5.2R(2)*. [deleted]~~

- 3.5.2B R *A firm* must categorise a local public authority or municipality which (in either case) does not manage public debt as a *retail client*, unless it is permitted to treat such a *person* as an *elective professional client* in accordance with *COBS 3.5.3BR* to *COBS 3.5.3ER*.

- 3.5.2C G As a result of *COBS 3.5.2BR*, a local public authority or municipality which (in either case) does not manage public debt should not be treated as a *per*

se professional client.

Elective professional clients

- 3.5.3 R A *firm* may treat a *client* other than a local public authority or municipality as an *elective professional client* if it complies with (1) and (3) and, where applicable, (2):
- ...
- 3.5.3A G (1) As a result of COBS 3.5.3BR and COBS 3.5.3ER a *firm* should always assess a local public authority or municipality against a “quantitative test” to treat it as an *elective professional client*, regardless of whether the *firm* intends to conduct business involving MiFID or equivalent third country business or other regulated activities subject to COBS 3.
- (2) The “quantitative test” that a *firm* should use depends on the application of COBS 3.5.3BR (which applies for UK clients) and COBS 3.5.3ER (which applies for non-UK clients).
- 3.5.3B R (1) A *firm* may treat a UK local public authority or municipality as an *elective professional client* if it complies with COBS 3.5.3R(1) and COBS 3.5.3R(3) and, in addition, paragraph (2) of this rule.
- (2) In the course of the assessment under COBS 3.5.3R(1) the criterion in (a) below is satisfied as well as one of the criteria in (b) below (the “quantitative test”):
- (a) the size of the *client*’s financial instrument portfolio defined as including cash deposits and financial instruments, exceeds £10,000,000; and
- (b) either:
- (i) the *client* has carried out transactions, in significant size, on the relevant market at an average frequency of ten per quarter over the previous four quarters; or
- (ii) the *person* authorised to carry out transactions on behalf of the *client* works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the provision of services envisaged; or
- (iii) the *client* is an ‘administering authority’ of the Local Government Pension Scheme within the meaning of the version of Schedule 3 of The Local Government Pension Scheme Regulations 2013 or, (in relation to Scotland) within the meaning of the version of Schedule 3 of The Local Government Pension Scheme (Scotland) Regulations 2014 in force at 1 January 2018, and is

acting in that capacity.

- 3.5.3C R (1) This rule applies where a firm is subjecting a UK local public authority or municipality to the tests and is following the procedure required as a result of COBS 3.5.3BR in respect of the firm's business carried on in relation to that person's:
- (a) business in the course of or connected to its administration of a pension scheme; and
- (b) other business as a local public authority or municipality.
- (2) A firm must apply the qualitative and quantitative tests required as a result of COBS 3.5.3BR separately and independently in relation to the client's business under (1)(a) and (1)(b).
- (3) A firm must follow the procedure in COBS 3.5.3R(3) required as a result of COBS 3.5.3BR separately and independently in relation to the client's business under (1)(a) and (1)(b).
- 3.5.3D G As a result of COBS 3.5.2BR and COBS 3.5.3CR, and depending on the outcome of the qualitative and quantitative tests required as a result of COBS 3.5.3BR, a firm may be required to categorise a UK local public authority or municipality differently in relation to the two sorts of business described at COBS 3.5.3CR(1)(a) and (b).
- 3.5.3E R (1) A firm may treat a non-UK local public authority or municipality as an elective professional client if it complies with COBS 3.5.3R(1) and COBS 3.5.3R(3) and, in addition, applies the relevant "quantitative test" under paragraph (2).
- (2) The relevant "quantitative test" under this rule is either:
- (a) where the local public authority or municipality is established in an EEA State and the EEA State has adopted alternative or additional criteria to those listed in the fifth paragraph to section II.1 of annex II to MiFID, those criteria as set out in the law or measures of that EEA State; or
- (b) in any other case the same "quantitative test" that is applied in relation to MiFID or equivalent third country business under COBS 3.5.3R(2).

...

- 3.5.6 R Before deciding to accept a request for re-categorisation as an *elective professional client* a firm must take all reasonable steps to ensure that the client requesting to be treated as an *elective professional client* satisfies the qualitative test and, where applicable, the relevant quantitative test.

[Note: second paragraph of section II.2 of annex II to MiFID]

...

3.5.8 G *Professional ~~client~~ clients* are responsible for keeping the *firm* informed about any change that could affect their current categorisation.

3.5.9 R ...

[**Note:** fourth paragraph of section II.2 of annex II to *MiFID* and article 28(1) of the *MiFID implementing Directive*]

### 3.6 Eligible counterparties

3.6.1 R ...

[**Note:** article 2430(1) of *MiFID*]

Per se eligible counterparties

3.6.2 R Each of the following is a *per se eligible counterparty* (including an entity that is not from an *EEA State* that is equivalent to any of the following) unless and to the extent it is given a different categorisation under this chapter:

...

(7) ~~an undertaking exempted from the application of *MiFID* under either Article 2(1)(k) (certain own account dealers in commodities or commodity derivatives) or Article 2(1)(l) (locals) of that directive;~~  
[deleted]

(8) a national government or its corresponding office, including a public body that deals with the public debt at national level;

(9) a central bank; and

...

[**Note:** first paragraph of article 2430(2) and first paragraph of article 2430(4) of *MiFID*]

...

Elective eligible counterparties

3.6.4 R *A firm* may treat a *client* as an *elective eligible counterparty* in relation to business other than *MiFID* or equivalent third country business if:

(1) the *client* is an undertaking and:

(a) is a *per se professional client* (except for a *client* that is only a

*per se professional client* because it is an institutional investor under *COBS 3.5.2R(5)*) and, ~~in relation to business other than *MiFID* or equivalent third country business:~~

- (i) ...
- (ii) meets the criteria in the *rule* on meeting two quantitative tests (*COBS 3.5.2R(3)(b)*); ~~or~~ and

~~(b) requests such categorisation and is an *elective professional client*, but only in respect of the services or transactions for which it could be treated as a *professional client*; and~~

- (2) ~~the *firm* has, in relation to *MiFID* or equivalent third country business, obtained express confirmation from the prospective counterparty that it agrees to be treated as an *eligible counterparty* the *firm* adheres to the procedure set out at *COBS 3.6.4BEU*.~~

...

3.6.4A EU Article 71(1) of the *MiFID Org Regulation* explains which sorts of *per se professional clients* may be treated as *elective eligible counterparties*.

71 (1) In addition to the categories which are explicitly set out in Article 30(2) of Directive 2014/65/EU, Member States may recognise as eligible counterparty, in accordance with Article 30(3) of that Directive, an undertaking falling within a category of clients who are to be considered professional clients in accordance with paragraphs 1, 2 and 3 of Section I of Annex II to that Directive.

3.6.4B EU Article 71(5) of the *MiFID Org Regulation* sets out the procedure to be followed where a *client* requests to be treated as an *eligible counterparty*.

71 (5) Where a client requests to be treated as an eligible counterparty, in accordance with Article 30(3) of Directive 2014/65/EU, the following procedure shall be followed:

- (a) the investment firm shall provide the client with a clear written warning of the consequences for the client of such a request, including the protections they may lose;
- (b) the client shall confirm in writing the request to be treated as an eligible counterparty either generally or in respect of one or more investment services or a transaction or type of transaction or product and that they are aware of the consequences of the protection they may have lost as a result of the request.

3.6.4C R (1) *COBS 3.6.4AEU* and *COBS 3.6.4BEU* apply in relation to *equivalent third country business*.

- (2) COBS 3.6.4AEU and COBS 3.6.4BEU do not apply in relation to any other business that is not *MiFID business*.

...

3.6.6 R ...

[**Note:** second paragraph of article 2430(3) of *MiFID*]

Client and firm located in different jurisdictions

3.6.7 R ...

[**Note:** first paragraph of article 2430(3) of *MiFID*]

### 3.7 Providing clients with a higher level of protection

3.7.1 R ...

[**Note:** second paragraph of article 24 30(2) of, and second paragraph of section I of annex II to, *MiFID* and the second paragraph of article 50(2) of the *MiFID implementing Directive*]

3.7.2 G ...

[**Note:** third paragraph of section I and fourth paragraph of section II.2 of annex II to *MiFID* and article 50(2) of the *MiFID implementing Directive*]

3.7.3 R ~~A firm may, either on its own initiative or at the request of the client concerned:~~

- (1) ~~treat as a professional client or a retail client a client that might otherwise be categorised as a per se eligible counterparty;~~
- (2) ~~treat as a retail client a client that might otherwise be categorised as a per se professional client;~~

~~and if it does so, the client will be re-categorised accordingly. Where applicable, this re-categorisation is subject to the requirement for a written agreement in COBS 3.7.5R. [deleted]~~

[**Note:** second paragraph of article 24(2) of, and second paragraph of section I of annex II to, *MiFID* and article 28(3) and the second paragraph of article 50(2) of the *MiFID implementing Directive*]

3.7.3A EU Article 45(3) of the *MiFID Org Regulation* sets out provisions in respect of giving clients a higher level of protection.

45 (3) Investment firms may, either on their own initiative or at the request of the client concerned treat a client in the following



manner:

- (a) as a professional or retail client where that client might otherwise be classified as an eligible counterparty pursuant to Article 30(2) of Directive 2014/65/EU;
- (b) a retail client where that client that is considered a professional client pursuant to Section I of Annex II to Directive 2014/65/EU.

3.7.3B EU Article 71(2) to (4) of the MiFID Org Regulation sets out provisions applying to eligible counterparties requesting a higher level of protection.

- 71 (2) Where, pursuant to the second subparagraph of Article 30(2) of that Directive 2014/65/EU, an eligible counterparty requests treatment as a client whose business with an investment firm is subject to Articles 24, 25, 27 and 28 of that Directive, the request should be made in writing, and shall indicate whether the treatment as retail client or professional client refers to one or more investment services or transactions, or one or more types of transaction or product.
- (3) Where an eligible counterparty requests treatment as a client whose business with an investment firm is subject to Articles 24, 25, 27 and 28 of Directive 2014/65/EU, but does not expressly request treatment as a retail client, the firm shall treat that eligible counterparty as a professional client.
- (4) Where the eligible counterparty expressly requests treatment as a retail client, the investment firm shall treat the eligible counterparty as a retail client, applying the provisions in respect of requests of non-professional treatment specified in the second, third and fourth sub-paragraphs of Section I of Annex II to Directive 2014/65/EU.

3.7.4 R ~~If a *per se* eligible counterparty requests treatment as a client whose business with the firm is subject to conduct of business protections, but does not expressly request treatment as a retail client and the firm agrees to that request, the firm must treat that eligible counterparty as a professional client. [deleted]~~

~~[Note: first paragraph of article 50(2) of the MiFID implementing Directive]~~

3.7.5 R (1) ~~If, in relation to MiFID or equivalent third country business a *per se* professional client or a *per se* eligible counterparty requests treatment as a retail client, the client will be classified as a retail client if it enters into a written agreement with the firm to the effect that it will not be treated as a professional client or eligible~~

*counterparty* for the purposes of the applicable conduct of business regime.

- (2) This agreement must specify the scope of the re-categorisation, such as whether it applies to one or more particular services or transactions, to one or more types of product or transaction or to one or more *rules*.

[**Note:** fourth paragraph of section I of annex II to *MiFID* and second paragraph of article 50(2) of the *MiFID implementing Directive*]

...

3.7.7 G ...

[**Note:** second paragraph of article 24~~30~~(2) of *MiFID*]

...

### 3.8 Policies, procedures and records

...

Records

3.8.2 R ...

[**Note:** article 51(3)~~16~~(6) of the *MiFID implementing Directive* *MiFID*]

...

## 4. Communicating with clients, including financial promotions

### 4.1 Application

Who? What?

4.1.1 R This chapter applies to a *firm*:

- (1) communicating with a *client* in relation to its *designated investment business*;

...

- (3) when a *MiFID investment firm* or a *credit institution* is communicating in connection with selling, or advising *clients* in relation to, *structured deposits* as specified by *COBS 1.1.1AAR*.

...

4.1.4 G (1) In *COBS 4.3.1R*, ~~*COBS 4.5.8R*~~ and ~~*COBS 4.7.1R*~~, the defined terms term “*financial promotion*” and “*direct offer financial promotion*”

includes, in relation to ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business, all communications that are marketing communications within the meaning of *MiFID*.

- (2) In the case of ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business, certain requirements in this chapter are subject to an exemption for the communication of a *third party prospectus* in certain circumstances (see recital 73 of the *MiFID Org Regulation*). This has a similar effect to the exemption in article 70(1)(c) of the *Financial Promotion Order*, which is referred to in the definition of an *excluded communication*.

...

- 4.1.5 G (1) A *firm* communicating with an *eligible counterparty* should have regard to the application of *COBS* to *eligible counterparty business* (*COBS* 1 Annex 1 Part 1).
- (2) ~~This chapter does not apply in relation to communicating with an *eligible counterparty* other than the section on compensation information (see *COBS* 4.4) but elements of the requirements in *PRIN* may apply.~~
- 4.1.6 G Approving a *financial promotion* without *communicating* it (which includes causing it to be communicated) is not ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business. *Communicating* a *financial promotion* to a *person*, such as a *corporate finance contact* or a *venture capital contact*, who is not a *client* within the meaning of *COBS* 3.2.1R(1), *COBS* 3.2.1R(2) or *COBS* 3.2.1R(4) in respect of the ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business to which the *financial promotion* relates, is also not ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business. Further guidance on what amounts to *MiFID business* may be found in *PERG* 13.
- 4.1.7 G A reference in this chapter to ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business includes a reference to communications that occur before an agreement to perform services in relation to ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business.

[**Note:** see recital 82 16 to the ~~MiFID implementing Directive~~ MiFID Org Regulation]

...

## 4.2 Fair, clear and not misleading communications

The fair, clear and not misleading rule

- 4.2.1 R (1) A *firm* must ensure that a communication or a *financial promotion* is fair, clear and not misleading.
- (2) This *rule* applies in relation to:
- (a) a communication by the *firm* to a ~~*client*~~ *customer* in relation to *designated investment business* other than a *third party prospectus*;
- (aa) a communication to an *eligible counterparty* that is in relation to *MiFID* or equivalent *third country business*, other than a *third party prospectus*;
- ...
- (3) As part of complying with (1), a *firm* must take into account the nature of the *client*.
- [**Note:** article 19(2) of *MiFID*, recital 52 to the *MiFID implementing Directive* article 24(3) and article 30(1) of *MiFID* and article 77 of the *UCITS Directive*]

- 4.2.2 G (1) The *fair, clear and not misleading rule* applies in a way that is appropriate and proportionate taking into account the means of communication, ~~and~~ the information the communication is intended to convey and the nature of the *client* and of its *business*, if any. So a communication addressed to a *professional client* or an *eligible counterparty* may not need to include the same information, or be presented in the same way, as a communication addressed to a *retail client*.
- (2) ...
- [**Note:** article 30(1) of *MiFID* and recital 65 to the *MiFID Org Regulation*]

...

### 4.3 Financial promotions to be identifiable as such

- 4.3.1 R (1) ...
- [**Note:** article ~~19(2)~~ 24(3) of *MiFID* and article 77 of the *UCITS Directive*]
- (2) If a *financial promotion* relates to a *firm's* ~~*MiFID* or equivalent *third country business*~~ *MiFID*, equivalent *third country* or optional *exemption business*, this *rule* does not apply to the extent that the *financial promotion* is a *third party prospectus*.
- ...

...

## 4.5 Communicating with retail clients (non-MiFID provisions)

### Application

- 4.5.1 R (1) Subject to (2) and (3), this section applies to a *firm* in relation to:
- (a) the provision of information in relation to its *designated investment business*; and
  - (b) the *communication or approval of a financial promotion*;<sup>2</sup>
- where such information or *financial promotion* is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client*.
- (2) ~~If a communication relates to a firm's MiFID or equivalent third country business, this section does not apply.~~ This section does not apply to a firm communicating in relation to its MiFID, equivalent third country or optional exemption business.
- (a) ~~to the extent that it is a third party prospectus;~~
  - (b) ~~if it is image advertising.~~
- (3) ~~If a communication relates to a firm's business that is not MiFID or equivalent third country business, this~~ This section does not apply in relation to a communication:

...

### General rule

- 4.5.2 R A *firm* must ensure that information:
- (1) includes the name of the *firm*;
  - (2) is accurate and ~~in particular does not emphasise~~ always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of relevant business or a relevant investment without also giving a fair and prominent indication of any relevant risks;
  - (3) 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; ~~and~~
  - (4) does not disguise, diminish or obscure important items, statements or warnings;
  - (5) 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 that ensures that such indication is prominent;

(6) 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 agreed to receive information in more than one language; and

(7) is up-to-date and relevant to the means of communication used.

~~[Note: article 27(2) of the MiFID implementing Directive]~~

...

4.5.5 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

4.5.6 R ~~(1) If information compares *relevant business, relevant investments*, or persons who carry on *relevant business*, a *firm* must ensure that:~~

~~(a) the comparison is meaningful and presented in a fair and balanced way; and~~

~~(b) in relation to *MiFID or equivalent third country business*;~~

~~(i) the sources of the information used for the comparison are specified; and~~

~~(ii) the key facts and assumptions used to make the comparison are included.~~

~~(2) In this rule, in relation to *MiFID or equivalent third country business*, *ancillary services* are to be regarded as *relevant business*.~~

~~[Note: article 27(3) of the MiFID implementing Directive]~~

Referring to tax

4.5.7 R (1) ...

~~[Note: article 27(7) of the MiFID implementing Directive]~~

~~(2) This rule applies in relation to *MiFID or equivalent third country business* or, otherwise, to a *financial promotion*. However, it does not apply to a *financial promotion* except to the extent that it relates to:~~

~~(a) [deleted]~~

- (b) a *pure protection contract* that is a *long-term care insurance contract*.

#### Consistent financial promotions

- 4.5.8 R (1) A *firm* must ensure that information contained in a *financial promotion* is consistent with any information the *firm* provides to a *retail client* in the course of carrying on *designated investment business* ~~or, in the case of *MiFID* or equivalent third country business, ancillary services.~~

~~[Note: article 29(7) of the *MiFID* implementing Directive]~~

- (2) This *rule* does not apply to a *financial promotion* to the extent that it relates to:

- (a) ~~{deleted}~~
- (b) a *pure protection contract* that is a *long-term care insurance contract*.

...

After COBS 4.5 (Communicating with retail clients (non-MiFID provisions)) insert the following new section. All the text is new and is not underlined.

#### **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 “EU” 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 “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

#### General requirements

- 4.5A.3 EU 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 EU 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 EU 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 EU 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 EU 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 that of the Member State in which the retail client or potential retail client is resident, 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 EU 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:
- (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;

- (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;
- (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.12EU, the conditions referred to in article 44(5)(b) can be found reproduced in *COBS* 4.5A.10EU.

#### Future performance

- 4.5A.14 EU 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.14EU. 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 EU 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*]

Amend the following as shown.

#### 4.6 Past, simulated past and future performance (non-MiFID provisions)

##### Application

4.6.1 R (1) Subject to (2) and (3), this section applies to a *firm* in relation to:

- (a) ~~the provision of information in relation to its *MiFID* or equivalent third country business; [deleted]~~
- (b) the communication or approval of a *financial promotion*;

where such information or *financial promotion* is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client*.

(2) ~~If a communication relates to a *firm's MiFID* or equivalent third country business, this section does not apply. This section does not apply to a *firm* communicating in relation to its *MiFID*, equivalent third country or optional exemption business~~

- (a) ~~to the extent that the communication is a *third party prospectus*;~~
- (b) ~~if it is *image advertising*.~~

(3) ~~If a communication relates to a *firm's* business that is not *MiFID* or equivalent third country business, this This section does not apply in relation to a communication:~~

...

- (d) to the extent that it relates to a *deposit* that is not a *structured deposit* (see also COBS 4.1.1R(3));

...

##### Past performance

4.6.2 R A *firm* must ensure that information that contains an indication of past performance of *relevant business*, a *relevant investment* or a financial index, satisfies the following conditions:

...

- (2) the information includes appropriate performance information which covers ~~at least the immediately~~ the preceding five years, or the whole

period for which the investment has been offered, the financial index has been established, or the service has been provided ~~if~~ (where less than five years, or such longer period as the *firm* may decide), and in every case that performance information must be based on ~~and show~~ complete 12-month periods;

...

~~[Note: article 27(4) of the MiFID implementing Directive]~~

...

#### Simulated past performance

4.6.6 R A *firm* must ensure that information that contains an indication of simulated past performance of *relevant business*, a *relevant investment* or a financial index, satisfies the following conditions:

...

(2) the simulated past performance is based on the actual past performance of one or more investments or financial indices which are the same as, substantially the same as, or underlie, the investment concerned;

(3) in respect of the actual past performance referred to in (2), the conditions set out in paragraphs (1) to (3), (5) and (6) of the *rule* on past performance (COBS 4.6.2R) are complied with; and

...

~~[Note: article 27(5) of the MiFID implementing Directive]~~

#### Future performance

4.6.7 R (1) A *firm* must ensure that information that contains an indication of future performance of *relevant business*, a *relevant investment*, a *structured deposit* or a financial index, satisfies the following conditions:

...

(c) ~~it discloses the effect of commissions, fees or other charges if~~ where the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed; ~~and~~

(ca) it is based on performance scenarios in different market conditions (both negative and positive scenarios), and reflects the nature and risks of the specified types of investments included in the analysis; and

(d) ...

- (2) ~~Other than in relation to MiFID or equivalent third country business, this~~ This rule only applies in relation to financial promotions that relate to a financial instrument (or a financial index that relates exclusively to financial instruments) or a structured deposit.

~~[Note: article 27(6) of the MiFID implementing Directive]~~

...

## 4.7 Direct offer financial promotions

### Application

- 4.7.-1      G      (1)      COBS 4.7.-1AEU to COBS 4.7.1R contain provisions on the communication of direct offer financial promotions.
- (2)      In broad terms:
- (a)      COBS 4.7.-1AEU is relevant to a firm communicating a direct offer financial promotion in relation to its MiFID, equivalent third country or optional exemption business; and
- (b)      COBS 4.7.1R is relevant to a firm communicating a direct offer financial promotion that does not relate to its MiFID, equivalent third country or optional exemption business.
- (3)      However, a MiFID investment firm, third country investment firm or MiFID optional exemption firm which is subject to the requirements in COBS 4.7.-1AEU may be subject to the rule in COBS 4.7.1R to the extent that it communicates a direct offer financial promotion:
- (a)      which is not a marketing communication; or
- (b)      which does not relate to its MiFID, equivalent third country or optional exemption business.

Direct offer financial promotions relating to MiFID, equivalent third country or optional exemption business

- 4.7.-1A      EU      46(6)      Marketing communications containing an offer or invitation of the following nature and specifying the manner of response or including a form by which any response may be made, shall include such of the information referred to in Articles 47 to 50 as is relevant to that offer or invitation:
- (a)      an offer to enter into an agreement in relation to a financial instrument or investment service or ancillary service with any person who responds to the communication;
- (b)      an invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment service or

ancillary service.

However, the first subparagraph shall not apply if, in order to respond to an offer or invitation contained in the marketing communication, the potential client must refer to another document or documents, which, alone or in combination, contain that information.

**[Note: article 46(6) of the *MiFID Org Regulation*]**

Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms

- 4.7.-1B     R     Provisions in this section marked “EU” apply in relation to *MiFID optional exemption business* as if they were *rules* (see *COBS 1.2.2G*).
- 4.7.-1C     G     The effect of *GEN 2.2.22AR* is that provisions in this section marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.
- 4.7.-1D     G     For the purposes of *COBS 4.7.-1AEU*, the provisions of articles 47 to 50 of the *MiFID Org Regulation* can be found reproduced in *COBS 6.1ZA* and *COBS 14.3A*.

Other direct offer financial promotions

- 4.7.1        R     (1)     Subject to (3) and (4), a *firm* must ensure that a *direct offer financial promotion* that is addressed to, or disseminated in such a way that it is likely to be received by, a *retail client* contains:
- (a)     ~~such of~~ the information referred to in the *rules* on information disclosure (*COBS 6.1.4R*, *COBS 6.1.6R*, *COBS 6.1.7R*, *COBS 6.1.9R*, *COBS 14.3.2R*, *COBS 14.3.3R*, *COBS 14.3.4R* and *COBS 14.3.5R*) as is relevant to that offer or invitation; and
- [**Note: article 29(8) of the *MiFID implementing Directive*, the ~~rules~~ listed implement Articles 30 to 33 of the *MiFID implementing Directive*]**
- (b)     ~~if it does not relate to *MiFID* or *equivalent third country business*,~~ additional appropriate information about the *relevant business* and *relevant investments* so that the *client* is reasonably able to understand the nature and risks of the *relevant business* and *relevant investments* and consequently to take investment decisions on an informed basis.
- (2)     ...
- (3)     ~~If This section does not apply in relation to a marketing communication that relates to a firm’s *MiFID* or *equivalent third country business*, this section does not apply: *MiFID*, *equivalent*~~

third country or optional exemption business

- (a) to the extent that it is a *third party prospectus*;
  - (b) if it is *image advertising*.
- (4) ~~If a communication relates to a firm's business that is not *MiFID or equivalent third country business*, this~~ This section does not apply in relation to a communication:
- ...
- (5) ~~In this rule, in relation to *MiFID or equivalent third country business*, ancillary services are to be regarded as *relevant business*.~~  
[deleted]

## Guidance

- 4.7.2 G Although *COBS 4.7.1R(1)(b)* does not apply in relation to ~~*MiFID or equivalent third country business*~~ *MiFID, equivalent third country or optional exemption business*, similar requirements may apply under *COBS 2.2 2.2A*.

...

## Warrants and derivatives

- 4.7.6 R (1) A firm must not *communicate* or *approve* a *direct offer financial promotion*:
- ...
- (c) where the *firm* will not itself be required to comply with the *rules* on appropriateness (see *COBS 10 and 10A*);
- ...

...

## Non-readily realisable securities

- 4.7.7 R ...
- (3) The second condition is that the *firm* itself or the *person* who will *arrange* or *deal* in relation to the *non-readily realisable security* will comply with the *rules* on appropriateness (see *COBS 10 and 10A*) or equivalent requirements for any application or order that the *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* 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

...

...

#### **4.10 Systems and controls and approving and communicating financial promotions**

...

Approving financial promotions

...

##### 4.10.3 G ...

- (3) *Approving a financial promotion for communication by an unauthorised person is not ~~MiFID or equivalent third country business~~ MiFID, equivalent third country or optional exemption business.*

...

Relying on another firm's confirmation of compliance

##### 4.10.10 R ...

- (2) This *rule* does not apply in relation to ~~*MiFID or equivalent third country business*~~ *MiFID, equivalent third country or optional exemption business*.

#### **4.11 Record keeping: financial promotion**

##### 4.11.1 R ...

- (4) If a communication relates to a *firm's* ~~*MiFID or equivalent third country business*~~ *MiFID, equivalent third country or optional exemption business*, this section does not apply:

...

...

~~[Note: see article 51(3) of the MiFID implementing Directive]~~

- 4.11.1A G A MiFID investment firm, third country investment firm or MiFID optional exemption firm should refer to the requirements on record keeping in the MiFID Org Regulation and SYSC 9.

...

## 4.12 Restrictions on the promotion of non-mainstream pooled investments

...

Advice and preliminary assessment of suitability

- 4.12.5 G (1) Where a *firm* communicates any promotion of a *non-mainstream pooled investment* in the context of advice, it should have regard to and comply with its obligations under *COBS 9 or 9A (as applicable)*. *Firms* should also be mindful of the appropriateness requirements in *COBS 10 and 10A* which apply to a wide range of non-advised services.

(2) ...

(b) There is no duty to communicate the preliminary assessment of suitability to the *client*. If the *firm* does so, it must not do so in a way that amounts to making a *personal recommendation* unless it complies with the *rules in COBS 9 or 9A (as applicable)* on suitability.

(c) The requirement for a preliminary assessment of suitability does not extend to a full suitability assessment, unless advice is being offered in relation to the *non-mainstream pooled investment* being promoted, in which case the requirements in *COBS 9 or 9A* apply (*as applicable*). However, it requires that the *firm* ~~take~~ takes reasonable steps to acquaint itself with the *client's* profile and objectives in order to ascertain whether the *non-mainstream pooled investment* under contemplation is likely to be suitable for that *client*. The *firm* should not promote the *non-mainstream pooled investment* to the *client* if it does not consider it likely to be suitable for that *client* following such preliminary assessment.

...

## 6 Information about the firm, its services and remuneration

### 6.1 Information about the firm and compensation information (non-MiFID provisions)

Application

- 6.1.1 R (1) This section applies to a *firm* that carries on *designated investment business, other than MiFID, equivalent third country or optional exemption business*, for:
- (a) ~~a retail client; and~~
  - (b) ~~in the case of MiFID or equivalent third country business, a client.~~
- (2) ~~If expressly provided, this section also applies to ancillary services not covered by (1), but only in the course of MiFID or equivalent third country business carried on with or for a client. [deleted]~~

...

#### Information about a firm and its services

- 6.1.4 R A *firm* must provide a ~~retail~~ *client* with the following general information, if relevant:

...

- (2) ~~in the case of MiFID or equivalent third country business, the languages in which the client may communicate with the firm, and receive documents and other information from the firm; [deleted]~~

...

- (5) ~~in the case of MiFID or equivalent third country business, the contact address of the competent authority that has authorised the firm; [deleted]~~

- (6) ~~if the firm is acting through an appointed representative or, where applicable, a tied agent, a statement of this fact specifying the EEA State in which that appointed representative or tied agent is registered;~~

...

~~[Note: article 30(1) of the MiFID implementing Directive]~~

...

- 6.1.6 R ...
- (2) If a *firm* proposes to *manage investments* for a ~~retail~~ *client*, the *firm* must provide the *client* with such of the following information as is applicable:

...

~~[Note: articles 30(2) and (3) of the MiFID implementing Directive]~~

Information concerning safeguarding of designated investments belonging to clients and client money

- 6.1.7 R (1) A *firm* that holds *designated investments* or *client money* for a ~~*retail*~~ *client* subject to the *custody chapter* or the *client money chapter* must provide that *client* with the following information:
- ...
- (b) if applicable, that the *designated investments* belonging to the ~~*retail*~~ *client* may be held in an omnibus account by a third party and a prominent warning of the resulting risks;
- ...
- (2) A *firm* that holds *designated investments* or *client money* for a ~~*retail*~~ *client* must inform the *client*:
- ...
- (3) A *firm* within (1) must also, before entering into *securities financing transactions* in relation to *designated investments* held by it on behalf of a ~~*retail*~~ *client*, or before otherwise using such *designated investments* for its own account or the account of another *client*, in good time before the use of those *designated investments* provide the *client*, in a *durable medium*, with clear, full and accurate information on the obligations and responsibilities of the *firm* with respect to the use of those *designated investments*, including the terms for their restitution, and on the risks involved.
- (4) ~~A *firm* within (1) that holds *client designated investments* or *client money* for a *professional client* must provide that *client* with the information in paragraphs (1)(d) and (2)(a) and (b). [deleted]~~
- ~~[Note: articles 29(3), 30(1)(g) and 32 of the *MiFID implementing Directive*]~~

...

Information about costs and associated charges

- 6.1.9 R A *firm* must provide a ~~*retail*~~ *client* with information on costs and associated charges including, if applicable:
- (1) the total price to be paid by the *client* in connection with the *designated investment* or the *designated investment business* ~~or *ancillary services*~~, including all related fees, commissions, charges and expenses, and all taxes payable via the *firm* or, if an exact price cannot be indicated, the basis for the calculation of the total price so that the *client* can verify it. The commissions charged by the *firm* must be itemised separately in every case;

...

~~[Note: article 33 of the MiFID implementing Directive]~~

...

#### Timing of disclosure

- 6.1.11 R (1) A *firm* must provide a *client* with the information required by this section in good time before the provision of *designated investment business* ~~or ancillary services~~ unless otherwise provided by this *rule*.
- (2) A *firm* may instead provide that information immediately after starting to provide *designated investment business* ~~or ancillary services~~ if:
- ...
- (b) in any case where the *rule* on voice telephony communications (COBS 5.1.12R) does not otherwise apply, the *firm* complies with that *rule* in relation to the ~~retail~~ *client*, as if that *client* were a *consumer*.

~~[Note: article 29(2), 29(3) and 29(5) of the MiFID implementing Directive]~~

...

#### Medium of disclosure

- 6.1.13 R ...

~~[Note: article 29(4) of the MiFID implementing Directive]~~

#### Keeping the client up to date

- 6.1.14 R ...

~~[Note: article 29(6) of the MiFID implementing Directive]~~

#### Existing clients

- 6.1.15 G ...

~~[Note: recital 50 to the MiFID implementing Directive]~~

...

#### Compensation information

- 6.1.16 R (1) A *firm* ~~carrying on MiFID business~~ must make available to a *client*, who has used or intends to use ~~those~~ the firm's services, information necessary for the identification of the *compensation scheme* or any

other investor-compensation scheme of which the *firm* is a member (including, if relevant, membership through a *branch*) or any alternative arrangement provided for in accordance with the *Investor Compensation Directive*.

...

...

After COBS 6.1 (Information about the firm and compensation information (non-MiFID provisions)) insert the following new section. All the text is new and is not underlined.

## **6.1ZA Information about the firm and compensation information (MiFID provisions)**

### **6.1ZA.1 Application**

6.1ZA.1.1 R (1) Subject to (2), this section applies to a *firm* in relation to its *MiFID*, *equivalent third country or optional exemption business*.

(2) *COBS* 6.1ZA.2.12R does not apply to a *firm* in respect of its *MiFID optional exemption business*.

6.1ZA.1.2 G This section imposes requirements relating to disclosure of information to *clients* that are additional to the general requirements in *COBS* 2.2A.

Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms

6.1ZA.1.3 R Provisions in this section marked “EU” apply in relation to *MiFID optional exemption business* as if they were *rules* (see *COBS* 1.2.2G).

6.1ZA.1.3 G The effect of *GEN* 2.2.22AR is that provisions in this section marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

A

[**Note:** ESMA has issued guidelines under article 16(3) of the ESMA Regulation on cross-selling practices. See [https://www.esma.europa.eu/sites/default/files/library/2016-574\\_en\\_guidelines\\_on\\_cross-selling\\_practices.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-574_en_guidelines_on_cross-selling_practices.pdf)]

### **6.1ZA.2 Information about a firm and its services**

6.1ZA.2.1 EU 47(1) Investment firms shall provide clients or potential clients with the following general information, where relevant:

(a) the name and address of the investment firm, and the contact details necessary to enable clients to communicate effectively

with the firm;

- (b) the languages in which the client may communicate with the investment firm, and receive documents and other information from the firm;
- (c) the methods of communication to be used between the investment firm and the client including, where relevant, those for the sending and reception of orders;
- (d) a statement of the fact that the investment firm is authorised and the name and contact address of the competent authority that has authorised it;
- (e) where the investment firm is acting through a tied agent, a statement of this fact specifying the Member State in which that agent is registered;
- (f) the nature, frequency and timing of the reports on the performance of the service to be provided by the investment firm to the client in accordance with Article 25(6) of Directive 2014/65/EU;
- (g) where the investment firm holds client financial instruments or client funds, a summary description of the steps which it takes to ensure their protection, including summary details of any relevant investor compensation or deposit guarantee scheme which applies to the firm by virtue of its activities in a Member State;
- (h) a description, which may be provided in summary form, of the conflicts of interest policy maintained by the firm in accordance with Article 34;
- (i) at the request of the client, further details of that conflicts of interest policy in a durable medium or by means of a website (where that does not constitute a durable medium) provided that the conditions set out Article 3(2) are satisfied.

The information listed in points (a) to (i) shall be provided in good time before the provision of investment services or ancillary services to clients or potential clients.

[**Note:** article 47(1) of the *MiFID Org Regulation*]

- 6.1ZA.2.2 G Reference in *COBS* 6.1ZA.2.1EU to “Article 25(6) of Directive 2014/65/EU” is to the requirements in *COBS* 16A.2.1R.
- 6.1ZA.2.3 G A *firm* disclosing details of its authorisation should refer to the appropriate form of words set out in *GEN* 4 Annex 1R or *GEN* 4 Annex 1AR as appropriate.

## Information about a firm's portfolio management service

- 6.1ZA.2.4 EU 47(2) When providing the service of portfolio management, investment firms shall establish an appropriate method of evaluation and comparison such as a meaningful benchmark, based on the investment objectives of the client and the types of financial instruments included in the client portfolio, so as to enable the client for whom the service is provided to assess the firm's performance.
- 47(3) Where investment firms propose to provide portfolio management services to a client or potential client, they shall provide the client, in addition to the information required under paragraph 1, with such of the following information as is applicable:
- (a) information on the method and frequency of valuation of the financial instruments in the client portfolio;
  - (b) details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio;
  - (c) a specification of any benchmark against which the performance of the client portfolio will be compared;
  - (d) the types of financial instrument that may be included in the client portfolio and types of transaction that may be carried out in such instruments, including any limits;
  - (e) the management objectives, the level of risk to be reflected in the manager's exercise of discretion, and any specific constraints on that discretion.
- The information listed in points (a) to (e) shall be provided in good time before the provision of investment services or ancillary services to clients or potential clients.

[**Note:** articles 47(2) and (3) of the *MiFID Org Regulation*]

## Information concerning safeguarding of financial instruments belonging to clients and client money

- 6.1ZA.2.5 EU 49(1) Investment firms holding financial instruments or funds belonging to clients shall provide those clients or potential clients with the information specified in paragraphs 2 to 7 where relevant.
- 49(2) The investment firm shall inform the client or potential client where the financial instruments or funds of that client may be held by a third party on behalf of the investment firm and of the responsibility of the investment firm under the applicable national law for any acts or omissions of the third party and the



consequences for the client of the insolvency of the third party.

- 49(3) Where financial instruments of the client or potential client may, if permitted by national law, be held in an omnibus account by a third party, the investment firm shall inform the client of this fact and shall provide a prominent warning of the resulting risks.
- 49(4) The investment firm shall inform the client or potential client where it is not possible under national law for client financial instruments held with a third party to be separately identifiable from the proprietary financial instruments of that third party or of the investment firm and shall provide a prominent warning of the resulting risks.
- 49(5) The investment firm shall inform the client or potential client where accounts that contain financial instruments or funds belonging to that client or potential client are or will be subject to the law of a jurisdiction other than that of a Member State and shall indicate that the rights of the client or potential client relating to those financial instruments or funds may differ accordingly.
- 49(6) An investment firm shall inform the client about the existence and the terms of any security interest or lien which the firm has or may have over the client's financial instruments or funds, or any right of set-off it holds in relation to those instruments or funds. Where applicable, it shall also inform the client of the fact that a depository may have a security interest or lien over, or right of set-off in relation to those instruments or funds.
- 49(7) An investment firm, before entering into securities financing transactions in relation to financial instruments held by it on behalf of a client, or before otherwise using such financial instruments for its own account or the account of another client shall in good time before the use of those instruments provide the client, in a durable medium, with clear, full and accurate information on the obligations and responsibilities of the investment firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved.

[**Note:** article 49 of the *MiFID Org Regulation*]

- 6.1ZA.2.6 G *Firms* subject to either or both the *custody rules* and the *client money rules* are reminded of the information requirements concerning *custody assets* and *client money* in CASS 9.3 (Prime brokerage agreement disclosure annex) and CASS 9.4 (Information to clients concerning custody assets and client money).

Information about costs and associated charges

- 6.1ZA.2.7 R *COBS 2.2A.2R* requires a *firm* to provide a *client* with information about all costs and related charges. That information must include:

- (1) information relating to both *investment services* and *ancillary services*;
- (2) where relevant, the cost of any *investment advice*;
- (3) the cost of the *financial instrument* recommended or marketed to the *client*;
- (4) information on how the *client* may pay; and
- (5) details of any third party payments.

[**Note:** article 24(4)(c) of *MiFID*]

- 6.1ZA.2.8 R
- (1) A *firm* must aggregate the information about costs and charges required by *COBS 2.2A.2R* and *COBS 6.1ZA.2.7R*, where those costs and charges are not caused by the occurrence of underlying market risk. This is to allow the *client* to understand the overall cost, and the cumulative effect on the return, of the investment.
  - (2) A *firm* must provide the *client* with an itemised breakdown of the costs and charges information required by (1) and *COBS 6.1ZA.2.7R* when requested by the *client*.
  - (3) The information must, where applicable, be provided to the *client* on a regular basis, and at least annually, during the life of the investment.

[**Note:** article 24(4) of *MiFID*]

- 6.1ZA.2.9 R
- (1) A *firm* must provide the information required by *COBS 6.1ZA.2.7R* and *COBS 6.1ZA.2.8R* in a comprehensible form in such a manner that the *client* is reasonably able to understand the nature and risks of the *investment service* and of the specific type of *financial instrument* that is being offered and, consequently, to take investment decisions on an informed basis.
  - (2) That information may be provided in a standardised format.

[**Note:** article 24(5) of *MiFID*]

- 6.1ZA.2.1 EU  
0
- 50(1) For the purposes of providing information to clients on all costs and charges pursuant to Article 24(4) of Directive 2014/65/EU, investment firms shall comply with the detailed requirements in paragraphs 2 to 10.
- Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to professional clients shall have the right to agree to a limited application of the detailed requirements set out in this Article with these clients. Investment firms shall not be allowed to agree such limitations when the services of investment advice or

portfolio management are provided or when, irrespective of the investment service provided, the financial instruments concerned embed a derivative.

Without prejudice to the obligations set out in Article 24(4) of Directive 2014/65/EU, investment firms providing investment services to eligible counterparties shall have the right to agree to a limited application of the detailed requirements set out in this Article, except when, irrespective of the investment service provided, the financial instruments concerned embed a derivative and the eligible counterparty intends to offer them to its clients.

- 50(2) For ex-ante and ex-post disclosure of information on costs and charges to clients, investment firms shall aggregate the following:
- (a) all costs and associated charges charged by the investment firm or other parties where the client has been directed to such other parties, for the investment services(s) and/or ancillary services provided to the client; and
  - (b) all costs and associated charges associated with the manufacturing and managing of the financial instruments.
- Costs referred to in points (a) and (b) are listed in Annex II to this Regulation. For the purposes of point (a), third party payments received by investment firms in connection with the investment service provided to a client shall be itemised separately and the aggregated costs and charges shall be totalled and expressed both as a cash amount and as a percentage.
- 50(3) Where any part of the total costs and charges is to be paid in or represents an amount of foreign currency, investment firms shall provide an indication of the currency involved and the applicable currency conversion rates and costs. Investment firms shall also inform about the arrangements for payment or other performance.
- 50(4) In relation to the disclosure of product costs and charges that are not included in the UCITS KIID, the investment firms shall calculate and disclose these costs, for example, by liaising with UCITS management companies to obtain the relevant information.
- 50(5) The obligation to provide in good time a full ex-ante disclosure of information about the aggregated costs and charges related to the financial instrument and to the investment or ancillary service provided shall apply to investment firms in the following situations:
- (a) where the investment firm recommends or markets financial instruments to clients; or
  - (b) where the investment firm providing any investment services is required to provide clients with a UCITS KIID or PRIIPs KID in relation to the relevant financial

instruments, in accordance with relevant Union legislation.

- 50(6) Investment firms that do not recommend or market a financial instrument to the client or are not obliged to provide the client with a KID/KIID in accordance with relevant Union legislation shall inform their clients about all costs and charges relating to the investment and/or ancillary service provided.
- 50(7) Where more than one investment firm provides investment or ancillary services to the client, each investment firm shall provide information about the costs of the investment or ancillary services it provides. An investment firm that recommends or markets to its clients the services provided by another firm, shall aggregate the cost and charges of its services together with the cost and charges of the services provided by the other firm. An investment firm shall take into account the costs and charges associated to the provision of other investment or ancillary services by other firms where it has directed the client to these other firms.
- 50(8) Where calculating costs and charges on an ex-ante basis, investment firms shall use actually incurred costs as a proxy for the expected costs and charges. Where actual costs are not available, the investment firm shall make reasonable estimations of these costs. Investment firms shall review ex-ante assumptions based on the ex-post experience and shall make adjustment to these assumptions, where necessary.
- 50(9) Investment firms shall provide annual ex-post information about all costs and charges related to both the financial instrument(s) and investment and ancillary service(s) where they have recommended or marketed the financial instrument(s) or where they have provided the client with the KID/KIID in relation to the financial instrument(s) and they have or have had an ongoing relationship with the client during the year. Such information shall be based on costs incurred and shall be provided on a personalised basis.
- Investment firms may choose to provide such aggregated information on costs and charges of the investment services and the financial instruments together with any existing periodic reporting to clients.
- 50(10) Investment firms shall provide their clients with an illustration showing the cumulative effect of costs on return when providing investment services. Such an illustration shall be provided both on an ex-ante and ex-post basis. Investment firms shall ensure that the illustration meets the following requirements:
- (a) the illustration shows the effect of the overall costs and charges on the return of the investment;
  - (b) the illustration shows any anticipated spikes or

fluctuations in the costs; and

- (c) the illustration is accompanied by a description of the illustration.

[**Note:** article 50 of the *MiFID Org Regulation*]

- 6.1ZA.2.1 G The *rules* on inducements in *COBS 2.3A* may also require a *firm* to disclose  
1 information to a *client* in relation to the benefits provided to a *firm*.

Information about costs and charges of different services or products

- 6.1ZA.2.1 R (1) This *rule* applies to a *firm* that offers an *investment service* with  
2 another service or product or as part of a package or as a condition of the same agreement or package.
- (2) The *firm* must inform the *client* whether it is possible to buy the different components separately and must provide information on the costs and charges of each component.
- (3) If the agreement or package is offered to a *retail client*, the *firm* must:
- (a) inform that *retail client* if the risks resulting from the agreement or package are likely to be different from the risks associated with the components when taken separately; and
- (b) provide that *retail client* with an adequate description of the different components of the agreement or package and the way in which its interaction modifies the risks.

[**Note:** article 24(11) of *MiFID*]

Timing of disclosure

- 6.1ZA.2.1 EU 46(2) Investment firms shall, in good time before the provision of  
3 investment services or ancillary services to clients or potential clients, to provide the information required under Articles 47 to 50.

[**Note:** article 46(2) of the *MiFID Org Regulation*]

- 6.1ZA.2.1 G The following provisions of *COBS* reproduce the information requirements  
4 contained in Articles 47 to 50 of the *MiFID Org Regulation*: *COBS 6.1ZA.2.1EU*, *COBS 6.1ZA.2.4EU*, *COBS 6.1ZA.2.5EU*, *COBS 6.1ZA.2.10EU*, and *COBS 14.3A.5EU*.

Medium of disclosure

- 6.1ZA.2.1 EU 46(3) The information referred to in paragraphs 1 and 2 shall be provided  
5 in a durable medium or by means of a website (where it does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

[**Note:** article 46(3) of the *MiFID Org Regulation*]

#### Keeping the client up to date

- |                |    |       |   |
|----------------|----|-------|---|
| 6.1ZA.2.1<br>6 | EU | 46(4) | Investment firms shall notify a client in good time about any material change to the information provided under Articles 47 to 50 which is relevant to a service that the firm is providing to that client. That notification shall be given in a durable medium if the information to which it relates is given in a durable medium. |
|----------------|----|-------|---|

[**Note:** article 46(4) of the *MiFID Org Regulation*]

#### Existing clients

- |                |   |     |   |
|----------------|---|-----|---|
| 6.1ZA.2.1<br>7 | G | (1) | A <i>firm</i> need not treat each of several transactions in respect of the same type of <i>financial instrument</i> as a new or different service and so does not need to comply with the disclosure <i>rules</i> in this chapter in relation to each transaction. |
|----------------|---|-----|---|

[**Note:** recital 69 to the *MiFID Org Regulation*]

- |     |   |
|-----|---|
| (2) | A <i>firm</i> should ensure that the <i>client</i> has received all relevant information in relation to a subsequent transaction, such as details of product charges that differ from those disclosed in respect of a previous transaction. |
|-----|---|

#### Compensation information

- |                |   |     |   |
|----------------|---|-----|---|
| 6.1ZA.2.1<br>8 | R | (1) | A <i>firm</i> must make available to a <i>client</i> , who has used or intends to use a <i>firm's</i> services, information necessary for the identification of the <i>compensation scheme</i> or any other investor-compensation scheme of which the <i>firm</i> is a member (including, if relevant, membership through a <i>branch</i> ) or any alternative arrangement provided for in accordance with the <i>Investor Compensation Directive</i> . |
|                |   | (2) | The information under (1) must include the amount and scope of the cover offered by the compensation scheme and any rules laid down by the <i>EEA State</i> pursuant to article 2(3) of the <i>Investor Compensation Directive</i> .  |
|                |   | (3) | A <i>firm</i> must provide, on the <i>client's</i> request, information concerning the conditions governing compensation and the formalities which must be completed to obtain compensation.  |
|                |   | (4) | The information provided for in this <i>rule</i> must be made available in a <i>durable medium</i> or via a website if the <i>website conditions</i> are satisfied in the official language or languages of the <i>EEA State</i> .  |

[**Note:** article 10(1) and (2) of the *Investor Compensation Directive*]

Record keeping: information about the firm and compensation information

6.1ZA.2.1 G *Firms* are reminded of the general record-keeping requirements in SYSC  
9 9.

Amend the following as shown.

## 6.1A Adviser charging and remuneration

...

Requirement to be paid through adviser charges

6.1A.4 R Except as specified in *COBS* 6.1A.4AR, *COBS* 6.1A.4ABR, *COBS*  
6.1A.4ACG, and *COBS* 6.1A.4BR and *COBS* 6.1A.5AR(1), a *firm* must:

...

...

6.1A.5 G ...

### Acceptable minor non-monetary benefits

- 6.1A.5A R (1) For the purposes of *COBS* 6.1A.4R(2), a *firm* or its *associate* may solicit or accept minor non-monetary benefits which meet the requirements of:
- (a) *COBS* 2.3A.15R, in relation to the provision of *investment services*; or
  - (b) *COBS* 6.1A.5AR(2), in relation to other business.
- (2) An acceptable minor non-monetary benefit is one which:
- (a) is clearly disclosed prior to the provision of the relevant service to the *client*, which the *firm* may describe in a generic way;
  - (b) is capable of enhancing the quality of service provided to the *client*;
  - (c) is of a scale and nature that it could not be judged to impair the *firm's* compliance with its duty to act honestly, fairly and professionally in the best interests of the *client*;
  - (d) is reasonable, proportionate and of a scale that is unlikely to influence the *firm's* behaviour in any way that is detrimental

to the interests of the relevant *client*; and

(e) consists of:

(i) information or documentation relating to a specific *retail investment product* or a service provided in the course of carrying on related *designated investment business*, that is generic in nature or personalised to reflect the circumstances of an individual *client*;

(ii) written material from a third party that is commissioned and paid for by a corporate *issuer* or potential *issuer* to promote a new issuance by the company, or where the third party *firm* is contractually engaged and paid by the *issuer* to produce such material on an ongoing basis, provided that the relationship is clearly disclosed in the material and that the material is made available at the same time to any *firms* wishing to receive it, or to the general public;

(iii) participation in conferences, seminars and other training events on the benefits and features of a specific *retail investment product* or a service provided in the course of carrying on related *designated investment business*; and

(iv) hospitality of a reasonable de minimis value, such as food and drink during a business meeting or a conference, seminar or other training events mentioned under (iii).

(v) research relating to an issue of *shares, debentures, warrants* or *certificates representing certain securities* by an *issuer*, which is:

(A) produced:

(1) prior to the issue being completed; and

(2) by a *person* that is providing underwriting or placing services to the *issuer* on that issue; and

(B) made available to prospective investors in the issue; or

(vi) research that is received so that the *firm* may evaluate the research provider's research service, provided that:



- (A) it is received during a trial period that lasts no longer than three *months*;
- (B) no monetary or non-monetary consideration is due (whether during the trial period, before or after) to the research provider for providing the research during the trial period;
- (C) the trial period is not commenced with the research provider within 12 *months* from the termination of an arrangement for the provision of research (including any previous trial period) with the research provider; and
- (D) the *firm* makes and retains a record of the dates of any trial period accepted under this *rule*, as well as a record of how the conditions in (A) to (C) were satisfied for each such trial period.

6.1A.5B      G      COBS 2.3A.8R sets out the conditions to be met if a fee, commission or non-monetary benefit is designed to enhance the quality of the service to a *client* in relation to *MiFID*, *equivalent third country* or *optional exemption business*. For the purposes of *COBS 2.3A.19R(2)* and *COBS 6.1A.5AR(2)*, those conditions are also likely to be relevant to *firms* considering whether a fee, commission or non-monetary benefit is capable of enhancing the quality of the service to a *client* in relation to the restriction in *COBS 6.1A.4R(2)*.

[Note: articles 24(7) and (8) of *MiFID* refer to minor non-monetary benefits that are capable of enhancing the quality of service provided to the *client*]

...

**6.1B      Retail investment product provider, operator of an electronic system in relation to lending, and platform service provider requirements relating to adviser charging and remuneration**

...

Requirement not to offer commissions

6.1B.5      R      (1)      Except as specified in *COBS 6.1B.5AR*, a *firm* must not offer or pay (and must ensure that none of its *associates* offers or pays) any commissions, remuneration or benefit of any kind to another *firm*, or to any other third party for the benefit of that *firm*, in relation to a *personal recommendation* (or any related services), except those that facilitate the payment of *adviser charges* from a *retail client's* investments in accordance with this section.

(2) Paragraph (1) does not apply to minor non-monetary benefits which meet the requirements of:

(a) COBS 2.3A.19R, in connection with the provision of investment services; or

(b) COBS 6.1A.5AR(2), in connection with other business.

6.1B.5-A G The guidance in COBS 6.1A.5BG is also relevant for the purposes of COBS 6.1B.5R(2).

6.1B.5A R ...

...

Requirements on firms facilitating the payment of adviser charges

...

6.1B.11 G *COBS 6.1B.9R(3) does not prevent a firm, if this is in the retail client's best interests, from entering into an agreement with another firm which is providing a personal recommendation to a retail client, or with a retail client of such a firm, to provide it with credit separately in accordance with the rules on providing credit and other benefits to firms that advise on retail investment products or P2P agreements (COBS 2.3.12E and, COBS 2.3.12AG, COBS 2.3A.27E and COBS 2.3A.28G).*

...

## 6.1F Using a platform service for arranging and advising

Client's best interests rule and using a platform service

...

6.1F.2 G *When selecting and using a platform service for the purpose described in COBS 6.1F.1R, a firm should be mindful of its duty to comply with the client's best interests rule and the ~~rule~~ rules on inducements (COBS 2.3.1R, COBS 2.3A.5R and COBS 2.3A.15R).*

...

COBS 6.2A (Describing advice services) is deleted in its entirety. The deleted text is not shown.

## 6.2A Describing advice services [deleted]

After the deleted COBS 6.2A insert the following new section COBS 6.2B. All the text is new and is not underlined.

## **6.2B Describing advice services**

### Application

- 6.2B.1 R (1) This section applies to a *firm* that provides:
- (a) *investment advice* in the course of *MiFID*, *equivalent third country* or *optional exemption business* to *clients* in relation to *financial instruments* or *structured deposits*; or
  - (b) *investment advice* to *retail clients* in the *United Kingdom* in relation to *financial instruments*, *structured deposits* or other *retail investment products*; or
  - (c) *basic advice* to *retail clients* in the *United Kingdom*.
- 6.2B.2 R (1) This section does not apply to a *firm* when it makes a *personal recommendation* or provides *basic advice* to an employee, if that recommendation or advice is provided under the terms of an agreement between the *firm* and that employee's employer which is subject to the rules on *consultancy charges* (*COBS 6.1C*).
- (2) This section does not apply to a *firm* when it makes a *personal recommendation* to a *retail client* in relation to a *Holloway sickness policy*, provided that the *Holloway policy special application conditions* are met.
- 6.2B.3 G *P2P agreements* are neither *financial instruments* nor *retail investment products*. This section does not apply to a *firm* when it is *advising on P2P agreements*.
- 6.2B.4 G (1) This section applies in accordance with the territorial scope of the general application of this sourcebook as modified in *COBS 1 Annex 1*.
- (2) But the effect of *COBS 6.2B.1R(1)* and *COBS 6.2B.6R* to *COBS 6.2B.9R* includes that:
- (a) this section does not apply to a *firm* that provides *investment advice* to a *retail client* in relation to a *retail investment product* that is not a *financial instrument* if the *retail client* is outside the *United Kingdom*; and
  - (b) a *firm* that carries on *MiFID* or *equivalent third country business* with a *retail client* outside the *United Kingdom* need only have regard to *financial instruments* and

*structured deposits* (and not other *retail investment products*) in conducting its assessment for the purposes of *COBS* 6.2B.11R.

#### Introduction

- 6.2B.5 G This section transposes provisions in *MiFID* on describing advice services relating to *financial instruments* and *structured deposits* for all *clients* and reproduces a number of provisions of the directly applicable *MiFID Org Regulation* as explained in *COBS* 1.2. The requirements apply in relation to *MiFID*, *equivalent third country* or *optional exemption business*. The requirements are extended to apply to other *investment advice* and cover other *retail investment products* when the *client* is a *retail client* in the *United Kingdom*.

#### Interpretation of rules and guidance: relevant products

- 6.2B.6 R In this section a “relevant product” is:
- (1) where the *client* is a *retail client* in the *United Kingdom*, a *financial instrument*, *structured deposit* or other *retail investment product*; or
  - (2) otherwise, a *financial instrument* or *structured deposit*.

[**Note:** article 1(4) of *MiFID*]

#### Interpretation of EU provisions: MiFID business

- 6.2B.7 R A *firm* must treat obligations in relation to *financial instruments* as extending to other *retail investment products* when complying with the provisions in this section marked “EU” in the course of *MiFID business* with a *retail client* in the *United Kingdom*.
- 6.2B.8 G References to *financial instruments* include *structured deposits* (but not other *retail investment products*) when a *firm* is complying with the provisions in this section marked “EU” in the course of *MiFID business* with a *retail client* outside the *United Kingdom* or with a *professional client*.

[**Note:** article 1(2) of the *MiFID Org Regulation*]

#### Interpretation of EU provisions: non-MiFID business

- 6.2B.9 R In relation to business that is not *MiFID business*, a *firm* must comply with provisions in this section marked “EU” as if they were *rules* but:
- (1) reading references to *financial instruments* as including *structured deposits* and (if the *client* is a *retail client* in the *United Kingdom*) other *retail investment products*;
  - (2) (for business that is not *equivalent business of a third country*

*investment firm or MiFID optional exemption business*) the *firm* need not comply with the following provisions of the *MiFID Org Regulation*:

- (a) the requirement in paragraph 2 of article 52(1) of the *MiFID Org Regulation* (reproduced in COBS 6.2B.32EU) not to give undue prominence to their *independent advice* services;
- (b) the requirement in article 52(4) of the *MiFID Org Regulation* (reproduced in COBS 6.2B.36EU) to distinguish the range of *financial instruments* issued or provided by entities not being closely linked with the *firm*; and
- (c) the requirement in article 53(3)(c) of the *MiFID Org Regulation* (reproduced in COBS 6.2B.29EU) that a *firm* does not allow a natural person to provide both *independent advice* and *restricted advice*.

Interpretation: non-independent advice and restricted advice

- 6.2B.10 G This section refers to both “restricted advice” and “non-independent advice”. These terms have the same meaning.

Firms holding themselves out as independent

- 6.2B.11 R If a *firm* informs a *client* that it provides *independent advice*, that *firm* must assess a sufficient range of relevant products available on the market which must:
- (1) be sufficiently diverse with regard to their:
    - (a) type; and
    - (b) issuers or product providers,
 to ensure that the *client's* investment objectives can be suitably met; and
  - (2) not be limited to relevant products issued or provided by:
    - (a) the *firm* itself or by entities having close links with the *firm*; or
    - (b) other entities with which the *firm* has such close legal or economic relationships, including contractual relationships, as to present a risk of impairing the independent basis of the advice provided.

[**Note:** article 24(7)(a) of *MiFID*]

- 6.2B.12 R COBS 6.2B.11R does not apply to *group personal pension schemes* if a *firm* discloses information to a *client* in accordance with the *rule on group*

*personal pension schemes (COBS 6.1C.20AR).*

- 6.2B.13 G The combined effect of *COBS 6.2B.6R* and *COBS 6.2B.11R* is that the assessment undertaken by a *firm* for the purpose of *COBS 6.2B.11R* must:
- (1) where the *client* is a *retail client* in the *United Kingdom*, include a sufficient range of *financial instruments*, *structured deposits* and other *retail investment products*; or otherwise
  - (2) include a sufficient range of *financial instruments* and *structured deposits*,
- which in each case must meet the requirements as to diversity and scope in *COBS 6.2B.11R*(1) and (2) respectively.

Requirements for firms providing focused independent advice

- 6.2B.14 G A *firm* that holds itself out as providing *independent advice* may provide broad and general advice or specialist and specific advice.

[**Note:** recital 71 to the *MiFID Org Regulation*]

- 6.2B.15 EU 53(2) An investment firm that provides investment advice on an independent basis and that focuses on certain categories or a specified range of financial instruments shall comply with the following requirements:
- (a) the firm shall market itself in a way that is intended only to attract clients with a preference for those categories or range of financial instruments;
  - (b) the firm shall require clients to indicate that they are only interested in investing in the specified category or range of financial instruments; and
  - (c) prior to the provision of the service, the firm shall ensure that its service is appropriate for each new client on the basis that its business model matches the client's needs and objectives, and the range of financial instruments that are suitable for the client. Where this is not the case the firm shall not provide such a service to the client.

[**Note:** article 53(2) of the *MiFID Org Regulation*]

- 6.2B.16 G (1) *COBS 6.2B.15EU* means that a *firm* providing *independent advice* need not provide advice on all relevant products. A *firm* may market itself as, for example, an independent stockbroker that provides *independent advice* on *shares* only. A *firm* might alternatively market itself on the basis of providing *independent advice* on a particular product market such as ethical and socially responsible investments. The requirements in *COBS 6.2B.15EU* apply to ensure that *clients* of a *firm* that provides

*independent advice* on a focused basis properly understand the nature of the advice that they will receive and that the service is appropriate.

- (2) A *firm* that provides *independent advice* in respect of a relatively narrow market should not hold itself out as acting independently in a broader sense. A *firm* which specialises in providing advice in respect of a particular market might include reference to the provision of independent investment advice in its name. However, it would need to be clear in any marketing materials, and when describing its service, that it only provides *independent advice* in respect of that particular product market.

#### Sufficient range

- 6.2B.17 G The extent of the assessment which a *firm* is required to undertake in order to meet the requirement to assess a sufficient range of relevant products will depend on:
- (1) the nature of the *independent advice* service provided by the *firm* (general or focused) for the purposes of COBS 6.2B.15EU;
  - (2) the investment objectives of the *client* (COBS 6.2B.11R(1)); and
  - (3) the *firm's* close links and relationships with product providers and issuers (COBS 6.2B.11R(2)).
- 6.2B.18 EU 53(1) Investment firms providing investment advice on an independent basis shall define and implement a selection process to assess and compare a sufficient range of financial instruments available on the market in accordance with Article 24(7)(a) of Directive 2014/65/EU. The selection process shall include the following elements:
- (a) the number and variety of financial instruments considered is proportionate to the scope of investment advice services offered by the independent investment adviser;
  - (b) the number and variety of financial instruments considered is adequately representative of financial instruments available on the market;
  - (c) the quantity of financial instruments issued by the investment firm itself or by entities closely linked to the investment firm itself is proportionate to the total amount of financial instruments considered; and
  - (d) the criteria for selecting the various financial instruments shall include all relevant aspects such as risks, costs and complexity as well as the characteristics of the investment firm's clients, and shall ensure that the selection of the

instruments that may be recommended is not biased.

Where such a comparison is not possible due to the business model or the specific scope of the service provided, the investment firm providing investment advice shall not present itself as independent.

[**Note:** article 53(1) of the *MiFID Org Regulation*]

- 6.2B.19 G (1) *COBS 6.2B.11R* does not require a *firm* providing *independent advice* to assess every relevant product available on the market before making a *personal recommendation*.
- [**Note:** recital 73 to *MiFID*]
- (2) Notwithstanding (1), since the assessment conducted by the *firm* must be such as to ensure the *client's* investment objectives can be suitably met, a *firm* providing *independent advice* should be in a position to advise on all types of relevant product within the scope of the market (for the purposes of *COBS 6.2B.15EU*) on which it provides advice. When the *client* is a *retail client* in the *United Kingdom*, this means being in a position to advise on all types of *financial instrument, structured deposit* and other *retail investment products*.
- (3) For example, a *firm* providing *independent advice* on *personal pension schemes* should be in a position to consider all *personal pension schemes*. What will constitute a sufficient range of *personal pension schemes* to be considered before providing a *client* with a *personal recommendation* will, however, depend upon the investment objectives of that *client*.
- (4) A *firm* not specialising in a particular market would generally be expected to be in a position to consider all relevant product types which would be capable of meeting the investment objectives of its *clients*.
- (5) If a *firm* that provides focused *independent advice* is not able to recommend a *financial instrument* that would meet the investment objectives of a *client*, the *firm* should not provide that *client* with a *personal recommendation*. For example, if a *firm* providing *independent advice* on *shares* considered that a *client's* investment objectives would be better met by way of investment in an accumulation product, it should not provide that *client* with a *personal recommendation*.

Guidance on the independence standard

- 6.2B.20 G A *personal recommendation* on a relevant product that invests in a number of underlying relevant products would not of itself enable the *firm* providing the *personal recommendation* to satisfy the requirement to have considered a sufficient range of relevant products which are sufficiently



diverse (*COBS 6.2B.11R*), even if the relevant product invests in a wide range of underlying *investments*.

- 6.2B.21 G The effect of *COBS 6.2B.11R(2)* is that a *firm* which is subject to any form of agreement with an issuer or provider of relevant products that confines that *firm* to providing advice on relevant products issued or provided by that other *person* only will not be in a position to provide *independent advice*.
- 6.2B.22 G The fact that a *firm* is owned by, or owns, in whole or in part, the issuer or provider of relevant products does not prevent that *firm* from providing *independent advice*, provided that the *firm's* assessment of relevant products is:
- (1) not limited to relevant products issued or provided by that related issuer or provider (*COBS 6.2B.11R(2)*);
  - (2) proportionate; and
  - (3) not biased (*COBS 6.2B.18EU*).
- 6.2B.23 G In providing *independent advice* to a *retail client* in the *United Kingdom* a *firm* should consider financial products other than relevant products which are capable of meeting the investment needs and objectives of that *retail client*, examples of which could include national savings and investments (ns&i) products and *cash deposit ISAs*.

#### Use of platforms

- 6.2B.24 R A *firm* which:
- (1) holds itself out to a *retail client* in the *United Kingdom* as acting independently; and
  - (2) relies upon a single *platform service* to facilitate the majority of its *personal recommendations*,
- must ensure that, as appropriate, the selection of relevant products made available by the *platform service provider* is such as to enable the *firm* to satisfy the requirements of *COBS 6.2B.11R*.

- 6.2B.25 G When a *firm* considers whether a *platform service provider's* selection of relevant products enables it to satisfy the requirements of *COBS 6.2B.11R*, a *firm* should take into account any fees, commission or non-monetary benefits the *platform service provider* receives in relation to those relevant products.

#### Use of panels

- 6.2B.26 G A *firm* providing *independent advice* may satisfy the requirement to assess a sufficient range of relevant products which are sufficiently diverse (*COBS 6.2B.11R*) by using 'panels'. Such a *firm* would need to

ensure that any panel is sufficiently broad in its composition to enable the *firm* to make *personal recommendations* based on an assessment of a sufficient range of relevant products available on the market which are sufficiently diverse. The *firm* would need to review the panel regularly and ensure that the *client's* investment objectives can be suitably met.

- 6.2B.27 G When using a panel a *firm* may exclude a certain type or class of relevant product from the panel if, after review, there is a valid reason, consistent with this section and the *client's best interests rule*, for doing so.
- 6.2B.28 G If a *firm* providing *independent advice* chooses to engage a third party to conduct an assessment of the relevant products available on the market, the *firm* remains responsible for complying with the requirements of COBS 6.2B.11R to ensure that its advice is based on an assessment of a sufficient range of relevant products which are sufficiently diverse as to ensure that the *client's* investment objectives can be suitably met.

#### Requirements for firms providing both independent and restricted advice

- 6.2B.29 EU 53(3) An investment firm offering investment advice on both an independent basis and on a non-independent basis shall comply with the following obligations:
- (a) in good time before the provision of its services, the investment firm has informed its clients, in a durable medium, whether the advice will be independent or non-independent in accordance with Article 24(4)(a) of Directive 2014/65/EU and the relevant implementing measures;
  - (b) the investment firm has presented itself as independent for the services for which it provides investment advice on an independent basis; and
  - (c) the investment firms has adequate organisational requirements and controls in place to ensure that both types of advice services and advisers are clearly separated from each other and that clients are not likely to be confused about the type of advice that they are receiving and are given the type of advice that is appropriate for them. The investment firm shall not allow a natural person to provide both independent and non-independent advice.

[**Note:** article 53(3) of the *MiFID Org Regulation*]

- 6.2B.30 G A *firm* that offers an unlimited range of *regulated mortgage contracts*, or gives advice in relation to *contracts of insurance* on the basis of a fair analysis, but offers *restricted advice* on relevant products should not hold itself out as acting independently for its business as a whole, for example by holding itself out as an independent financial adviser. However, it may disclose that it offers an unlimited range of *regulated mortgage contracts*

or gives advice in relation to *contracts of insurance* on the basis of a fair analysis provided it makes clear in accordance with the *fair, clear and not misleading rule* (COBS 4.2.1R) that it provides *restricted advice* on relevant products.

6.2B.31 G A *firm* that provides *basic advice* on *stakeholder products* may still use the facilities and stationery it uses for other business in accordance with the rule on basic advice on stakeholder products: other issues (COBS 9.6.17 R (2)).

6.2B.32 EU 52(1) Where advice is offered or provided to the same client on both an independent and non-independent basis, investment firms shall explain the scope of both services to allow investors to understand the differences between them and not present itself as an independent investment adviser for the overall activity. Firms shall not give undue prominence to their independent investment advice services over non-independent investment services in their communications with clients.

[**Note:** article 52(1) of the *MiFID Org Regulation*]

#### Disclosing the nature of advice provided

6.2B.33 R (1) A *firm* must disclose to a *client*, in good time before the provision of *investment advice* or *basic advice*:

- (a) whether its advice will be:
  - (i) *independent advice*; or
  - (ii) *restricted advice*;
- (b) whether the advice will be based on a broad or more restricted analysis of different types of relevant products; and
- (c) where the advice will be *restricted advice*, whether the range will be limited to relevant products issued or provided by entities having close links with the *firm* or any other legal or economic relationships, such as contractual relationships, so as to present a risk of impairing the independent basis of the advice provided.

[**Note:** article 24(4)(a)(i) and (ii) of *MiFID*]

(2) A *firm* must include the term “independent advice” or “restricted advice” or both, as relevant, in the disclosure.

6.2B.34 R (1) A *firm* must provide the information required by COBS 6.2B.33R in a comprehensible form in such a manner that the *client* is reasonably able to understand the nature and risks of the *investment service* and of the specific type of *financial instrument* that is being offered and,

consequently, to take investment decisions on an informed basis.

- (2) That information may be provided in a standardised format.

[**Note:** article 24(5) of *MiFID*]

- 6.2B.35 EU 52(1) Investment firms shall explain in a clear and concise way whether and why investment advice qualifies as independent or non-independent and the type and nature of the restrictions that apply, including, when providing investment advice on an independent basis, the prohibition to receive and retain inducements.

[**Note:** article 52(1) of the *MiFID Org Regulation*]

- 6.2B.36 EU 52(2) Investment firms providing investment advice, on an independent or non-independent basis, shall explain to the client the range of financial instruments that may be recommended, including the firm's relationship with the issuers or providers of the instruments.
- 52(3) Investment firms shall provide a description of the types of financial instruments considered, the range of financial instruments and providers analysed per each type of instrument according to the scope of the service, and, when providing independent advice, how the service provided satisfies the conditions for the provision of investment advice on an independent basis and the factors taken into consideration in the selection process used by the investment firm to recommend financial instruments, such as risks, costs and complexity of the financial instruments.
- 52(4) When the range of financial instruments assessed by the investment firm providing investment advice on an independent basis includes the investment firm's own financial instruments or those issued or provided by entities having close links or any other close legal or economic relationship with the investment firm as well as other issuers or providers which are not linked or related, the investment firm shall distinguish, for each type of financial instrument, the range of the financial instruments issued or provided by entities not having any links with the investment firm.

[**Note:** article 52(2), (3) and (4) of the *MiFID Org Regulation*]

Medium of disclosure

- 6.2B.37 G A *firm* should provide the disclosure information required by the *rule* on describing the breadth of a *firm's* advice service (*COBS* 6.2B.33R) in a *durable medium* or through a website (if it does not constitute a *durable medium*) provided the *website conditions* are satisfied.

Additional oral disclosure for firms providing restricted advice

6.2B.38 R If a *firm* provides *restricted advice* and engages in spoken interaction with the *retail client*, in addition to the disclosure required by COBS 6.2B.33R, a *firm* must disclose orally in good time before the provision of its *investment advice* that it provides *restricted advice* and the nature of that restriction.

6.2B.39 G Examples of statements which would comply with COBS 6.2B.38R include:

- (1) “I am a [Firm X] adviser offering restricted advice, which means that my advice is restricted to advice on [Firm X] [products/stakeholder products] only”; or
- (2) “I am a [Firm X] adviser offering restricted advice, which means that my advice is restricted to advice on [products/stakeholder products] from a limited number of companies that [Firm X] has selected”.

#### Record keeping

6.2B.40 G *Firms* are reminded of the general record keeping requirements in SYSC 3.2 and SYSC 9. A *firm* should keep appropriate records of the disclosures required by this section.

#### Systems and controls

- 6.2B.41 G
- (1) *Firms* are reminded of the systems and controls requirements in SYSC.
  - (2) A *firm* providing *restricted advice* should take reasonable care to establish and maintain appropriate systems and controls to ensure that if there is no relevant product in the *firm's* range of products which meets the investment needs and objectives of the *client*, no *personal recommendation* should be made.
  - (3) A *firm* specialising in a particular market should take reasonable care to establish and maintain appropriate systems and controls to ensure that it does not make a *personal recommendation* if there is a relevant product outside the market on which it provides *investment advice* which would meet the investment needs and objectives of the *client*.

## 6.4 Disclosure of charges, remuneration and commission

...

Guidance on disclosure requirements for packaged products -

...

6.4.9 G The *rules* in this section build on the disclosure of fees, ~~commissions~~

commission and non-monetary benefits made under the ~~rule~~ rules on inducements (COBS 2.3.1R, COBS 2.3A.5R, COBS 2.3A.6R, COBS 2.3A.15R and COBS 2.3A.16R).

Amend the following as shown.

## 8 Client agreements (non-MiFID provisions)

### 8.1 Client agreements: non-MiFID designated investment business

#### ~~Providing a client agreement~~ Application

- 8.1.1 R (1) This chapter applies to a *firm* in relation to *designated investment business* carried on for:
- (a) ~~a retail client; and~~
  - (b) ~~in relation to MiFID or equivalent third country business, a professional client.~~
- (2) ~~If expressly provided, this chapter also applies to a firm in relation to other ancillary services carried on for a client, but only in relation to its MiFID or equivalent third country business. [deleted]~~
- (3) But this chapter does not apply to:
- (a) a firm in relation to its MiFID, equivalent third country or optional exemption business; or
  - (b) a firm to the extent that it is *effecting contracts of insurance* in relation to a *life policy* issued or to be issued by the *firm* as principal.

#### Providing a client agreement

- 8.1.2 R ...

~~[Note: article 39 of the MiFID implementing Directive]~~

- 8.1.3 R (1) A *firm* must, in good time before a ~~retail~~ *client* is bound by any agreement relating to *designated investment business* ~~or ancillary services~~ or before the provision of those services, whichever is the earlier, provide that *client* with:
- (a) the terms of any such agreement; and
  - (b) the information about the *firm* and its services relating to that agreement or to those services required by COBS 6.1.4R, including information on communications, conflicts of

interest and authorised status.

...

(4) ...

~~[Note: article 29(1), (4), (5) and (6) of the MiFID implementing Directive]~~

Record keeping: client agreements

- 8.1.4 R (1) A *firm* must establish a record that includes the document or documents agreed between it and a *client* which set out the rights and obligations of the parties, and the other terms on which it will provide services to the *client*.
- (2) The record must be maintained for ~~at least whichever is the longer of:~~
- (a) ~~5 years; or~~ [deleted]
  - (b) unless (c) applies, at least the duration of the relationship with the *client*; or
  - (c) in the case of a record relating to a *pension transfer, pension conversion, pension opt-out* or *FSAVC*, indefinitely.

~~[Note: article 19(7) of MiFID and article 51(1) of the MiFID implementing Directive. See article 51(3) of the MiFID implementing Directive]~~

8.1.5 R ...

~~[Note: article 19(7) of MiFID and article 39 of the MiFID implementing Directive]~~

- 8.1.6 G When considering its approach to client agreements, a *firm* should be aware of other obligations in the *Handbook* which may be relevant. These include the *fair, clear and not misleading rule* ~~and~~, the *rules* on disclosure of information to a *client* before providing services, ~~and~~ the *rules* on distance communications (principally in *COBS* 2.2, 5, 6 and 13) and the provisions on record keeping (principally in SYSC 9).

After COBS 8 (Client agreements (non-MiFID provisions)) insert the following new chapter COBS 8A (Client agreements (MiFID provisions)). All the text is new and is not underlined.

**8A Client agreements (MiFID provisions)**

**8A.1 Client agreements (MiFID, equivalent third country or optional exemption business)**

## Application and purpose provisions

- 8A.1.1 R This chapter applies to a *firm* in relation to its *MiFID*, *equivalent third country or optional exemption business*.
- 8A.1.2 R Provisions in this chapter marked “EU” apply to *MiFID optional exemption firms* as if they were *rules*.
- 8A.1.3 G In order to provide legal certainty and enable clients to better understand the nature of the services provided, investment firms that provide investment or ancillary services to clients should enter into a written basic agreement with the client, setting out the essential rights and obligations of the firm and the client.

[**Note:** recital 90 to the *MiFID Org Regulation*]

## Providing a client agreement: retail and professional clients

- 8A.1.4 EU 58 Investment firms providing any investment service or the ancillary service referred to in Section B(1) of Annex I to Directive 2014/65/EC to a client after the date of application of this Regulation shall enter into a written basic agreement with the client, in paper or another durable medium, with the client setting out the essential rights and obligations of the firm and the client. Investment firms providing investment advice shall comply with this obligation only where a periodic assessment of the suitability of the financial instruments or services recommended is performed.
- The written agreement shall set out the essential rights and obligations of the parties, and shall include the following:
- (a) a description of the services, and where relevant the nature and extent of the investment advice, to be provided;
  - (b) in case of portfolio management services, the types of financial instruments that may be purchased and sold and the types of transactions that may be undertaken on behalf of the client, as well as any instruments or transactions prohibited; and
  - (c) a description of the main features of any services referred to in Section B(1) of Annex I to Directive 2014/65/EC to be provided, including where applicable the role of the firm with respect to corporate actions relating to client instruments and the terms on which securities financing transactions involving client securities will generate a return for the client.

[**Note:** article 58 of the *MiFID Org Regulation*]



## General requirement for information to clients

- 8A.1.5 EU 46(1) Investment firms shall, in good time before a client or potential client is bound by any agreement for the provision of investment services or ancillary services or before the provision of those services, whichever is the earlier to provide that client or potential client with the following information:
- (a) the terms of any such agreement;
  - (b) the information required by Article 47 relating to that agreement or to those investment or ancillary services.

[**Note:** article 46(1) of the *MiFID Org Regulation*]

- 8A.1.6 EU 46(2) Investment firms shall, in good time before the provision of investment services or ancillary services to clients or potential clients, to provide the information required under Articles 47 to 50.

[**Note:** article 46(2) of the *MiFID Org Regulation*]

- 8A.1.7 EU 46(3) The information referred to in paragraphs 1 and 2 shall be provided in a durable medium or by means of a website (where it does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

[**Note:** article 46(3) of the *MiFID Org Regulation*]

## Avoiding duplicate information

- 8A.1.8 G (1) Articles 47 to 50 of the *MiFID Org Regulation* require a *firm* to provide a *client* with information about:
- (a) the *firm* and its services for *clients* and potential *clients* (including information on communications, conflicts of interest and authorised status);
  - (b) *financial instruments*;
  - (c) safeguarding of *client financial instruments* or *client funds*; and
  - (d) costs and associated charges.
- (2) Provided the information referred to in (1) is communicated to a *client* in good time before the provision of the service, a *firm* does not need to provide it either separately or by incorporating it in a *client* agreement.
- (3) The requirements for *firms* to provide *clients* with the information

referred to in (1) are set out at *COBS* 6.1ZA.

[**Note:** recital 84 to *MiFID*]

Record keeping: client agreements

- 8A.1.9 R A *firm* must establish a record that includes the document or documents agreed between it and a *client* which set out the rights and obligations of the parties, and the other terms on which it will provide services to the *client*.

[**Note:** article 25(5) of *MiFID*]

- 8A.1.10 EU 73 Records which set out the respective rights and obligations of the investment firm and the client under an agreement to provide services, or the terms on which the firm provides services to the client, shall be retained for at least the duration of the relationship with the client.

[**Note:** article 73 of the *MiFID Org Regulation*]

- 8A.1.11 R For the purposes of this chapter, a *firm* may incorporate the rights and duties of the parties into an agreement by referring to other documents or legal texts.

[**Note:** article 25(5) of *MiFID*]

- 8A.1.12 G When considering its approach to *client* agreements, a *firm* should be aware of other obligations in the *Handbook* which may be relevant. These include the *fair, clear and not misleading rule*, the *rules* on disclosure of information to a *client* before providing services (principally in *COBS* 2.2A, 6.1ZA and 13) and the provisions on record keeping (principally in *SYSC* 9).

Amend the following as shown.

## 9 Suitability (including basic advice) (non-MiFID provisions)

### 9.1 Application and purpose provisions

~~**Note:** ESMA has also issued guidelines under article 16(3) of the ESMA Regulation on certain aspects of the MiFID suitability requirements. See <http://www.esma.europa.eu/content/Guidelines-certain-aspects-MiFID-suitability-requirements> [https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387_en.pdf).~~

~~Making personal recommendations~~ Application

- 9.1.1 R This chapter applies to a *firm* which:
- (a) makes a *personal recommendation to a retail client* in relation to a *designated investment*;
  - (b) *manages investments of a retail client of the firm*;
  - (c) *manages the assets of an occupational pension scheme, stakeholder pension scheme or personal pension scheme, other than in relation to its MiFID, equivalent third country or optional exemption business.*

9.1.1A G COBS 9A contains suitability requirements which apply in respect of a firm's MiFID, equivalent third country or optional exemption business involving the provision of investment advice or portfolio management.

...

#### Managing investments P2P agreements

9.1.3 R ~~This chapter applies to a firm which manages investments.~~ [deleted]

...

#### ~~Business which is not MiFID or equivalent third country business~~

9.1.4 R ~~In respect of the business of a firm which is not MiFID or equivalent third country business, this chapter only applies if:~~

- (1) ~~the client is a retail client; or~~
- (2) ~~the firm is managing the assets of an occupational pension scheme, stakeholder pension scheme or personal pension scheme.~~ [deleted]

#### Life policies for professional clients

9.1.5 R If the *firm* makes a *personal recommendation to a professional client* to take out a *life policy*, this chapter applies, but only those *rules* which implement the requirements of the *Insurance Mediation Directive*.

...

## 9.2 Assessing suitability

### Assessing suitability: the obligations

9.2.1 R ...

[**Note:** ~~article 19(4) of MiFID~~, article 12(2) of the *Insurance Mediation Directive*]

9.2.2 R ...  
~~[Note: articles 35(1), (3) and (4) of the *MiFID implementing Directive*]~~

9.2.3 R ...  
~~[Note: article 37(1) of the *MiFID implementing Directive*]~~

9.2.4 R ...  
~~[Note: article 37(2) of the *MiFID implementing Directive*]~~

#### Reliance on information

9.2.5 R ...  
~~[Note: article 37(3) of the *MiFID implementing Directive*]~~

#### Insufficient information

9.2.6 R ...  
~~[Note: article 35(5) of the *MiFID implementing Directive*]~~

9.2.7 G Although a *firm* may not be permitted to make a *personal recommendation* or take a decision to trade because it does not have the necessary information, its *client* may still ask the *firm* to provide another service such as, for example, to arrange a deal or to deal as agent for the *client*. If this happens, the *firm* should ensure that it receives written confirmation of the instructions. The *firm* should also bear in mind the *client's best interests rule* and any obligation it may have under the *rules* relating to appropriateness when providing the different service (see *COBS 10, Appropriateness (for non-advised services)* and *COBS 10A, Appropriateness (for non-advised services) (MiFID provisions)*).

#### Professional clients (~~MiFID and equivalent third country business~~)

9.2.8 R (1) ~~If a *firm* makes a *personal recommendation* or manages investments for a *professional client* in the course of *MiFID* or *equivalent third country business*, it is entitled to assume that, in relation to the products, transactions and services for which the *professional client* is so classified, the *client* has the necessary level of experience and knowledge for the purposes of *COBS 9.2.2R (1)(e)*.~~

(2) ~~If the service consists of making a *personal recommendation* to a *per se professional client*, the *firm* is entitled to assume that the *client* is able financially to bear any related investment risks consistent with his investment objectives for the purposes of *COBS 9.2.2R (1)(b)*. ~~[deleted]~~~~

~~[Note: article 35(2) of the MiFID implementing Directive]~~

...

### 9.3 Guidance on assessing suitability

9.3.1 G ...

~~[Note: recital 57 to the MiFID implementing Directive]~~ [deleted]

Churning and switching

9.3.2 G ...

~~[Note: recital 57 to the MiFID implementing Directive]~~ [deleted]

...

### 9.4 Suitability reports

Providing a suitability report

9.4.1 R ...

~~[Note: article 19(8) of MiFID]~~

...

### 9.5 Record keeping and retention periods for suitability records

...

9.5.2 R A *firm* must retain its records relating to suitability for a minimum of the following periods:

...

(2) if relating to a *life policy, personal pension scheme or stakeholder pension scheme*, five years; and

(3) ~~if relating to MiFID or equivalent third country business, five years; and~~ [deleted]

...

9.5.3 R A *firm* need not retain its records relating to suitability if

(1) the *client* does not proceed with the recommendation; ~~and~~

(2) ~~they do not relate to MiFID or equivalent third country business.~~

...

After COBS 9 insert the following new chapter COBS 9A Suitability (MiFID provisions). The text is all new and is not underlined.

## **9A Suitability (MiFID provisions)**

### **9A.1 Application and purpose**

**Note:** ESMA has also issued guidelines under article 16(3) of the ESMA Regulation on certain aspects of the MiFID suitability requirements. See [https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387\\_en.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-387_en.pdf).

Application

- 9A.1.1 R This chapter applies to a *firm* which provides *investment advice* or *portfolio management* in the course of *MiFID*, *equivalent third country* or *optional exemption business*.

Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms

- 9A.1.2 R Provisions in this chapter marked “EU” apply in relation to *MiFID optional exemption business* as if they were *rules*.

- 9A.1.3 G The effect of *GEN 2.2.22AR* is that provisions in this chapter marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

### **9A.2 Assessing suitability**

Assessing suitability: the obligations

- 9A.2.1 R When providing *investment advice* or *portfolio management* a *firm* must:
- (1) obtain the necessary information regarding the *client's*:
    - (a) knowledge and experience in the investment field relevant to the specific type of *financial instrument* or service;
    - (b) financial situation including his ability to bear losses; and
    - (c) investment objectives including his risk tolerance,
 so as to comply with (2);
  - (2) recommend *investment services* and *financial instruments*, or take the decision to trade, which is suitable for the *client* and, in

particular, in accordance with the *client's* risk tolerance and ability to bear losses.

[Note: first paragraph of article 25(2) of *MiFID*]

- 9A.2.2 G *Firms* should undertake a suitability assessment not only when making a *personal recommendation* to buy a *financial instrument* but for all decisions whether to trade, including making any *personal recommendations* about whether or not to buy, hold or sell an investment.

[Note: recital 87 to the *MiFID Org Regulation*]

- 9A.2.3 G Where a *firm* providing a *portfolio management* service makes a recommendation or request, or provides advice, to a *client* to the effect that the *client* should give or alter a mandate to the *firm* that defines the limits of the *firm's* discretion, that recommendation, request or advice should be considered a recommendation for the purposes of *COBS* 9A.2.1R. A *firm* should therefore undertake a suitability assessment in relation to any such recommendation, request or advice.

[Note: recital 89 to the *MiFID Org Regulation*]

Assessing the extent of the information required

- 9A.2.4 EU 54(2) Investment firms shall determine the extent of the information to be collected from clients in light of all the features of the investment advice or portfolio management services to be provided to those clients. Investment firms shall obtain from clients or potential clients such information as is necessary for the firm to understand the essential facts about the client and to have a reasonable basis for determining, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:
- (a) it meets the investment objectives of the client in question, including client's risk tolerance;
  - (b) it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;
  - (c) it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio.

[Note: article 54(2) of the *MiFID Org Regulation*]

Professional clients

9A.2.5 EU 54(3) Where an investment firm provides an investment service to a professional client it shall be entitled to assume that in relation to the products, transactions and services for which it is so classified, the client has the necessary level of experience and knowledge for the purposes of point (c) of paragraph 2.

Where that investment service consists in the provision of investment advice to a professional client covered by Section 1 of Annex II to Directive 2014/65/EU, the investment firm shall be entitled to assume for the purposes of point (b) of paragraph 2 that the client is able financially to bear any related investment risks consistent with the investment objectives of that client.

[**Note:** article 54(3) of the *MiFID Org Regulation*]

#### Obtaining information about knowledge and experience

9A.2.6 EU 55(1) Investment firms shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:

- (a) the types of service, transaction and financial instrument with which the client is familiar;
- (b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;
- (c) the level of education, and profession or relevant former profession of the client or potential client.

[**Note:** article 55(1) of the *MiFID Org Regulation*]

#### Obtaining information about a client's financial situation

9A.2.7 EU 54(4) The information regarding the financial situation of the client or potential client shall include, where relevant, information on the source and extent of his regular income, his assets, including liquid assets, investments and real property, and his regular financial commitments.

[**Note:** article 54(4) of the *MiFID Org Regulation*]

#### Obtaining information about a client's investment objectives

9A.2.8 EU 54(5) The information regarding the investment objectives of the client or potential client shall include, where relevant,



information on the length of time for which the client wishes to hold the investment, his preferences regarding risk taking, his risk profile, and the purposes of the investment.

[**Note:** article 54(5) of the *MiFID Org Regulation*]

#### Reliability of information

9A.2.9	EU	54(7)	<p>Investment firms shall take reasonable steps to ensure that the information collected about their clients or potential clients is reliable. This shall include, but shall not be limited to, the following:</p> <ul style="list-style-type: none"> <li>(a) ensuring clients are aware of the importance of providing accurate and up-to-date information;</li> <li>(b) ensuring all tools, such as risk assessment profiling tools or tools to assess a client's knowledge and experience, employed in the suitability assessment process are fit-for-purpose and are appropriately designed for use with their clients, with any limitations identified and actively mitigated through the suitability assessment process;</li> <li>(c) ensuring questions used in the process are likely to be understood by clients, capture an accurate reflection of the client's objectives and needs, and the information necessary to undertake the suitability assessment; and</li> <li>(d) taking steps, as appropriate, to ensure the consistency of client information, such as by considering whether there are obvious inaccuracies in the information provided by clients.</li> </ul>
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[**Note:** article 54(7) of the *MiFID Org Regulation*]

#### Maintaining adequate and up-to-date information

9A.2.10	EU	54(7)	<p>Investment firms having an on-going relationship with the client, such as by providing an on-going advice or portfolio management service, shall have, and be able to demonstrate, appropriate policies and procedures to maintain adequate and up-to-date information about clients to the extent necessary to fulfil the requirements under paragraph 2.</p>
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[**Note:** article 54(7) of the *MiFID Org Regulation*]

#### Discouraging the provision of information

9A.2.11	EU	55(2)	<p>An investment firm shall not discourage a client or potential client from providing information required for the purposes of Article 25(2) and (3) of Directive 2014/65/EU.</p>
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[**Note:** article 55(2) of the *MiFID Org Regulation*]

#### Reliance on information

- 9A.2.12 EU 55(3) An investment firm shall be entitled to rely on the information provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

[**Note:** article 55(3) of the *MiFID Org Regulation*]

#### Insufficient information

- 9A.2.13 EU 54(8) Where, when providing the investment service of investment advice or portfolio management, an investment firm does not obtain the information required under Article 25(2) of Directive 2014/65/EU, the firm shall not recommend investment services or financial instruments to the client or potential client.

[**Note:** article 54(8) of the *MiFID Org Regulation*]

- 9A.2.14 G Although a *firm* may not be permitted to make a *personal recommendation* or take a decision to trade because it does not have the necessary information, its *client* may still ask the *firm* to provide another service such as, for example, to arrange a deal or to deal as agent for the *client*. If this happens, the *firm* should ensure that it receives written confirmation of the instructions. The *firm* should also bear in mind the *client's best interests rule* and any obligation it may have under the *rules* relating to appropriateness when providing the different service (see *COBS 10A* (Appropriateness (for non-advised services in relation to MiFID provisions))).

#### Identifying the subject of a suitability assessment

- 9A.2.15 EU 54(6) Where a client is a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person, the investment firm shall establish and implement policy as to who should be subject to the suitability assessment and how this assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives should be collected. The investment firm shall record this policy.
- Where a natural person is represented by another natural person or where a legal person having requested treatment as professional client in accordance with Section 2 of Annex II to Directive 2014/65/EU is to be considered for the suitability assessment, the financial situation and investment objectives shall be those of the legal person or, in relation to the natural person, the underlying client rather than of the representative. The knowledge and experience shall be that of the representative

of the natural person or the person authorised to carry out transactions on behalf of the underlying client.

[**Note:** article 54(6) of the *MiFID Org Regulation*]

#### Bundled packages

- 9A.2.16 R Where a *firm* provides a *personal recommendation* recommending a package of services or products bundled pursuant to COBS 6.1ZA.2.12R, the *firm* must ensure that the overall bundled package is suitable for the *client*.

[**Note:** second paragraph of article 25(2) of *MiFID*]

- 9A.2.17 G When considering the suitability of a particular *financial instrument* which is linked directly or indirectly to any form of loan, mortgage or *home reversion plan*, a *firm* should take account of the suitability of the overall transaction. The *firm* should have regard to any applicable suitability *rules* in *MCOB*.

#### Switching

- 9A.2.18 EU 54(11) When providing investment advice or portfolio management services that involve switching investments, either by selling an instrument and buying another or by exercising a right to make a change in regard to an existing instrument, investment firms shall collect the necessary information on the client's existing investments and the recommended new investments and shall undertake an analysis of the costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are greater than the costs.

[**Note:** article 54(11) of the *MiFID Org Regulation*]

#### Adequate policies and procedures

- 9A.2.19 EU 54(9) Investment firms shall have, and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, including costs and risks of investment services and financial instruments selected for their clients and that they assess, while taking into account cost and complexity, whether equivalent investment services or financial instruments can meet their client's profile.

[**Note:** article 54(9) of the *MiFID Org Regulation*]

#### Unsuitability

- 9A.2.20 EU 54(10) When providing the investment service of investment advice or portfolio management, an investment firm shall not recommend or decide to trade where none of the services or instruments are

suitable for the client.

[**Note:** article 54(10) of the *MiFID Org Regulation*]

#### Guidance on assessing suitability

- 9A.2.21 G (1) A transaction may be unsuitable for a *client* due to the risks of the associated *financial instruments*, the type of transaction, the characteristics of the order or the frequency of the trading.
- (2) A series of transactions, each of which are suitable when viewed in isolation may be unsuitable if the recommendation or the decisions to trade are made with a frequency that is not in the best interests of the *client*.
- (3) In the case of *portfolio management*, a transaction might be unsuitable if it would result in an unsuitable portfolio.

[**Note:** recital 88 to the *MiFID Org Regulation*]

#### Investments subject to restrictions on retail distribution

- 9A.2.22 G (1) *Firms* should note that restrictions and specific requirements apply to the retail distribution of certain *financial instruments*:
- (a) *non-mainstream pooled investments* are subject to a restriction on *financial promotions* (see section 238 of the *Act* and *COBS* 4.12);
- (b) *non-readily realisable securities* are subject to a restriction on *direct offer financial promotions* (see *COBS* 4.7);
- (c) *mutual society shares* are subject to specific requirements in relation to *dealing* and *arranging activities* (see *COBS* 22.2);
- (d) *contingent convertible instruments* and *CoCo funds* are subject to a restriction on sales and on promotions (see *COBS* 22.3).
- (2) A *firm* should be satisfied that an exemption is available before recommending a *financial instrument* subject to a restriction on distribution to a *retail client*, noting in particular that a *personal recommendation* to invest will generally incorporate a *financial promotion*.
- (3) In addition to assessing whether the promotion is permitted, a *firm* giving advice on a *financial instrument* subject to a restriction on distribution should comply with their obligations in *COBS* 9A and ensure any *personal recommendation* is suitable for its *client*.
- (4) In considering its obligations under *COBS* 9A, a *firm* purchasing a *financial instrument* subject to a restriction on distribution on behalf

of a *retail client* as part of a discretionary management agreement should exercise particular care to ensure the transaction is suitable and in the *client's* best interests, having regard to the *FCA's* view that such *financial instruments* pose particular risks of inappropriate distribution.

- (5) A restriction on promotion does not affect a transaction where there has been no prior communication with the *client* in connection with the investment by the *firm* or a person connected to the *firm*. Nonetheless, if promotion of a *financial instrument* to a *retail client* would not have been permitted, then the discretionary manager's decision to purchase it on behalf of the *retail client* should be supported by detailed and robust justification of his assessment of suitability.

#### Automated or semi-automated systems

9A.2.23	EU	54(1)	Where investment advice or portfolio management services are provided in whole or in part through an automated or semi-automated system, the responsibility to undertake the suitability assessment shall lie with the investment firm providing the service and shall not be reduced by the use of an electronic system in making the personal recommendation or decision to trade.
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[**Note:** second paragraph of article 54(1) of the *MiFID Org Regulation*]

### 9A.3 Information to be provided to the client

#### Explaining the reasons for assessing suitability

9A.3.1	EU	54(1)	Investment firms shall not create any ambiguity or confusion about their responsibilities in the process when assessing the suitability of investment services or financial instruments in accordance with Article 25(2) of Directive 2014/65/EU. When undertaking the suitability assessment, the firm shall inform clients or potential clients, clearly and simply, that the reason for assessing suitability is to enable the firm to act in the client's best interest.
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[**Note:** first paragraph of article 54(1) of the *MiFID Org Regulation*]

#### Suitability reports

- |        |   |     |  |
|--------|---|-----|--|
| 9A.3.2 | R | (1) | This <i>rule</i> applies in relation to <i>investment advice</i> given to a <i>retail client</i> .   |
|        |   | (2) | When providing <i>investment advice</i> , a <i>firm</i> must, before the transaction is concluded, provide the <i>client</i> with a <i>suitability report</i> in a <i>durable medium</i> specifying the advice given and how that advice |

meets the preferences, objectives and other characteristics of the *client*.

- (3) Where the agreement to buy or sell a *financial instrument* is concluded using a means of distance communication which prevents the prior delivery of the *suitability report*, the *firm* may provide the *suitability report* in a *durable medium* immediately after the *client* is bound by any such agreement, provided both the following conditions are met:
- (a) the *client* has consented to receiving the *suitability report* without undue delay after the conclusion of the transaction; and
  - (b) the *firm* has given the *client* the option of delaying the transaction in order to receive the *suitability report* in advance.
- (4) Where a *firm* provides a *portfolio management* service or has informed the *client* that it will carry out periodic assessment of suitability, the periodic report, provided under COBS 16A.2.1R, must contain an updated statement of how the *client's* investments meet the preferences, objectives and other characteristics of the *client*.

[**Note:** second, third and fourth paragraphs of article 25(6) of, and recital 82 to, *MiFID*]

#### Providing a suitability report

9A.3.3

- EU 54(12) When providing investment advice, investment firms shall provide a report to the retail client that includes an outline of the advice given and how the recommendation provided is suitable for the retail client, including how it meets the client's objectives and personal circumstances with reference to the investment term required, client's knowledge and experience and client's attitude to risk and capacity for loss.
- Investment firms shall draw clients' attention to and shall include in the suitability report information on whether the recommended services or instruments are likely to require the retail client to seek a periodic review of their arrangements.
- Where an investment firm provides a service that involves periodic suitability assessments and reports, the subsequent reports after the initial service is established may only cover changes in the services or instruments involved and/or the circumstances of the client and may not need to repeat all the details of the first report.

[**Note:** article 54(12) of the *MiFID Org Regulation*]

- 9A.3.4 G When providing a *suitability report*, a *firm* should consider the requirements in *COBS 4.2.1R* to ensure that the contents of the suitability report are fair, clear and not misleading.
- 9A.3.5 G Situations that are likely to require a *retail client* to seek a periodic review of their arrangements include where a *client* is likely to need to seek advice to bring a portfolio of investments back in line with the original recommended allocation where there is a probability that the portfolio could deviate from the target asset allocation.

[**Note:** recital 85 to the *MiFID Org Regulation*]

#### Periodic assessments

- 9A.3.6 R A *firm* must, in good time before it provides its *investment advice*, inform the *client* whether it will provide the *client* with a periodic assessment of the suitability of the *financial instruments* recommended to the *client*.

[**Note:** article 24(4)(a)(iii) of *MiFID*]

- 9A.3.7 G *COBS 9A.3.6R* supplements *COBS 2.2A.2R* (information disclosure before providing services (MiFID provisions)).

- 9A.3.8 EU 52(5) Investments firms providing a periodic assessment of the suitability of the recommendations provided pursuant to Article 54(12) shall disclose all of the following:
- (a) the frequency and extent of the periodic suitability assessment and where relevant, the conditions that trigger that assessment;
  - (b) the extent to which the information previously collected will be subject to reassessment; and
  - (c) the way in which an updated recommendation will be communicated to the client.

[**Note:** article 52(5) of the *MiFID Org Regulation*]

- 9A.3.9 EU 54(13) Investment firms providing a periodic suitability assessment shall review, in order to enhance the service, the suitability of the recommendations given at least annually. The frequency of this assessment shall be increased depending on the risk profile of the client and the type of financial instruments recommended.

[**Note:** article 54(13) of the *MiFID Org Regulation*]

## 9A.4 Record keeping and retention periods for suitability records

- 9A.4.1 G A *firm* to which SYSC 9 applies is required to keep orderly records of its business and internal organisation (see SYSC 9, General rules on recording-keeping). The records may be expected to reflect the different effect of the requirements in this chapter depending on whether the *client* is a *retail client* or a *professional client*; for example, in respect of information about the *client* which the *firm* must obtain and whether the *firm* is required to provide a *suitability report*.
- 9A.4.2 G A *firm* should refer to SYSC 9 for its obligations in relation to record keeping.
- [Note: article 16(7) of MiFID]

Amend the following as shown.

## 10 **Appropriateness (for non-MiFID non-advised services) (non-MiFID provisions)**

### 10.1 **Application and purpose provisions**

- 10.1.1 R ~~This chapter applies to a *firm* which provides *investment services* in the course of *MiFID* or *equivalent third country business* other than making a *personal recommendation* and *managing investments*. [deleted]~~
- 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*, 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*.
- 10.1.3 R ~~This chapter applies to a *firm* which assesses appropriateness on behalf of another *MiFID* investment *firm* so that the other *firm* may rely on the assessment under COBS 2.4.4R (Reliance on other investment firms: *MiFID* and *equivalent business*). [deleted]~~

#### Related rules

- 10.1.4 G A *firm* that is carrying on a *regulated activity* on a non-advised basis, whether or not the *rules* in this chapter apply to its activities, should also consider whether other *rules* in COBS apply. ~~For example, a *firm* carrying on *insurance mediation activity* in relation to a *life policy* that does not involve the provision of advice, should have regard to COBS 7 (Insurance mediation).~~

### 10.2 **Assessing appropriateness: the obligations**



- 10.2.1 R ...
- (2) When assessing appropriateness, a *firm*:
- (a) must determine whether the *client* has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service offered or demanded;
- (b) ~~may assume that a *professional client* has the necessary experience and knowledge in order to understand the risks involved in relation to those particular *investment services* or transactions, or types of transaction or product, for which the *client* is classified as a *professional client*.~~
- ~~[Note: article 19(5) of *MiFID* and article 36 of the *MiFID implementing Directive*]~~

- 10.2.2 R ...
- ~~[Note: article 37(1) of the *MiFID implementing Directive*]~~

- 10.2.3 R ...
- ~~[Note: article 37(2) of the *MiFID implementing Directive*]~~

Reliance on information

- 10.2.4 R ...
- ~~[Note: article 37(3) of the *MiFID implementing Directive*]~~

...

No duty to communicate firm's assessment of knowledge and experience

- 10.2.8 G If a *firm* is satisfied that the *client* has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service, there is no duty to communicate this to the *client*. If the *firm* does so, it must not do so in a way that amounts to making a *personal recommendation* unless it complies with the *rules* in COBS 9 ~~on suitability~~. (Suitability (including basic advice) (non-MiFID provisions)).

### 10.3 Warning the client

- 10.3.1 R ...
- ~~[Note: article 19(5) of *MiFID*]~~

- 10.3.2 R ...

~~[Note: article 19(5) of MiFID]~~

...

#### 10.4 Assessing appropriateness: when it need not be done

10.4.1 R (1) A *firm* is not required to ask its *client* to provide information or assess appropriateness if:

- (a) the service only consists of execution and/or the reception and transmission of *client* orders, with or without *ancillary services*, it relates to particular *financial instruments* and is provided at the initiative of the *client*;

...

(2) The *financial instruments* referred to in (1)(a) are:

- (a) ~~shares admitted to trading on a regulated market or an equivalent third country market (that is, one which is included in the list which is published by the European Commission and updated periodically); or [deleted]~~

...

- (c) ~~units in a scheme authorised under the UCITS directive; or [deleted]~~

- (d) other non-complex *financial instruments*.

(3) A *financial instrument* is non-complex if it satisfies the following criteria:

...

~~[Note: article 19(6) of MiFID and article 38 of the MiFID implementing Directive]~~

10.4.2 R If a *client* engages in a course of dealings involving a specific type of product or service through the services of a *firm*, the *firm* is not required to make a new assessment on the occasion of each separate transaction. A *firm* complies with the *rules* in this chapter provided that it makes the necessary appropriateness assessment before beginning that service.

~~[Note: recital 59 to the MiFID implementing Directive]~~

10.4.3 R ~~A *client* who has engaged in a course of dealings involving a specific type of product or service beginning before 1 November 2007 is presumed to have the necessary experience and knowledge in order to understand the risks involved in relation to that specific type of product or service. [deleted]~~

~~[Note: recital 59 of the MiFID implementing Directive]~~

## 10.5 Assessing appropriateness: guidance

The initiative of the client

- 10.5.1 G A service should be considered to be provided at the initiative of a *client* (see COBS 10.4.1R(1)(a)) unless the *client* demands it in response to a personalised communication from or on behalf of the *firm* to that particular *client* which contains an invitation or is intended to influence the *client* in respect of a specific *financial instrument* or specific transaction.

~~[Note: recital 30 to MiFID]~~

- 10.5.2 G A service can be considered to be provided at the initiative of a *client* notwithstanding that the *client* demands it on the basis of any communication containing a promotion or offer of *financial instruments investments* made by any means that by its very nature is general and addressed to the public or a larger group or category of *clients*.

~~[Note: recital 30 to MiFID]~~

Personalised communications

- 10.5.3 G ...
- (2) Communications addressed to a *client* (such as, for example, an email, a telephone call or a letter), may or may not be personalised depending on the content.
- ...

~~Equivalent third country markets~~

- 10.5.4 G ~~[to insert the reference or hypertext link to the list of equivalent third country markets when available] [deleted]~~

~~[Note: article 19(6) of MiFID]~~

Independent valuation systems

- 10.5.5 G The circumstances in which valuation systems will be independent of the issuer (see COBS 10.4.1R(3)(b)) include where they are overseen by a depositary that is regulated as a provider of depositary services in a *EEA State*.

~~[Note: recital 61 to the MiFID implementing Directive]~~

## 10.6 When a firm need not assess appropriateness

...

- 10.6.2 G ~~A firm may not need to assess appropriateness if it is able to rely on a recommendation made by an investment firm (see COBS 2.4.5 G (Reliance on other investment firms: MiFID and equivalent business)). [deleted]~~

...

After COBS 10 (Appropriateness (for non-MiFID services) (non-MiFID provisions)) insert the following new chapter. All the text is new and is not underlined.

## 10A Appropriateness (for non-advised services) (MiFID provisions)

### 10A.1 Application

[Note: ESMA has also issued guidelines under article 16(3) of the ESMA Regulation on complex debt instruments and structured deposits. See [[https://www.esma.europa.eu/sites/default/files/library/2015-1787\\_-\\_guidelines\\_on\\_complex\\_debt\\_instruments\\_and\\_structured\\_deposits.pdf](https://www.esma.europa.eu/sites/default/files/library/2015-1787_-_guidelines_on_complex_debt_instruments_and_structured_deposits.pdf)]

Application

- 10A.1.1 R This chapter applies to a *firm* which provides *investment services* in the course of *MiFID or equivalent third country business* other than making a *personal recommendation* or carrying out *portfolio management*.
- 10A.1.2 R This chapter applies to a *firm* which assesses appropriateness on behalf of a *MiFID investment firm* so that the other *firm* may rely on the assessment under *COBS 2.4.4R (Reliance on other investment firms: MiFID and equivalent business)*.
- Effect of provisions marked EU
- 10A.1.3 R The effect of *GEN 2.2.22AR* is that provisions in this chapter marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

### 10A.2 Assessing appropriateness: the obligations

- 10A.2.1 R When providing a service to which this chapter applies, a *firm* must ask the *client* to provide information regarding that *client’s* knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded to enable the *firm* to assess whether the service

or product envisaged is appropriate for the *client*.

[Note: article 25(3) of *MIFID*]

#### Bundled packages

- 10A.2.2 R Where a bundle of services or products is envisaged pursuant to *COBS* 6.1ZA.2.12R, the assessment made pursuant to *COBS* 10A.2.1R must consider whether the overall bundled package is appropriate.

[Note: article 25(3) of *MiFID*]

#### Assessing a client's knowledge and experience

- 10A.2.3 EU 56(1) Investment firms, shall determine whether that client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded when assessing whether an investment service as referred to in Article 25(3) of Directive 2014/65/EU is appropriate for a client.
- An investment firm shall be entitled to assume that a professional client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular investment services or transactions, or types of transaction or product, for which the client is classified as a professional client.

[Note: article 56(1) of the *MiFID Org Regulation*]

#### Information regarding a client's knowledge and experience

- 10A.2.4 EU 55(1) Investment firms shall ensure that the information regarding a client's or potential client's knowledge and experience in the investment field includes the following, to the extent appropriate to the nature of the client, the nature and extent of the service to be provided and the type of product or transaction envisaged, including their complexity and the risks involved:
- (a) the types of service, transaction and financial instrument with which the client is familiar;
  - (b) the nature, volume, and frequency of the client's transactions in financial instruments and the period over which they have been carried out;
  - (c) the level of education, and profession or relevant former profession of the client or potential client.

[Note: article 55(1) of the *MiFID Org Regulation*]

#### Discouraging the provision of information

- 10A.2.5 EU 55(2) An investment firm shall not discourage a client or potential client ) from providing information required for the purposes of Article 25(2) and (3) of Directive 2014/65/EU.

[Note: article 55(2) of the *MiFID Org Regulation*]

#### Reliance on information

- 10A.2.6 EU 55(3) An investment firm shall be entitled to rely on the information ) provided by its clients or potential clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

[Note: article 55(3) of the *MiFID Org Regulation*]

#### Use of existing information

- 10A.2.7 G When assessing appropriateness, a *firm* may use information it already has in its possession.

#### Knowledge and experience

- 10A.2.8 G Depending on the circumstances, a *firm* may be satisfied that the *client's* knowledge alone is sufficient for him to understand the risks involved in a product or service. Where reasonable, a *firm* may infer knowledge from experience.

#### Increasing the client's understanding

- 10A.2.9 G If, before assessing appropriateness, a *firm* seeks to increase the *client's* level of understanding of a service or product by providing information to him, relevant considerations are likely to include the nature and complexity of the information and the *client's* existing level of understanding.

#### No duty to communicate firm's assessment of knowledge and experience

- 10A.2.10 G If a *firm* is satisfied that the *client* has the necessary experience and knowledge in order to understand the risks involved in relation to the product or service, there is no duty to communicate this to the *client*. If the *firm* does so, it must not do so in a way that amounts to making a *personal recommendation* unless it complies with the *rules* in COBS 9A (MiFID provisions)).

### 10A.3 Warning the client

- 10A.3.1 R (1) If a *firm* considers, on the basis of information received to enable it to assess appropriateness, that the product or service is not appropriate for the *client*, the *firm* must warn the *client*.

(2) This warning may be provided in a standardised format.

[Note: article 25(3) of *MiFID*]

10A.3.2 R (1) If the *client* does not provide the information to enable the *firm* to assess appropriateness, or if the *client* provides insufficient information regarding their knowledge and experience, the *firm* must warn the *client* that the *firm* is not in a position to determine whether the service or product envisaged is appropriate for the *client*.

(2) This warning may be provided in a standardised format.

[Note: article 25(3) of *MiFID*]

10.A.3.3 G If a *client* asks a *firm* to go ahead with a transaction, despite being given a warning by the *firm*, it is for the *firm* to consider whether to do so having regard to the circumstances.

#### **10A.4 Assessing appropriateness: when it need not be done**

10A.4.1 R (1) A *firm* is not required to ask its *client* to provide information or assess appropriateness if:

- (a) the service:
  - (i) only consists of execution or reception and transmission of *client* orders, with or without *ancillary services*, excluding *ancillary service* (2) in section B of Annex I to *MiFID* (granting of credits or loans), where the relevant credits or loans do not comprise existing credit limits of loans, current accounts and overdraft facilities of *clients*;
  - (ii) relates to particular *financial instruments*; and
  - (iii) is provided at the initiative of the *client*;
- (b) the *client* has been clearly informed (whether in a standardised format or not) that, in the provision of this service, the *firm* is not required to assess the appropriateness of the *financial instrument* or service provided or offered and that therefore the *client* does not benefit from the protection of the *rules* on assessing appropriateness; and
- (c) the *firm* complies with its obligations in relation to conflicts of interest.

(2) The *financial instruments* referred to in (1)(a)(ii) are any of the following:

- (a) shares in companies admitted to trading on:
    - (i) a *regulated market*; or
    - (ii) an equivalent third country market; or
    - (iii) an *MTF*,
 except shares that embed a derivative and *units* in a collective investment undertaking that is not a *UCITS*; or
  - (b) bonds or other forms of securitised debt admitted to trading on:
    - (i) a *regulated market*; or
    - (ii) an equivalent third country market; or
    - (iii) an *MTF*,
 except those that embed a derivative or incorporate a structure which makes it difficult for the *client* to understand the risk involved; or
  - (c) *money-market instruments*, excluding those that embed a derivative or incorporate a structure which makes it difficult for the *client* to understand the risk involved; or
  - (d) shares or *units* in a *UCITS*, excluding structured *UCITS* as referred to in the second subparagraph of article 36(1) of the *KII Regulation*; or
  - (e) *structured deposits*, excluding those that incorporate a structure which makes it difficult for the *client* to understand the risk of return or the cost of exiting the product before term; or
  - (f) other non-complex *financial instruments*.
- (3) For the purposes of this *rule*, a third country market is considered to be equivalent to a *regulated market* if it is a market in relation to which the Commission has adopted an affirmative equivalence decision in accordance with the requirements in article 4(1)(c) of Directive 2003/71/EC and the condition in article 4(1)(d) of Directive 2003/71/EC is satisfied.

[Note: article 25(4) of *MIFID*]

[Note: ESMA has published guidelines which specify criteria for the assessment of (i) debt instruments incorporating a structure which makes it difficult for the client to understand the risk involved, and (ii) structured deposits incorporating a structure which makes it difficult for the client to understand the risk of return or the cost of exiting the product before term. The guidelines can be found here:



[[https://www.esma.europa.eu/sites/default/files/library/2015-1787\\_-\\_guidelines\\_on\\_complex\\_debt\\_instruments\\_and\\_structured\\_deposits.pdf](https://www.esma.europa.eu/sites/default/files/library/2015-1787_-_guidelines_on_complex_debt_instruments_and_structured_deposits.pdf).]

#### Non-complex financial instruments

- 10A.4.2 EU 57 A financial instrument which is not explicitly specified in Article 25(4)(a) of Directive 2014/65/EU shall be considered as non-complex for the purposes of Article 25(4)(a)(vi) of Directive 2014/65/EU if it satisfies the following criteria:
- (a) it does not fall within Article 4(1)(44)(c) of, or points (4) to (11) of Section C of Annex I to Directive 2014/65/EU;
  - (b) there are frequent opportunities to dispose of, redeem, or otherwise realise that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated, by valuation systems independent of the issuer;
  - (c) it does not involve any actual or potential liability for the client that exceeds the cost of acquiring the instrument;
  - (d) it does not incorporate a clause, condition or trigger that could fundamentally alter the nature or risk of the investment or pay out profile, such as investments that incorporate a right to convert the instrument into a different investment;
  - (e) it does not include any explicit or implicit exit charges that have the effect of making the investment illiquid even though there are technically frequent opportunities to dispose of, redeem or otherwise realise it;
  - (f) adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average retail client to make an informed judgment as to whether to enter into a transaction in that instrument.

[Note: article 57 of the *MiFID Org Regulation*]

### 10A.5 Assessing appropriateness: guidance

#### The initiative of the client

- 10A.5.1 G A service should be considered to be provided at the initiative of a *client* (see *COBS* 10A.4.1R(1)(a)(iii)), unless the *client* demands it in response to a personalised communication from or on behalf of the *firm* to that *client* which contains an invitation or is intended to influence the *client* in respect of a specific *financial instrument* or specific transaction.

[Note: recital 85 to *MIFID*]

- 10A.5.2 G A service can be considered to be provided at the initiative of a *client* notwithstanding that the *client* demands it on the basis of any communication containing a promotion for, or offer of, *financial instruments* made by any means and that by its very nature is general and addressed to the public or a larger group or category of *clients*.

[Note: recital 85 to *MIFID*]

Personalised communications

- 10A.5.3 G (1) Communications to the world at large, such as those in newspapers or in billboards, are likely to be by their very nature general and therefore not personalised communications.
- (2) Communications addressed to a *client* (such as, for example, an email, telephone call or letter), may or may not be personalised depending on the content.
- (3) A communication is not personalised solely because it contains the name and address of the *client* or because a mailing list has been filtered.
- (4) If a *firm* is satisfied that a communication does not contain any personalised content, it may wish to make clear that it does not intend the communication to be personalised and that the personal circumstances of the recipient have not been taken into account.

## 10A.6 When a firm need not assess appropriateness

- 10A.6.1 G A *firm* need not assess appropriateness if it is receiving or transmitting an order in relation to which it has assessed suitability under *COBS 9A* (Suitability (MiFID, equivalent third country and optional exemption business)).
- 10A.6.2 G A *firm* may not need to assess appropriateness if it is able to rely on a recommendation made by an *investment firm* (see *COBS 2.4.5G* (Reliance on other investment firms: MiFID and equivalent business)).

## 10A.7 Record keeping and retention periods for appropriateness records

- 10A.7.1 G A *firm* is required to keep orderly records of its business and internal organisation, including all services and transactions undertaken by it. The records may be expected to include the *client* information a *firm* obtains to assess appropriateness and should be adequate to indicate what the assessment was.

- 10A.7.2 EU 56(2) Investment firms shall maintain records of the appropriateness assessments undertaken which shall include the following:
- (a) the result of the appropriateness assessment;
  - (b) any warning given to the client where the investment service or product purchase was assessed as potentially inappropriate for the client, whether the client asked to proceed with the transaction despite the warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction;
  - (c) any warning given to the client where the client did not provide sufficient information to enable the firm to undertake an appropriateness assessment, whether the client asked to proceed with the transaction despite this warning and, where applicable, whether the firm accepted the client's request to proceed with the transaction.

[Note: article 56(2) of the *MiFID Org Regulation*]

- 10A.7.2 G A *firm* should refer to SYSC 9 for its obligations in relation to record keeping. This requires records kept for the purposes of this chapter to be retained for a period of at least five years.

Amend the following as shown.

## 11 Dealing and managing

### 11.1 Application

...

- 11.1.2 R ~~In~~ Save as may be provided in the relevant sections, in this chapter, provisions marked "EU" apply to a *firm* which is not a *MiFID investment firm* as if they were rules.

~~Application to section on the use of dealing commission~~

- 11.1.3 R ~~The section on the use of dealing commission applies to a *firm* that acts as an *investment manager*.~~ [deleted]

...

- 11.1.5 G The *EEA territorial scope rule* modifies the default territorial scope of the section on personal account dealing (see *COBS 11.7* and *COBS 11.7A*) to the extent necessary to be compatible with European law. This means that the relevant section on personal account dealing also applies to passported

activities carried on by a *UK MiFID investment firm* or a *UK UCITS management company* from a branch in another *EEA State*, but does not apply to the *UK branch of an EEA MiFID investment firm* in relation to its *MiFID business* or of an *EEA UCITS management company* in relation to activities it is entitled to carry on in the *United Kingdom* under the *UCITS Directive*.

11.1.6 R The section on best execution (*COBS 11.2A*) does not apply to a *firm* when:  
...

11.1.7 R The section on best execution (*COBS 11.2* or *COBS 11.2B*, as applicable) does not apply to a *firm* when, acting in the capacity of *operator of a collective investment scheme*, it purchases or sells units in that *scheme*.

## 11.2 **Best execution for AIFMs and residual CIS operators**

### Application

11.2.-7 G This section applies to:

- (1) a small authorised UK AIFM and a residual CIS operator in accordance with COBS 18.5.2R; and
- (2) a full-scope UK AIFM and an incoming EEA AIFM branch, in accordance with COBS 18.5A.3R.

11.2.-6 G In accordance with COBS 18.5.4R, this section does not apply to a small authorised UK AIFM of an unauthorised AIF or a residual CIS operator of a fund whose fund documents include a statement that best execution does not apply in relation to the fund and in which:

- (1) no investor is a retail client; or
- (2) no current investor in the fund was a retail client when it invested in the fund.

11.2.-5 G In accordance with COBS 18.5A.8R, only the following provisions of this section apply to a full-scope UK AIFM and an incoming EEA AIFM branch:

- (1) COBS 11.2.5G;
- (2) COBS 11.2.17G;
- (3) COBS 11.2.23AR;
- (4) COBS 11.2.24R;
- (5) COBS 11.2.25R(1) and COBS 11.2.26R, but only where an AIF itself has a governing body which can provide prior consent; and

(6) COBS 11.2.27R, but only regarding the obligation on an AIFM to notify the AIF of any material changes to its order execution arrangements or execution policy.

11.2.-4 G A firm to which this section applies may comply with its obligations under this section by complying with the rules in COBS 11.2B (Best execution for UCITS management companies).

Modifications

11.2.-3 G In accordance with COBS 18.5.3R(1) and COBS 18.5A.5R, references in this section to customer or client are to any fund for which the firm is acting or intends to act.

11.2.-2 G In accordance with COBS 18.5.1AR and COBS 18.5.3R(2), in the case of a small authorised UK AIFM of an unauthorised AIF which is a collective investment scheme, or a residual CIS operator, when a firm is required by the rules in this section to provide information to, or obtain consent from, a fund, the firm must ensure that the information is provided to, or consent obtained from, an investor or a potential investor in the fund as the case may be.

11.2.-1 G In accordance with COBS 18.5.3R(3) and COBS 18.5A.9R, references to the service of portfolio management in this section are to be read as references to the management by a firm of financial instruments held for or within the fund.

Obligation to execute orders on terms most favourable to the client

11.2.1 R ...

~~[Note: article 21(1) of MiFID and article 25(2) first sentence of the UCITS implementing Directive]~~

[Note: The Committee of European Securities Regulators (CESR) has issued a Question and Answer paper on best execution under MiFID. This paper also incorporates the European Commission's responses to CESR's questions regarding the scope of the best execution obligations under MiFID. The paper can be found at:

[http://www.esma.europa.eu/system/files/07\\_320.pdf](http://www.esma.europa.eu/system/files/07_320.pdf)

[https://www.esma.europa.eu/sites/default/files/library/2015/11/07\\_320.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/07_320.pdf)]

Execution of decisions by UCITS management companies to deal on behalf of the schemes they manage

11.2.1A R ~~A management company must, in relation to each UCITS scheme or EEA UCITS scheme it manages, act in the best interests of the scheme when executing decisions to deal on its behalf in the context of the management of its portfolio, and COBS 11.2.1R applies in relation to all such decisions.~~  
[deleted]

~~[Note: article 25(1) of the UCITS implementing Directive]~~

Application of best execution obligation

11.2.2 G ...

~~[Note: recital 33 to MiFID]~~

11.2.3 G ~~Dealing on own account with clients by a firm should be considered as the execution of client orders, and therefore subject to the requirements under MiFID, in particular, those obligations in relation to best execution. [deleted]~~

~~[Note: first sentence of recital 69 to the MiFID implementing Directive]~~

11.2.4 G ...

~~[Note: second sentence of recital 69 to the MiFID implementing Directive]~~

11.2.5 G ...

~~[Note: recital 70 to the MiFID implementing Directive]~~

Management companies: execution and transmission of orders

11.2.5A G (1) ~~A management company should, for each UCITS scheme or EEA UCITS scheme it manages, act in the best interests of the scheme when directly executing orders to deal on its behalf or when transmitting those orders to third parties.~~

(2) ~~When executing orders on behalf of any such scheme it manages, a management company is expected to take all reasonable steps to obtain the best possible result for the scheme on a consistent basis, taking into account price, costs, speed, likelihood of execution and settlement, size and nature of the order or any other consideration relevant to the execution of the order. [deleted]~~

~~[Note: recital (19) to the UCITS implementing Directive]~~

Best execution criteria

11.2.6 R When executing a client order, a firm must take into account the following criteria for determining the relative importance of the execution factors:

...

(3) the characteristics of financial instruments that are the subject of that order; and

(4) the characteristics of the execution venues to which that order can be directed; and

- (5) ~~for a *management company*, the objectives, investment policy and risks specific to the *UCITS scheme* or *EEA UCITS scheme*, as indicated in its *prospectus* or *instrument constituting the fund*.~~  
~~[deleted]~~

~~[Note: article 44(1) of the *MiFID implementing Directive* and article 25(2) second sentence of the *UCITS implementing Directive*]~~

#### Role of price

11.2.7 R ...

~~[Note: paragraph 1 of article 44(3) of the *MiFID implementing Directive*]~~

11.2.8 G ...

~~[Note: recital 67 to the *MiFID implementing Directive*]~~

11.2.9 G ...

#### Delivering best execution where there are competing execution venues

11.2.10 R ...

~~[Note: article 44(3) of paragraph 2 of the *MiFID implementing Directive*]~~

11.2.11 G ...

~~[Note: recital 71 to the *MiFID implementing Directive*]~~

11.2.12 R ...

~~[Note: article 44(4) of the *MiFID implementing Directive*]~~

11.2.13 G ...

~~[Note: recital 73 to the *MiFID implementing Directive*]~~

#### Requirement for order execution arrangements including an order execution policy

11.2.14 R ...

~~[Note: article 21(2) of *MiFID* and article 25(3) first paragraph of the *UCITS implementing Directive*]~~

11.2.15 R ...

~~[Note: paragraph 1 of article 21(3) of *MiFID*]~~

11.2.16 G ...

~~[Note: recital 66 to the MiFID implementing Directive]~~

11.2.17 G ...

~~[Note: recital 72 to the MiFID implementing Directive]~~

11.2.18 G ...

~~[Note: recital 74 to the MiFID implementing Directive]~~

Following specific instructions from a client

11.2.19 R (1) ...

~~[Note: article 21(1) of MiFID]~~

(2) ...

~~[Note: article 44(2) of the MiFID implementing Directive]~~

11.2.20 G ...

~~[Note: recital 68 to the MiFID implementing Directive]~~

11.2.21 G ...

~~[Note: recital 68 to the MiFID implementing Directive]~~

Information about the order execution policy

11.2.22 R ...

~~[Note: paragraph 2 of article 21(3) of MiFID]~~

11.2.23 R ...

~~[Note: article 46(2) of the MiFID implementing Directive]~~

11.2.23A R *A management company full-scope UK AIFM and an incoming EEA AIFM branch* must make available appropriate information on its execution policy required under article 27(3) of the AIFMD level 2 regulation (Execution of decisions to deal on behalf of the managed AIF) and on any material changes to that policy to the *Unitholders* of investors in each scheme AIF it manages.

~~[Note: article 25(3) second part of the second paragraph of the UCITS implementing Directive]~~

11.2.24 R ...

~~[Note: paragraph 3 of article 21(3) of MiFID]~~



Client consent to execution policy and execution of orders outside a regulated market or MTF

- 11.2.25 R (1) ~~A firm (other than a management company providing collective portfolio management services for a UCITS scheme or an EEA UCITS scheme) must obtain the prior consent of its clients to the execution policy.~~
- (2) ~~In the case of a management company providing collective portfolio management services for an ICVC that is a UCITS scheme, or for an EEA UCITS scheme that is structured as an investment company, the management company must obtain the prior consent of the ICVC or investment company to the execution policy. [deleted]~~
- (3) ~~In the case of a management company that is the ACD of an ICVC that is a UCITS scheme, (2) does not apply where the ACD is the sole director of the ICVC. [deleted]~~

~~[Note: paragraph 2 of article 21(3) of MiFID and article 25(3) first part of the second paragraph of the UCITS implementing Directive]~~

11.2.26 R ...

~~[Note: paragraph 3 of article 21(3) of MiFID]~~

Monitoring the effectiveness of execution arrangements and policy

11.2.27 R ...

~~[Note: article 21(4) of MiFID and article 25(4) first paragraph of the UCITS implementing Directive]~~

Review of the order execution policy

11.2.28 R ...

~~[Note: article 46(1) of the MiFID implementing Directive and article 25(4) second paragraph of the UCITS implementing Directive]~~

Demonstration of execution of orders in accordance with execution policy

- 11.2.29 R (1) ~~A firm other than a management company must be able to demonstrate to its clients, at their request, that it has executed their orders in accordance with its execution policy.~~
- (2) ~~A management company must be able to demonstrate that it has executed orders on behalf of any UCITS scheme or EEA UCITS scheme it manages in accordance with its execution policy. [deleted]~~

~~[Note: article 21(5) of MiFID and article 25(5) of the UCITS implementing Directive]~~

Duty of portfolio managers, receivers and transmitters and management companies to act in clients' best interests

- 11.2.30 R A *firm* must, when providing the service of *portfolio management* ~~or, for a management company, collective portfolio management~~, comply with the obligation to act in accordance with the best interests of its *clients* when placing orders with other entities for execution that result from decisions by the *firm* to deal in *financial instruments* on behalf of its *client*.

~~[Note: article 45(1) of MiFID implementing Directive and article 26(1) of the UCITS implementing Directive]~~

- 11.2.31 R ...

~~[Note: article 45(2) of the MiFID implementing Directive]~~

- 11.2.32 R ...

~~[Note: article 45(3) of the MiFID implementing Directive and article 26(1) of the UCITS implementing Directive]~~

(1) ...

~~[Note: paragraph 1 and 2 of article 45(4) of the MiFID implementing Directive and article 26(2) first paragraph of the UCITS implementing Directive]~~

- (2) establish and implement a policy to enable it to comply with the obligation to take all reasonable steps to obtain the best possible result for its *clients*. The policy must identify, in respect of each class of instruments, the entities with which the orders are placed or to which the *firm* transmits orders for execution. The entities identified must have execution arrangements that enable the *firm* to comply with its obligations under this section ~~or, for a management company, must only enter into arrangements for execution where those arrangements are consistent with the requirements of this section~~, when it places an order with, or transmits an order to, that entity for execution;

~~[Note: paragraph 1 of article 45(5) of the MiFID implementing Directive and article 26(2) second paragraph of the UCITS implementing Directive]~~

- (3) provide appropriate information to its *clients* on the policy established in accordance with ~~COBS 11.2.32R(2)~~ ~~or, for a management company, make available to Unitholders appropriate information on that policy and on any material changes to it~~ paragraph (2);

~~[Note: paragraph 2 of article 45(5) of the MiFID implementing Directive and article 26(2) second paragraph last sentence of the UCITS implementing Directive]~~

(4) ...

~~[Note: first paragraph of article 45(6) of the *MiFID implementing Directive* and article 26(3) first paragraph of the *UCITS implementing Directive*]~~

(5) ...

~~[Note: second paragraph of article 45(6) of the *MiFID implementing Directive* and article 26(3) second paragraph of the *UCITS implementing Directive*]~~

11.2.32A R ~~A management company must be able to demonstrate that it has placed orders on behalf of any *UCITS scheme* or *EEA UCITS scheme* it manages in accordance with the policy referred to in *COBS 11.2.32R(2)*. [deleted]~~

~~[Note: article 26(4) of the *UCITS implementing Directive*]~~

11.2.33 G ...

~~[Note: recital 75 to the *MiFID implementing Directive*]~~

11.2.34 R ...

~~[Note: article 45(7) of the *MiFID implementing Directive* and article 25 of the *UCITS implementing Directive*]~~

Insert the new 11.2A, 11.2B and 11.2C after COBS 11.2 (Best execution for AIFMs and residual CIS operators). All of the text is new and is not underlined.

## **11.2A Best execution – MiFID provisions**

- 11.2A.1 R (1) Subject to (2) and (3), the following provisions apply to a *firm's* business other than *MiFID business* as if they were *rules*:
- (a) provisions within this chapter marked “EU”; and
  - (b) *COBS 11 Annex 1EU*.
- (2) The following provisions do not apply to *MiFID optional exemption firm's business*:
- (a) the part of the first sub-paragraph of article 65(6) to the *MiFID Org Regulation* (reproduced at *COBS 11.2A.34EU*) that reads:
 

“In particular, when the investment firm select other firms to provide order execution services, it shall summarise and

make public, on an annual basis, for each class of financial instruments, the top five investment firms in terms of trading volumes where it transmitted or placed client orders for execution in the preceding year and information on the quality of execution obtained. The information shall be consistent with the information published in accordance with the technical standards developed under Article 27(10)(b) of Directive 2014/65/EU.”; and

(b) *COBS* 11 Annex 1EU.

- (3) This chapter does not apply to *UCITS management companies*, which are subject to *COBS* 11.2B.
- (4) This chapter does not apply to *AIFMs* and *residual CIS operators*, which are subject to *COBS* 11.2.

#### Obligation to execute orders on terms most favourable to the client

- 11.2A.2 R (1) A *firm* must take all sufficient steps to obtain, when executing orders, the best possible results for its *clients* taking into account the *execution factors*.
- (2) The *execution factors* to be taken into account are price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of an order.

[**Note:** article 27(1) of *MiFID*]

#### Application of best execution obligation

- 11.2A.3 G The obligation to take all sufficient steps to obtain the best possible result for its *clients* (see *COBS* 11.2A.2R) should apply where a *firm* owes contractual or agency obligations to the *client*.

[**Note:** recital 91 to, and article 27(1) of, *MiFID*]

- 11.2A.4 G Dealing on own account with *clients* by a *firm* should be considered as the execution of *client* orders, and therefore subject to the requirements under *MiFID*, in particular, those obligations in relation to best execution.

[**Note:** first sentence, recital 103 to the *MiFID Org Regulation*]

- 11.2A.5 G *Dealing on own account* when executing *client* orders includes the execution by *firms* of orders from different *clients* on a matched principal basis (back-to-back trading). Such activities are regarded as acting as *principal* and are subject to the requirements of this chapter in relation to both execution of orders on behalf of *clients* and *dealing on own account*.

[**Note:** recital 24 to *MiFID*]

- 11.2A.6 G However if a *firm* provides a quote to a *client* and that quote would meet

the *firm's* obligations to take all sufficient steps to obtain the best possible result for its *clients* under COBS 11.2A.2R if the *firm* executed that quote at the time it was provided, then the *firm* will meet those same obligations if it executes its quote after the *client* accepts it, provided that, taking into account the changing market conditions and the time elapsed between the offer and acceptance of the quote, the quote is not manifestly out of date.

[**Note:** second sentence, recital 103 to the *MiFID Org Regulation*]

- 11.2A.7 G The obligation to deliver the best possible result when executing *client* orders applies in relation to all types of *financial instruments*. However, given the differences in market structures and the structure of *financial instruments*, it may be difficult to identify and apply a uniform standard of, and procedure for, best execution that would be valid and effective for all classes of instrument. Best execution obligations should therefore be applied to take into account the different circumstances surrounding the execution of orders for particular types of *financial instruments*. For example, transactions involving a customised *OTC financial instrument* with a unique contractual relationship tailored to the circumstances of the *client* and the *firm* may not be comparable for best execution purposes with transactions involving *shares* traded on centralised *execution venues*. As best execution obligations apply to all *financial instruments*, irrespective of whether they are traded on *trading venues* or *OTC*, *firms* should gather relevant market data in order to check whether the *OTC* price offered for a *client* is fair and delivers on the best execution obligation.

[**Note:** recital 104 to the *MiFID Org Regulation*]

#### Best execution criteria

- 11.2A.8 EU Article 64 of the *MiFID Org Regulation* sets out best execution criteria.

- 64 (1) When executing client orders, investment firms shall take into account the following criteria for determining the relative importance of the factors referred to in Article 27(1) of Directive 2014/65/EU:
- (a) the characteristics of the client including the categorisation of the client as retail or professional;
  - (b) the characteristics of the client order, including where the order involves a securities financing transaction (SFT);
  - (c) the characteristics of financial instruments that are the subject of that order;
  - (d) the characteristics of the execution venues to which that order can be directed.

For the purpose of this Article and Articles 65 and 66, 'execution venue' includes a regulated market, an MTF, an

OTF, a systematic internaliser, or a market maker or other liquidity provider or an entity that performs a similar function in a third country to the function performed by any of the foregoing.

- (2) An investment firm satisfies its obligation under Article 27(1) of Directive 2014/65/EU to take all sufficient steps to obtain the best possible result for a client to the extent that it executes an order or a specific aspect of an order following specific instructions from the client relating to the order or the specific aspect of the order.
- (3) Investment firms shall not structure or charge their commissions in such a way as to discriminate unfairly between execution venues.
- (4) When executing orders or taking decision to deal in OTC products including bespoke products, the investment firm shall check the fairness of the price proposed to the client, by gathering market data used in the estimation of the price of such product and, where possible, by comparing with similar or comparable products.

#### Role of price

- 11.2A.9 R Where a *firm* executes an order on behalf of a *retail client*, the best possible result must be determined in terms of the total consideration, representing the price of the *financial instrument* and the costs related to execution, which must include all expenses incurred by the *client* which are directly related to the execution of the order, including *execution venue* fees, clearing and settlement fees and any other fees paid to third parties involved in the execution of the order.

[**Note:** article 27(1) of *MiFID*]

- 11.2A.10 G When a *firm* executes a *retail client's* order in the absence of specific *client* instructions, for the purposes of ensuring that the *firm* obtains the best possible result for the *client*, the firm should take into consideration all factors that will enable it to deliver the best possible result in terms of the total consideration, representing the price of the *financial instrument* and the costs related to execution.

[**Note:** recital 101 to the *MiFID Org Regulation*]

- 11.2A.11 G Speed, likelihood of execution and settlement, the size and nature of the order, market impact and any other implicit transaction costs may be given precedence over the immediate price and cost consideration only insofar as they are instrumental in delivering the best possible result in terms of the total consideration to the *retail client*.

[**Note:** recital 101 to the *MiFID Org Regulation*]

Following specific instructions from a client

- 11.2A.12 R Whenever there is a specific instruction from the *client*, a *firm* must execute the order following the specific instruction.

[**Note:** article 27(1) of *MiFID*]

- 11.2A.13 G When a *firm* executes an order following specific instructions from the *client*, it should be treated as having satisfied its best execution obligations only in respect of the part or aspect of the order to which the *client* instructions relate. The fact that the *client* has given specific instructions which cover one part or aspect of the order should not be treated as releasing the *firm* from its best execution obligations in respect of any other parts or aspects of the *client* order that are not covered by such instructions.

[**Note:** recital 102 to the *MiFID Org Regulation*]

- 11.2A.14 G A *firm* should not induce a *client* to instruct it to execute an order in a particular way, by expressly indicating or implicitly suggesting the content of the instruction to the *client*, when the *firm* ought reasonably to know that an instruction to that effect is likely to prevent it from obtaining the best possible result for that *client*. However, this should not prevent a *firm* inviting a *client* to choose between two or more specified *trading venues*, provided that those venues are consistent with the execution policy of the *firm*.

[**Note:** recital 102 to the *MiFID Org Regulation*]

Delivering best execution where there are competing execution venues

- 11.2A.15 R A *firm's* own commissions and the costs for executing an order in each of the eligible *execution venues* must be taken into account when assessing and comparing the results that would be achieved for a *client* by executing the order on each of the *execution venues* listed in the *firm's* execution policy that is capable of executing that order.

[**Note:** article 27(1) of *MiFID*]

- 11.2A.16 G The obligation to deliver best execution for a *retail client* where there are competing *execution venues* is not intended to require a *firm* to compare the results that would be achieved for its *client* on the basis of its own execution policy and its own commissions and fees, with results that might be achieved for the same *client* by any other *firm* on the basis of a different execution policy or a different structure of commissions or fees. Nor is it intended to require a *firm* to compare the differences in its own commissions which are attributable to differences in the nature of the services that the *firm* provides to *clients*.

[**Note:** recital 93 to *MiFID*]

- 11.2A.17 G A *firm* would be considered to structure or charge its commissions in a way which discriminates unfairly between *execution venues* if it charged a different commission or spread to *clients* for execution on different *execution venues* and that difference did not reflect actual differences in the cost to the *firm* of executing on those venues.

[Note: recital 95 to *MiFID*]

- 11.2A.18 G The provisions of this section which provide that costs of execution include a *firm's* own commission or fees charged to the *client* for the provision of an *investment service* should not apply for the purpose of determining what *execution venues* must be included in the *firm's* execution policy in accordance with *COBS* 11.2A.21R.

[Note: recital 94 to *MiFID*]

- 11.2A.19 R A *firm* must not receive any remuneration, discount or non-monetary benefit for routing *client* orders to a particular *trading venue* or *execution venue* which would infringe the requirements on conflicts of interests (as set out in *SYSC* 10) or inducements as set out in *COBS* 2.3 (for firms carrying on business other than *MiFID*, *equivalent third country* or *optional exemption business*) and in *COBS* 2.3A, *COBS* 2.3B and *COBS* 2.3C (for *firms* carrying on *MiFID*, *equivalent third country* or *optional exemption business*).

[Note: article 27(2) of *MiFID*]

Requirement for order execution arrangements including an order execution policy

- 11.2A.20 R A *firm* must establish and implement effective arrangements for complying with the obligation to take all sufficient steps to obtain the best possible results for its *clients*. In particular, the *firm* must establish and implement an order execution policy to allow it to obtain, in accordance with *COBS* 11.2A.2R, the best possible result for the execution of *client* orders.

[Note: article 27(4) of *MiFID*]

- 11.2A.21 R The order execution policy must include, in respect of each class of *financial instruments*, information on the different *execution venues* where the *firm* executes its *client* orders and the factors affecting the choice of *execution venue*. It must at least include those *execution venues* that enable the *firm* to obtain on a consistent basis the best possible result for the execution of *client* orders.

[Note: article 27(5) of *MiFID*]

- 11.2A.22 R (1) A *firm* must provide appropriate information to its *clients* on its order execution policy.
- (2) That information must explain clearly how orders will be executed



by the *firm* for the *clients*.

- (3) The information must include sufficient details and be provided in a way that can be easily understood by *clients*.

[**Note:** article 27(5) of *MiFID*]

- 11.2A.23 R (1) A *firm* must obtain the prior consent of its *clients* to the execution policy.

[**Note:** article 27(5) of *MiFID*]

- 11.2A.24 R (1) Where a *firm's* order execution policy provides for the possibility that *client* orders may be executed outside a *trading venue*, a *firm* must, in particular, inform its *clients* about that possibility.
- (2) A *firm* must obtain the express prior consent of its *clients* before proceeding to execute their orders outside a *trading venue*.
- (3) A *firm* may obtain such consent either in the form of a general agreement or in respect of individual transactions.

[**Note:** article 27(5) of *MiFID*]

- 11.2A.25 EU Article 66 of the *MiFID Org Regulation* sets out requirements concerning execution policies

- 66 (1) Investment firms shall review, at least on an annual basis execution policy established pursuant to Article 27(4) of Directive 2014/65/EU, as well as their order execution arrangements.
- Such a review shall also be carried out whenever a material change as defined in Article 65(7) occurs that affects the firm's ability to continue to obtain the best possible result for the execution of its client orders on a consistent basis using the venues included in its execution policy. An investment firm shall assess whether a material change has occurred and shall consider making changes to the relative importance of the best execution factors in meeting the overarching best execution requirement.
- (2) The information on the execution policy shall be customised depending on the class of financial instrument and type of the service provided and shall include information set out in paragraphs 3 to 9.
- (3) Investment firms shall provide clients with the following details on their execution policy in good time prior to the provision of the service:
- (a) an account of the relative importance the

investment firm assigns, in accordance with the criteria specified in Article 59(1), to the factors referred to in Article 27(1) of Directive 2014/65/EU, or the process by which the firm determines the relative importance of those factors.

- (b) a list of the execution venues on which the firm places significant reliance in meeting its obligation to take all reasonable steps to obtain on a consistent basis the best possible result for the execution of client orders and specifying which execution venues are used for each class of financial instruments, for retail client orders, professional client orders and SFTs;
- (c) a list of factors used to select an execution venue, including qualitative factors such as clearing schemes, circuit breakers, scheduled actions, or any other relevant consideration, and the relative importance of each factor; The information about the factors used to select an execution venue for execution shall be consistent with the controls used by the firm to demonstrate to clients that best execution has been achieved in a consistent basis when reviewing the adequacy of its policy and arrangements;
- (d) how the execution factors of price costs, speed, likelihood of execution and any other relevant factors are considered as part of all sufficient steps to obtain the best possible result for the client;
- (e) where applicable, information that the firm executes orders outside a trading venue, the consequences, for example counterparty risk arising from execution outside a trading venue, and upon client request, additional information about the consequences of this means of execution;
- (f) a clear and prominent warning that any specific instruction from a client may prevent the firm from taking the steps that it has designed and implemented in its execution policy to obtain the best possible result for the execution of those orders in respect of the elements covered by those instructions;

- (g) a summary of the selection process for execution venues, execution strategies employed, the procedures and process used to analyse the quality of execution obtained and how the firms monitor and verify that the best possible results were obtained for clients.

That information shall be provided in a durable medium, or by means of a website (where that does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

- (4) Where investment firms apply different fees depending on the execution venue, the firm shall explain these differences in sufficient detail in order to allow the client to understand the advantages and the disadvantages of the choice of a single execution venue.
- (5) Where investment firms invite clients to choose an execution venue, fair, clear and not misleading information shall be provided to prevent the client from choosing one execution venue rather than another on the sole basis of the price policy applied by the firm.
- (6) Investment firms shall only receive third-party payments that comply with Article 24(9) of Directive 2014/65/EU and shall inform clients about the inducements that the firm may receive from the execution venues. The information shall specify the fees charged by the investment firm to all counterparties involved in the transaction, and where the fees vary depending on the client, the information shall indicate the maximum fees or range of the fees that may be payable.
- (7) Where an investment firm charges more than one participant in a transaction, in compliance with Article 24(9) of Directive 2014/65/EU and its implementing measures, the firm shall inform its client of the value of any monetary or non-monetary benefits received by the firm.
- (8) Where a client makes reasonable and proportionate requests for information about its policies or arrangements and how they are reviewed to an investment firm, that investment firm shall answer clearly and within a reasonable time.
- (9) Where an investment firm executes orders for retail clients, it shall provide those clients with a summary of the relevant policy, focused on the total cost they incur. The summary shall also provide a link to the most recent

execution quality data published in accordance with Article 27(3) of Directive 2014/65/EU for each execution venue listed by the investment firm in its execution policy.

- 11.2A.26 G (1) When establishing its execution policy in accordance with *COBS* 11.2A.20R a *firm* should determine the relative importance of the factors mentioned in *COBS* 11.2A.2R(2), or at least establish the process by which it determines the relative importance of these factors, so that it can deliver the best possible result to its *clients*.
- (2) Ordinarily, the *FCA* would expect that price will merit a high relative importance in obtaining the best possible result for *professional clients*. However, in some circumstances for some *clients*, orders, *financial instruments* or markets, the policy may appropriately determine that other *execution factors* are more important than price in obtaining the best possible execution result.
- (3) In order to comply with the obligation of best execution, a *firm*, when applying the criteria for best execution for *professional clients*, will typically not use the same *execution venues* for *securities financing transactions* and other transactions. This is because the *securities financing transactions* are used as a source of funding subject to a commitment that the borrower will return equivalent securities on a future date and the terms of the *securities financing transactions* are typically defined bilaterally between the *counterparties* ahead of the execution. Therefore, the choice of *execution venues* for *securities financing transactions* is more limited than in the case of other transactions, given that it depends on the particular terms defined in advance between the *counterparties* and on whether there is a specific demand on those *execution venues* for the *financial instruments* involved. As a result, the order execution policy established by *firms* should take into account the particular characteristics of *securities financing transactions* and it should list separately *execution venues* used for *securities financing transactions*.

[**Note:** recital 99 to the *MiFID Org Regulation*]

- 11.2A.27 G A *firm* should apply its execution policy to each *client* order that it executes with a view to obtaining the best possible result for the *client* in accordance with that policy.

[**Note:** recital 99 to the *MiFID Org Regulation*]

- 11.2A.28 G The obligation to take all sufficient steps to obtain the best possible result for the *client* should not be treated as requiring a *firm* to include in its execution policy all available *execution venues*.

11.2A.29 G An *investment firm* executing orders should be able to include a single *execution venue* in their policy only where they are able to show that this allows them to obtain best execution for their *clients* on a consistent basis. *Investment firms* should select a single *execution venue* only where they can reasonably expect that the selected *execution venue* will enable them to obtain results for *clients* that are at least as good as the results that they could reasonably expect from using alternative *execution venues*. This reasonable expectation must be supported by relevant data published in accordance with:

- (1) COBS 11.2A.38G;
- (2) COBS 11.2A.39R;
- (3) COBS 11.2C; and
- (4) by other internal analyses conducted by *investment firms*.

[**Note:** recital 108 to the *MiFID Org Regulation*]

11.2A.30 G The provisions of this section as to execution policy are without prejudice to the general obligation of a *firm* to monitor the effectiveness of its order execution arrangements and policy and assess the *execution venues* in its execution policy on a regular basis.

[**Note:** recital 105 to the *MiFID Org Regulation*]

Monitoring and review of the order execution arrangements including the order execution policy

11.2A.31 R (1) A *firm* must monitor the effectiveness of its order execution arrangements and execution policy to identify and, where appropriate, correct any deficiencies. In particular it must assess, on a regular basis, whether the *execution venues* included in the order execution policy provide for the best possible result for the *client* or whether it needs to make changes to its execution arrangements taking into account the information published in accordance with:

- (a) COBS 11.2A.38G;
- (b) COBS 11.2A.39R; and
- (c) COBS 11.2C.

(2) The *firm* must notify *clients* of any material changes to its order execution arrangements or execution policy.

[**Note:** article 27(7) of *MiFID*]

11.2A.32 R (1) A *firm* must be able to demonstrate to its *clients*, at their request, that it has executed their orders in accordance with its execution policy.

- (2) A *firm* must be able to demonstrate to the *FCA*, at the request of that authority, its compliance with *COBS* 11.2A.2R and with the related provisions in this chapter which require *firms* to execute orders on terms most favourable to the *client*.

[**Note:** article 27(8) of *MiFID*]

- 11.2A.33 G In order to obtain the best execution for a *client*, a *firm* should compare and analyse relevant data, including that made public in accordance with *COBS* 11.2A.38G, *COBS* 11.2C and article 27(3) of *MiFID* and respective implementing measures.

[**Note:** recital 107 to the *MiFID Org Regulation*]

Duty of portfolio managers, receivers and transmitters to act in client's best interest

- 11.2A.34 EU Article 65 of the *MiFID Org Regulation* sets out the duty of *firms* carrying out certain activities to act in the best interests of the *client*.

- 65 (1) Investment firms, when providing portfolio management, shall comply with the obligation under Article 24(1) of Directive 2014/65/EU to act in accordance with the best interests of their clients when placing orders with other entities for execution that result from decisions by the investment firm to deal in financial instruments on behalf of its client.
- (2) Investment firms, when providing the service of reception and transmission of orders, shall comply with the obligation under Article 24(1) of Directive 2014/65/EU to act in accordance with the best interests of their clients when transmitting client orders to other entities for execution.
- (3) In order to comply with paragraphs 1 or 2, investment firms shall comply with paragraphs 4 to 7 of this Article and Article 64(4).
- (4) Investment firms shall take all sufficient steps to obtain the best possible result for their clients taking into account the factors referred to in Article 27(1) of Directive 2014/65/EU. The relative importance of these factors shall be determined by reference to the criteria set out in Article 64(1) and, for retail clients, to the requirement under Article 27(1) of Directive 2014/65/EU.

An investment firm satisfies its obligations under paragraph 1 or 2, and is not required to take the steps mentioned in this paragraph, to the extent that it follows specific instructions from its client when placing an order with, or transmitting an order to, another entity for execution.

(5) Investment firms shall establish and implement a policy that enables them to comply with the obligation in paragraph 4. The policy shall identify, in respect of each class of instruments, the entities with which the orders are placed or to which the investment firm transmits orders for execution. The entities identified shall have execution arrangements that enable the investment firm to comply with its obligations under this Article when it places or transmits orders to that entity for execution.

(6) Investment firms shall provide information to their clients on the policy established in accordance with paragraph 5 and paragraphs 2 to 9 of Article 66. Investment firms shall provide clients with appropriate information about the firm and its services and the entities chosen for execution. In particular, when the investment firm select other firms to provide order execution services, it shall summarise and make public, on an annual basis, for each class of financial instruments, the top five investment firms in terms of trading volumes where it transmitted or placed client orders for execution in the preceding year and information on the quality of execution obtained. The information shall be consistent with the information published in accordance with the technical standards developed under Article 27(10)(b) of Directive 2014/65/EU.

Upon reasonable request from a client, investment firms shall provide its clients or potential clients with information about entities where the orders are transmitted or placed for execution.

(7) Investment firms shall monitor on a regular basis the effectiveness of the policy established in accordance with paragraph 5 and, in particular, shall monitor the execution quality of the entities identified in that policy and, where appropriate, correct any deficiencies.

Investment firms shall review the policy and arrangements at least annually. Such a review shall also be carried out whenever a material change occurs that affects the firm's ability to continue to obtain the best possible result for their clients.

Investment firms shall assess whether a material change has occurred and shall consider making changes to the execution venues or entities on which they place significant reliance in meeting the overarching best execution requirement.

A material change shall be a significant event that could impact parameters of best execution such as cost, price, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the

order.

- (8) This Article shall not apply where the investment firm that provides the service of portfolio management or reception and transmission of orders also executes the orders received or the decisions to deal on behalf of its client's portfolio. In those cases Article 27 of Directive 2014/65/EU shall apply.

- 11.2A.35 G This section is not intended to require a duplication of effort as to best execution between a *firm* which provides the service of reception and transmission of orders or *portfolio management* and any *firm* to which that *firm* transmits its orders for execution.

[**Note:** recital 106 to the *MiFID Org Regulation*]

- 11.2A.36 G A *firm* transmitting or placing orders with other entities for execution may select a single entity for execution only where the *firm* is able to show that this provides the best possible result for their *clients* on a consistent basis and where they can reasonably expect that the selected entity will enable them to obtain results for *clients* that are at least as good as the results that could reasonably be expected from using alternative entities for execution. This reasonable expectation should be supported by relevant data published in accordance with:

- (1) *COBS* 11.2A.38G;
- (2) *COBS* 11.2A.39R;
- (3) *COBS* 11.2C; and
- (4) by internal analysis conducted by *investment firms*.

[**Note:** recital 100 to the *MiFID Org Regulation*]

#### Providing information to clients on order execution

- 11.2A.37 R Following the execution of a transaction on behalf of a *client* a *firm* must inform the *client* of where the order was executed.

[**Note:** article 27(3) of *MiFID*]

#### Publishing information on execution quality

- 11.2A.38 G *Execution venues* (other than *market makers* and other liquidity providers to which *COBS* 11.2C applies) are reminded of the need to comply with the following provisions:

- (1) *MAR* 5.3.1A R(5);
- (2) *MAR* 5A.4.2R(3);
- (3) *MAR* 6.3A.1R; and



- (4) paragraph 4C of the Schedule to the *Recognition Requirements Regulations*.

[**Note:** article 27(3) of *MiFID* and *MiFID RTS 27*]

- 11.2A.39 R In accordance with the requirements of *COBS 11 Annex 1EU*, a *firm* which executes *client* orders must summarise and make public on an annual basis, for each class of *financial instruments*, the top five *execution venues* in terms of trading volumes, where they executed *client* orders in the preceding year, together with information on the quality of execution obtained.

[**Note:** article 27(6) of *MiFID* and *MiFID RTS 28*]

## 11.2B Best execution for UCITS management companies

### Application

- 11.2B.1 G This section applies to a *UCITS management company* when carrying on *scheme management activity*, in accordance with *COBS 18.5B.2R*.
- 11.2B.2 G A *firm* that is subject to *COBS 11.2* (Best execution for AIFMs and residual CIS providers) may comply with its obligations under *COBS 11.2* by complying with the *rules* in this chapter.
- 11.2B.3 G References in this chapter to a *scheme* are to a *UCITS scheme* or an *EEA UCITS scheme*.

### Obligation to execute orders on terms most favourable to the scheme

- 11.2B.4 R A *management company* must act in the best interests of each *scheme* it manages when *executing* decisions to deal on behalf of the *scheme*.

[**Note:** article 25(1) of the *UCITS implementing Directive*]

- 11.2B.5 R A *management company* must take all sufficient steps to obtain, when executing decisions to deal, the best possible result for each *scheme* it manages, taking into account:
- (1) price;
  - (2) costs;
  - (3) speed;
  - (4) likelihood of execution;
  - (5) likelihood of settlement;
  - (6) order size and nature; and
  - (7) any other consideration relevant to the execution of the decision to

deal,

(together the “*execution factors*”).

[**Note:** article 25(2) first sentence of the *UCITS implementing Directive*]

- 11.2B.6 G (1) The obligation to deliver the best possible result applies for all types of *financial instrument*. However, given the differences in market structures and the structure of *financial instruments*, it may be difficult to identify and apply a uniform standard of, and procedure for, best execution that would be valid and effective for all types of *financial instrument*.
- (2) Best execution obligations should therefore be applied to take into account the different circumstances surrounding the execution of orders for particular types of *financial instrument*. For example, transactions involving a customised *OTC financial instrument* with a unique contractual relationship tailored to the circumstances of the *scheme* and the *management company* may not be comparable for best execution purposes with transactions involving *shares* traded on centralised *execution venues*.
- (3) As best execution obligations apply to all *financial instruments*, irrespective of whether they are traded on *trading venues* or *OTC*, *management companies* should gather relevant market data to check whether the *OTC* price offered for a *scheme* is fair and delivers on the best execution obligation.

- 11.2B.7 R A *management company* must determine the relative importance of the *execution factors*, taking into account the following criteria:
- (1) the objectives, investment policy and risks specific to the *scheme*, as indicated in its *prospectus* or *instrument constituting the fund*;
- (2) the characteristics of the order, including where the order involves a *securities financing transaction*;
- (3) the characteristics of the *financial instruments* that are the subject of that order; and
- (4) the characteristics of the *execution venues* to which that order can be directed.

[**Note:** article 25(2) second sentence of the *UCITS implementing Directive*]

- 11.2B.8 R A *management company* must take into account its own commissions and costs for executing an order, when assessing and comparing the results that would be achieved for a *scheme* by executing the order on each of the *execution venues* listed in the *management company's* execution policy that is capable of executing that order.

- 11.2B.9 G The requirement in *COBS* 11.2B.8R that costs of execution include a *management company's* own commission or fees charged to the *scheme* should not apply for the purpose of determining which *execution venues* are included in the *firm's* execution policy in accordance with *COBS* 11.2B.18R.
- 11.2B.10 R A *management company* must not receive any remuneration, discount or non-monetary benefit for routing orders to a particular *trading venue* or *execution venue* which would infringe the requirements on conflicts of interest (in *SYSC* 10) or inducements (in *COBS* 2.3 and *COBS* 18 Annex 1).
- 11.2B.11 R A *management company* must not structure or charge its *commission* in a way that discriminates unfairly between *execution venues*.
- 11.2B.12 G A *management company* would be considered to discriminate unfairly between *execution venues* if it charged a different commission or spread to *schemes* for execution on different *execution venues* and that difference did not reflect actual differences in the cost to the *management company* of executing on those venues.
- 11.2B.13 R When executing orders or taking decisions to deal in *OTC* products including bespoke products, the *management company* must check the fairness of the price proposed to the *scheme*, by gathering market data used to estimate the price of such products and, where possible, by comparing with similar or comparable products.

Placing orders to deal on behalf of the scheme with other entities for execution

- 11.2B.14 R A *management company* must act in the best interests of each *scheme* it manages when placing orders to deal on behalf of that *scheme* with other entities for execution.
- [**Note:** article 26(1) of the *UCITS implementing Directive*]
- 11.2B.15 R (1) A *management company* must take all sufficient steps to obtain the best possible result for each *scheme* it manages when placing orders to deal on behalf of that *scheme* with other entities, taking into account the *execution factors*.
- (2) A *management company* must determine the relative importance of the *execution factors* in accordance with *COBS* 11.2B.7R.

[**Note:** article 26(2) first and second sentences of the first paragraph of the *UCITS implementing Directive*]

- 11.2B.16 G This section is not intended to require a duplication of effort as to best execution between a *management company* and any *firm* with which that *management company* places its orders for execution.

Requirement for order execution arrangements including an order execution

policy

- 11.2B.17 R (1) A *management company* must establish and implement effective arrangements for complying with the obligation to take all sufficient steps to obtain the best possible result for each *scheme* it manages.
- (2) In particular, the *management company* must establish and implement an order execution policy to allow it to obtain the best possible result for each *scheme* it manages when:
- (a) executing orders on behalf of the *scheme* (in accordance with *COBS* 11.2B.5R); and
- (b) placing orders with other entities for execution (in accordance with *COBS* 11.2B.15R(1)).

[**Note:** articles 25(3) first paragraph and 26(2) third sentence of the first paragraph of the *UCITS implementing Directive*]

- 11.2B.18 R (1) The order execution policy must include, for each type of *financial instrument*, information on the different *execution venues* where the *management company* executes its *scheme* orders and the factors affecting the choice of *execution venue*.
- (2) It must at least include *execution venues* that enable the *management company* to obtain the best possible result for the execution of *scheme* orders on a consistent basis.
- 11.2B.19 G The obligation in *COBS* 11.2B.17R does not require a *management company* to include all available *execution venues* in its execution policy.
- 11.2B.20 G (1) When establishing its execution policy in accordance with *COBS* 11.2B.17R(2), a *management company* should determine the relative importance of the *execution factors*, or at least establish the process by which it determines the relative importance of these factors.
- (2) Ordinarily, the *FCA* would expect that price will merit a high relative importance in obtaining the best possible result. However, in some circumstances for some *schemes*, orders, *financial instruments* or markets, the policy may appropriately determine that other *execution factors* are more important than price in obtaining the best possible result.
- (3) A *management company*, when applying the criteria for best execution, will typically not use the same *execution venues* for *securities financing transactions* and other transactions. As a result, the order execution policy should take into account the particular characteristics of *securities financing transactions* and it should list separately *execution venues* used for *securities financing transactions*.

- 11.2B.21 R (1) The order execution policy must identify, for each type of *financial instrument*, the entities with which orders are placed or to which the *management company* transmits orders for execution.
- (2) The entities identified must have execution arrangements that enable the *management company* to comply with its obligations under this section when it places or transmits orders to that entity for execution.

[**Note:** article 26(2) fourth sentence of the first paragraph and first sentence of the second paragraph]

- 11.2B.22 G (1) A *management company* may specify a single *execution venue*, or a single entity with which it places orders for execution, in its execution policy where it:
- (a) is able to show that this allows it to obtain best execution, or, when placing orders for execution, the best possible result, for the *schemes* it manages on a consistent basis; and
- (b) can reasonably expect that the selected *execution venue* or entity will enable it to obtain results for each *scheme* that are at least as good as the results that it could reasonably expect from using alternative *execution venues* or entities.
- (2) The reasonable expectation in (1)(b) should be supported by:
- (a) relevant data published in accordance with *COBS* 11.2A.39R, *COBS* 11.2B.36R, *COBS* 11.2C and the provisions referred to in *COBS* 11.2B.30G; or
- (b) other internal analyses conducted by the *management company*.

- 11.2B.23 R A *management company* must be able to demonstrate that it has executed or placed orders on behalf of each *scheme* it manages in accordance with its execution policy.

[**Note:** articles 25(5) and 26(4) of the *UCITS implementing Directive*]

- 11.2B.24 G A *management company* should apply its execution policy to each *scheme* order that it executes with a view to obtaining the best possible result for the *scheme* in accordance with that policy.

- 11.2B.25 G The provisions of this section relating to execution policy are in addition to the general obligation of a *management company* to monitor the effectiveness of its order execution arrangements and policy and assess the *execution venues* in its execution policy on a regular basis.

- 11.2B.26 R (1) A *management company* of an *ICVC* that is a *UCITS scheme*, or an *EEA UCITS scheme* that is structured as an investment company,

must obtain the prior consent of the *ICVC* or investment company to the execution policy.

- (2) In the case of a *management company* that is the *ACD* of an *ICVC* that is a *UCITS scheme*, (1) does not apply where the *ACD* is the sole *director* of the *ICVC*.

[**Note:** article 25(3) first sentence of the second paragraph of the *UCITS implementing Directive*]

Monitoring and review of the order execution arrangements including the order execution policy

- 11.2B.27 R (1) A *management company* must monitor the effectiveness of its order execution arrangements and policy on a regular basis to identify and, where appropriate, correct any deficiencies.
- (2) A *management company* that places orders with other entities for execution must in particular monitor the execution quality of those entities on a regular basis to identify and, where appropriate, correct any deficiencies.
- (3) A *management company* must assess, on a regular basis:
- (a) whether the *execution venues* included in the order execution policy provide for the best possible result for the *schemes* it manages; and
- (b) whether it needs to make changes to its execution arrangements taking into account the information published in accordance with *COBS 11.2A.39R*, *COBS 11.2B.36R*, *COBS 11.2C* and the provisions referred to in *COBS 11.2B.30G*.

[**Note:** article 25(4) first sentence, and article 26(3) first paragraph of the *UCITS implementing Directive*]

- 11.2B.28 R A *management company* must:
- (1) (a) assess whether a material change has occurred in its order execution arrangements; and
- (b) if so, consider making changes to the *execution venues* or entities on which it places significant reliance in meeting the overarching best execution requirement; and
- (2) review its execution policy, as well as its order execution arrangements:
- (a) at least annually; and
- (b) whenever a material change occurs that affects the

*management company's* ability to continue to obtain the best possible result for the *scheme*.

[**Note:** article 25(4) second sentence, and article 26(3) second paragraph of the *UCITS implementing Directive*]

- 11.2B.29 G For the purposes of *COBS* 11.2B.28R, a material change is a significant event that could impact parameters of best execution such as cost, price, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order.
- 11.2B.30 G A *management company* should compare and analyse relevant data, including that made public in accordance with:
- (1) *MAR* 5.3.1AR(5) (Functioning of an MTF);
  - (2) *MAR* 5A.4.2R(3) (Functioning of an OTF);
  - (3) *MAR* 6.3A.1R (Quality of execution); and
  - (4) paragraph 4C of the Schedule to the *Recognition Requirements Regulations*.

#### Information requirements

- 11.2B.31 R A *management company* must make available to the *unitholders* of each *scheme* it manages appropriate information on its execution policy and on any material changes to that policy.
- [**Note:** articles 25(3) second sentence of the second paragraph and 26(2) second sentence of the second paragraph of the *UCITS implementing Directive*]
- 11.2B.32 R The information on the execution policy must:
- (1) be customised depending on the type of *financial instrument* and type of service provided; and
  - (2) include the information in *COBS* 11.2B.33R and *COBS* 11.2B.35R(1) to (4).
- 11.2B.33 R A *management company* must make available the following details on its execution policy:
- (1) an account of the relative importance the *management company* assigns to the *execution factors*, or the process by which the *management company* determines the relative importance of the *execution factors*;
  - (2) a list of the *execution venues* on which the *management company* places significant reliance in meeting its obligation to take all reasonable steps to obtain the best possible result for the execution

- of *scheme* orders on a consistent basis, specifying which *execution venues* are used for each type of *financial instrument* and *SFT*;
- (3) appropriate information about the *management company* and the entities chosen for execution;
  - (4) a list of the factors used to select an *execution venue* which:
    - (a) includes:
      - (i) qualitative factors such as clearing schemes, circuit breakers, scheduled actions, or any other relevant consideration; and
      - (ii) the relative importance of each factor; and
    - (b) is consistent with the controls used by the *management company* to demonstrate that best execution has been achieved on a consistent basis, when reviewing the adequacy of its policy and arrangements;
  - (5) how the *execution factors* of price, costs, speed, likelihood of execution and any other relevant factors are considered as part of all sufficient steps to obtain the best possible result for the *scheme*;
  - (6) where applicable:
    - (a) confirmation that the *management company* executes orders outside a *trading venue*;
    - (b) the consequences of this, for example counterparty risk arising from *execution* outside a *trading venue*; and
    - (c) a statement that additional information about the consequences of this means of *execution* is available on request; and
  - (7) a summary of:
    - (a) the selection process for *execution venues*;
    - (b) the execution strategies employed;
    - (c) the procedures and process used to analyse the quality of execution obtained; and
    - (d) how the *management company* monitors and verifies that the best possible results were obtained for the *schemes* it manages.

11.2B.34 R A *management company* must make the information in COBS 11.2B.31R available to *unitholders* or potential *unitholders*:



- (1) in a *durable medium*; or
- (2) by means of a website (where that does not constitute a *durable medium*) provided that the *website conditions* are satisfied; or
- (3) in the *prospectus* of the *scheme*.
- 11.2B.35 R (1) A *management company* must make information available about the inducements that the *management company* may receive from *execution venues* in accordance with *COBS 2.3* and *COBS 18 Annex 1*.
- (2) The information in (1) must at least:
- (a) specify the fees charged by the *management company* to all counterparties involved in the transaction; and
- (a) where the fees vary depending on the *scheme*, indicate the maximum fees or range of the fees that may be payable.
- (3) Where a *management company* applies different fees depending on the *execution venue*, a *management company* must explain these differences in sufficient detail to allow *unitholders* to understand the advantages and the disadvantages of the choice of a particular *execution venue*.
- (4) Where a *management company* charges more than one participant in a transaction, the *firm* must make information available about the value of any monetary or non-monetary benefits received by the *firm*, in compliance with *COBS 2.3.1R*.
- (5) Where a *unitholder* makes a reasonable and proportionate request to a *management company* for information about its policies or arrangements and how they are reviewed, that *management company* must answer clearly and within a reasonable time.
- 11.2B.36 R (1) Where a *management company* executes *scheme* orders or selects other *firms* to provide order execution services, it must summarise and make public, on an annual basis, for each type of *financial instrument*:
- (a) the top five *execution venues* or *investment firms* where it transmitted or placed orders for execution in terms of trading volumes in the preceding year; and
- (b) information on the quality of execution obtained.
- (2) The information must be consistent with the information published in accordance with *COBS 11 Annex 1EU* (Regulatory technical standard 28) (which applies as *rules* in accordance with *COBS 18.5B.2R*).

- 11.2B.37 R Upon reasonable request from a *unitholder* or potential *unitholder*, a *management company* must provide information about entities where orders are transmitted or placed for execution.

## 11.2C Quality of execution

- 11.2C.1 R A *market maker* or other liquidity provider must make available the data detailed in COBS 11.2C.2R to the public in the following manner:
- (1) at least on an annual basis; and
  - (2) without any charges.
- 11.2C.2 R COBS 11.2C.1R applies to data relating to the quality of execution of transactions by that *market maker* or other liquidity provider, including details about price, costs, speed and likelihood of execution for individual *financial instruments*.

[**Note:** article 27(3) of *MiFID* and *MiFID RTS 27*]

Amend the following as shown.

## 11.3 Client order handling

### General principles

- 11.3.1 R (1) A *firm* (other than a *UCITS management company* providing *collective portfolio management* services) which is authorised to execute orders on behalf of *clients* must implement procedures and arrangements which provide for the prompt, fair and expeditious execution of *client* orders, relative to other orders or the trading interests of the *firm*.
- [**Note:** paragraph 1 of article ~~22(4)~~ 28(1) of *MiFID*]
- (2) These procedures or arrangements must allow for the execution of otherwise comparable orders in accordance with the time of their reception by the *firm*.
- [**Note:** paragraph 2 of article ~~22(4)~~ 28(1) of *MiFID*]
- (3) A *UCITS management company* providing *collective portfolio management* services, must establish and implement procedures and arrangements in respect of all *client* orders it carries out which provide for the prompt, fair and expeditious execution of portfolio transactions on behalf of the *UCITS scheme* or *EEA UCITS scheme*

it manages.

[**Note:** article 27(1) first paragraph of the *UCITS implementing Directive*]

- 11.3.1A      **R**      (1)      Subject to (2) and (3) in this chapter provisions marked “EU” apply to a firm’s business other than MiFID business as if they were rules.
- (2)      Provisions marked “EU” which derive from recitals to MiFID or the MiFID Org Regulation apply to all firms as guidance.
- (3)      COBS 11.3.4AEU, which reproduces article 67(2) of the MiFID Org Regulation, does not apply to a UCITS management company.

- 11.3.2      **R**      ~~A firm must satisfy the following conditions when carrying out client orders:~~
- (1)      ~~it must ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;~~
- (2)      ~~it must carry out otherwise comparable orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise; and~~
- (3)      ~~it must inform a retail client about any material difficulty relevant to the proper carrying out of orders promptly upon becoming aware of the difficulty. [deleted]~~

[**Note:** article 47(1) of the *MiFID implementing Directive*, article 19(1) of *MiFID* and article 27(1) second paragraph of the *UCITS implementing Directive*]

- 11.3.2A      **EU**      Article 67(1) of the MiFID Org Regulation requires firms to satisfy conditions when carrying out client orders.

- 67      (1)      Investment firms shall satisfy the following conditions when carrying out client orders:
- (a)      ensure that orders executed on behalf of clients are promptly and accurately recorded and allocated;
- (b)      carry out otherwise comparable client orders sequentially and promptly unless the characteristics of the order or prevailing market conditions make this impracticable, or the interests of the client require otherwise;
- (c)      inform a retail client about any material difficulty relevant to the proper carrying out of orders promptly upon becoming aware of the difficulty.

- 11.3.3      **G**      For the purposes of the provisions of this section, orders should not be

treated as otherwise comparable if they are received by different media and it would not be practicable for them to be treated sequentially.

[**Note:** recital 78 110 to the *MiFID implementing Directive Org Regulation*]

- 11.3.4 R Where a *firm* is responsible for overseeing or arranging the settlement of an executed order or *management company* executes the order itself in the course of providing *collective portfolio management* services, it must take all reasonable steps to ensure that any *client financial instruments* or *client funds* received in settlement of that executed order are promptly and correctly delivered to the account of the appropriate *client UCITS scheme*.

[**Note:** article 47(2) of the *MiFID implementing Directive*, article 19(1) of *MiFID* and article 27(1) third paragraph of the *UCITS implementing Directive*]

- 11.3.4A EU Article 67(2) of the *MiFID Org Regulation* places requirements on *firms* which are responsible for overseeing and arranging the settlement of an executed order.

67 (2) Where an investment firm is responsible for overseeing or arranging the settlement of an executed order, it shall take all reasonable steps to ensure that any client financial instruments or client funds received in settlement of that executed order are promptly and correctly delivered to the account of the appropriate client.

- 11.3.5 R ~~A *firm* must not misuse information relating to pending *client* orders, and shall take all reasonable steps to prevent the misuse of such information by any of its *relevant persons*. [deleted]~~

[**Note:** article 47(3) of the *MiFID implementing Directive*, article 19(1) of *MiFID* and article 27(2) of the *UCITS implementing Directive*]

- 11.3.5A EU Article 67(3) of the *MiFID Org Regulation* sets out requirements concerning the use of information relating to pending *client* orders.

67 (3) An investment firm shall not misuse information relating to pending *client* orders, and shall take all reasonable steps to prevent the misuse of such information by any of its *relevant persons*.

- 11.3.6 G Without prejudice to the *Market Abuse Regulation*, for the purposes of the ~~*rule provision*~~ on the misuse of information (see *COBS 11.3.5RAEU*), any use by a *firm* of information relating to a pending *client* order in order to deal on own account in the *financial instruments* to which the *client* order relates, or in related *financial instruments*, should be considered a misuse of that information. However, the mere fact that *market makers* or bodies authorised to act as counterparties confine themselves to pursuing their legitimate business of buying and selling *financial instruments*, or that

persons authorised to execute orders on behalf of third parties confine themselves to carrying out an order dutifully, should not in itself be deemed to constitute a misuse of information.

[**Note:** recital 78 110 to the *MiFID implementing Directive Org Regulation*]

#### Aggregation and allocation of orders

11.3.7 R ~~A firm is not permitted to carry out a *client* order or a transaction for own account in aggregation with another *client* order unless the following conditions are met:~~

- ~~(1) it must be unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any *client* whose order is to be aggregated;~~
- ~~(2) it must be disclosed to each *client* whose order is to be aggregated that the effect of aggregation may work to its disadvantage in relation to a particular order;~~
- ~~(3) an order allocation policy must be established and effectively implemented, providing in sufficiently precise terms for the fair allocation of aggregated orders and transactions, including how the volume and price of orders determines allocations and the treatment of partial executions. [deleted]~~

~~[**Note:** article 48(1) of the *MiFID implementing Directive*, article 19(1) of *MiFID* and article 28(1) of the *UCITS implementing Directive*]~~

11.3.7A EU Article 68(1) of the *MiFID Org Regulation* sets out requirements to be met where a *firm* carries out a *client* order or a transaction for own account in aggregation with another *client* order.

- 68 (1) Investment firms shall not carry out a *client* order or a transaction for own account in aggregation with another *client* order unless the following conditions are met:
- (a) it is unlikely that the aggregation of orders and transactions will work overall to the disadvantage of any *client* whose orders is to be aggregated;
  - (b) it is disclosed to each *client* whose order is to be aggregated that the effect of aggregation may work to its disadvantage in relation to a particular order;
  - (c) an order allocation policy is established and effectively implemented, providing for the fair allocation of aggregated orders and transactions, including how the volume and price of orders determines allocations and the treatment of partial

executions.

11.3.7B R *A management company must ensure that the order allocation policy referred to in article 68(1)(c) of the MiFID Org Regulation, reproduced at COBS 11.3.7AEU, is in sufficiently precise terms.*

[Note: article 28(1) of the UCITS implementing Directive]

11.3.8 R ~~*If a firm aggregates a client order with one or more other orders and the aggregated order is partially executed, it must allocate the related trades in accordance with its order allocation policy. [deleted]*~~

~~[Note: article 48(2) of the MiFID implementing Directive, article 19(1) of MiFID and article 28(2) of the UCITS implementing Directive]~~

11.3.8A EU *Article 68(2) of the MiFID Org Regulation sets out requirements concerning partial execution of aggregated client orders.*

68 (2) Where an investment firm aggregates an order with one or more other client orders and the aggregated order is partially executed, it shall allocate the related trades in accordance with its order allocation policy.

Aggregation and allocation of transactions for own account

11.3.9 R ~~*A firm which has aggregated transactions for own account with one or more client orders must not allocate the related trades in a way which is detrimental to a client. [deleted]*~~

~~[Note: article 49(1) of the MiFID implementing Directive, article 19(1) of MiFID and article 28(3) of the UCITS implementing Directive]~~

11.3.9A EU *Article 69(1) of the MiFID Org Regulation sets out requirements concerning aggregated transactions.*

69 (1) Investment firms which have aggregated transactions for own account with one or more client orders shall not allocate the related trades in a way that is detrimental to a client.

11.3.10 R (1) ~~*If a firm aggregates a client order with a transaction for own account and the aggregated order is partially executed, it must allocate the related trades to the client in priority to the firm.*~~

~~(2) However, if the firm is able to demonstrate on reasonable grounds that without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the transaction for own account proportionally, in accordance with its order allocation policy. [deleted]~~

~~[Note: article 49(2) of the MiFID implementing Directive, article 19(1) of~~

~~MiFID and article 28(4) of the UCITS implementing Directive]~~

- 11.3.10A EU Article 69(2) of the MiFID Org Regulation sets out allocation priorities where a firm aggregates a client order in accordance with its allocation policy referred to in article 68(1)(c) (see COBS 11.3.7AEU).

69 (2) Where an investment firm aggregates a client order with a transaction for own account and the aggregated order is partially executed, it shall allocate the related trades to the client in priority to the firm.

Where an investment firm is able to demonstrate on reasonable grounds that without the combination it would not have been able to carry out the order on such advantageous terms, or at all, it may allocate the transaction for own account proportionally, in accordance with its order allocation policy referred to in Article 68(1)(c).

- 11.3.11 R ~~A firm must, as part of its order allocation policy, put in place procedures to prevent the reallocation, in a way that is detrimental to the client, of transactions for own account which are executed in combination with client orders. [deleted]~~

~~[Note: article 49(3) of the MiFID implementing Directive and article 19(1) of MiFID]~~

- 11.3.11A EU Article 69(3) of the MiFID Org Regulation introduces requirements for order allocation policy, referred to in article 68(1)(c) (see COBS 11.3.7AEU), where transactions for own account are executed in combination with client orders.

69 (3) As part of the order allocation policy referred to in Article 68(1)(c), investment firms shall put in place procedures designed to prevent the reallocation, in a way that is detrimental to the client, of transactions for own account which are executed in combination with client orders.

- 11.3.12 G For the purposes of the provisions of this section, the reallocation of transactions should be considered as detrimental to a client if, as an effect of that reallocation, unfair precedence is given to the firm or to any particular person.

~~[Note: recital 77 109 to the MiFID implementing Directive Org Regulation]~~

- 11.3.13 G In this section, carrying out client orders includes:
- (1) the execution of orders on behalf of clients;
  - (2) the placing of orders with other entities for execution that result from decisions to deal in financial instruments on behalf of clients when providing the service of portfolio management or collective portfolio

*management;*

- (3) the transmission of *client* orders to other entities for execution when providing the service of reception and transmission of orders.

Transposition of client order handling provisions in the UCITS Implementing Directive

- 11.3.14 G (1) This section applies to a *UCITS management company* as a result of *COBS 18.5B.2R*.
- (2) The provisions of the *MiFID Org Regulation* reproduced in this section apply to a *UCITS management company* as a result of *COBS 11.3.1AR*.
- (3) Some of these provisions have been used to transpose provisions of the *UCITS implementing Directive*, as set out in the table below:

<u>MiFID Org Regulation Provision</u>	<u>COBS 11.3 provision</u>	<u>UCITS implementing Directive transposition</u>
<u>article 67(1)</u>	<u>COBS 11.3.2AEU</u>	<u>article 27(1) second paragraph</u>
<u>article 67(3)</u>	<u>COBS 11.3.5AEU</u>	<u>article 27(2)</u>
<u>article 68(1)</u>	<u>COBS 11.3.7AEU, as modified by <i>COBS 11.3.7BR</i></u>	<u>article 28(1)</u>
<u>article 68(2)</u>	<u>COBS 11.3.8AEU</u>	<u>article 28(2)</u>
<u>article 69(1)</u>	<u>COBS 11.3.9AEU</u>	<u>article 28(3)</u>
<u>article 69(2)</u>	<u>COBS 11.3.10AEU</u>	<u>article 28(4)</u>

## 11.4 Client limit orders

- 11.4.-1 R In this chapter provisions marked “EU” apply to a *firm’s* business other than *MiFID business* as if they were *rules*.

Obligation to make unexecuted client limit orders public

- 11.4.1 R Unless a *client* expressly instructs otherwise, a *firm* must, in the case of a *client limit order* in respect of shares admitted to trading on a *regulated market* or traded on a *trading venue* which is not immediately executed under prevailing market conditions, take measures to facilitate the earliest possible execution of that order by making public immediately that *client limit order* in a manner which is easily accessible to other market



participants.

[Note: article 22 28(2) of *MiFID*]

- 11.4.2 G In respect of transactions executed between *eligible counterparties*, the obligation to disclose *client limit orders* should only apply where the counterparty is explicitly sending a *limit order* to a *firm* for its execution.

[Note: recital 42 105 to *MiFID*]

How client limit orders may be made public

- 11.4.3 EU ~~An investment firm shall be considered to disclose *client limit orders* that are not immediately executable if it transmits the order to a *regulated market* or *MTF* that operates an order book trading system, or ensures that the order is made public and can be easily executed as soon as market conditions allow. [deleted]~~

~~[Note: article 31 of *MiFID Regulation*]~~

- 11.4.3A EU Article 70(1) of the *MiFID Org Regulation* provides when *client limit orders* shall be considered as being available to the public.

70 (1) A client limit order in respect of shares admitted to trading on a regulated market or traded on a trading venue which have not been immediately executed under prevailing market condition as referred to in Article 28(2) of Directive 2014/65/EU shall be considered available to the public when the investment firm has been submitted the order for execution to a regulated market or a MTF or the order has been published by a data reporting services provider located in one Member State and can be easily executed as soon as market conditions allow.

- 11.4.4 G ~~MAR 5.8.2EU sets out the conditions required for an arrangement to make *client limit orders* public under this section. MAR 5.8.3G and MAR 5.8.4G provide guidance on these conditions. [deleted]~~

- 11.4.4A G *Firms* may comply with the obligations in *COBS 11.4.1R*, to make public unexecuted *client limit orders*, by transmitting the *client limit order* to a *trading venue*.

[Note: article 28(2) of *MiFID*]

Orders that are large in scale

- 11.4.5 R The obligation in *COBS 11.4.1R* to make public a *limit order* ~~will not apply to a *limit order* that is~~ is disapplied in respect of transactions that are large in scale compared with normal market size as determined under article 4 of *MiFIR*.

[**Note:** article ~~22~~ 28(2) of *MiFID*]

- 11.4.6 G ~~MAR 5.7.10EU and MAR 5.7.11EU set out when an order shall be considered large in scale compared with normal market size. [deleted]~~

*COBS* 11.5 is deleted in its entirety. The deleted text is not shown.

## 11.5 Record keeping: client orders and transactions [deleted]

Insert the new section 11.5A after the deleted *COBS* 11.5 (Record keeping: client orders and transactions). All the text is new and is not underlined.

### 11.5A Record keeping: client orders and transactions

- 11.5A.1 R (1) Subject to (2), in this chapter provisions marked “EU” apply to a *firm’s* business other than *MiFID business* as if they were *rules*.
- (2) Provisions in this chapter which are marked “EU” do not apply to *corporate finance business* carried on by a *firm* which is not a *MiFID investment firm*.
- 11.5A.2 EU Article 74 of the *MiFID Org Regulation*, together with Section 1 of Annex IV to that Regulation which is reproduced at *COBS* 11.5A.4EU, makes provision for record keeping of initial orders from *clients*.

74 An investment firm shall, in relation to every initial order received from a client and in relation to every initial decision to deal taken, immediately record and keep at the disposal of the competent authority at least the details set out in Section 1 of Annex IV [reproduced below at *COBS* 11.5A.4EU] to this Regulation to the extent they are applicable to the order or decision to deal in question.

Where the details set out in Section 1 of Annex IV to this Regulation are also prescribed under Articles 25 and 26 of Regulation No (EU) 600/2014, these details should be maintained in a consistent way and according to the same standards prescribed under Articles 25 and 26 of Regulation No (EU) 600/2014.

- 11.5A.3 EU Article 75 of the *MiFID Org Regulation*, together with Section 2 of Annex IV to that Regulation which is reproduced at *COBS* 11.5A.5EU, makes provision for record keeping in relation to transactions and order processing.

75 Investment firms shall, immediately after receiving a client order or

making a decision to deal to the extent they are applicable to the order or decision to deal in question, record and keep at the disposal of the competent authority at least the details set out in Section 2 of Annex IV [reproduced below at *COBS 11.5A.5EU*].

Where the details set out in Section 2 of Annex IV are also prescribed under Articles 25 and 26 of Regulation No (EU) 600/2014, they shall be maintained in a consistent way and according to the same standards prescribed under Articles 25 and 26 of Regulation (EU) No 600/2014.

11.5A.4 EU Annex IV Section 1 of the *MiFID Org Regulation* makes provision for record keeping of *client* orders and decisions to deal.

1. Name and designation of the client
2. Name and designation of any relevant person acting on behalf of the client
3. A designation to identify the trader (Trader ID) responsible within the investment firm for the investment decision
4. A designation to identify the algorithm (Algo ID) responsible within the investment firm for the investment decision;
5. B/S indicator;
6. Instrument identification
7. Unit price and price notation
8. Price
9. Price multiplier
10. Currency 1
11. Currency 2
12. Initial quantity and quantity notation
13. Validity period
14. Type of the order
15. Any other details, conditions and particular instructions from the client
16. The date and exact time of the receipt of the order or the date and exact time of when the decision to deal was made. The exact time must be measured according to the methodology prescribed under the standards on clock synchronisation under Article 50(2)

## Directive 2014/65/EU.

11.5A.5 EU Annex IV Section 2 of the *MiFID Org Regulation* makes provision for record keeping of transactions and order processing.

1. Name and designation of the client
2. Name and designation of any relevant person acting on behalf of the client
3. A designation to identify the trader (Trader ID) responsible within the investment firm for the investment decision
4. A designation to identify the Algo (Algo ID) responsible within the investment firm for the investment decision
5. Transaction reference number
6. A designation to identify the order (Order ID)
7. The identification code of the order assigned by the trading venue upon receipt of the order
8. A unique identification for each group of aggregated clients' orders (which will be subsequently placed as one block order on a given trading venue). This identification should indicate "aggregated\_X" with X representing the number of clients whose orders have been aggregated
9. The segment MIC code of the trading venue to which the order has been submitted
10. The name and other designation of the person to whom the order was transmitted
11. Designation to identify the Seller & the Buyer
12. The trading capacity
13. A designation to identify the Trader (Trader ID) responsible for the execution
14. A designation to identify the Algo (Algo ID) responsible for the execution
15. B/S indicator;
16. Instrument identification
17. Ultimate underlying
18. Put/Call identifier

19. Strike price
20. Upfront payment
21. Delivery type
22. Option style
23. Maturity date
24. Unit price and price notation
25. Price
26. Price multiplier
27. Currency 1
28. Currency 2
29. Remaining quantity
30. Modified quantity
31. Executed quantity
32. The date and exact time of submission of the order or decision to deal. The exact time must be measured according to the methodology prescribed under the standards on clock synchronisation under Article 50(2) of Directive 2014/65/EU.
33. The date and exact time of any message that is transmitted to and received from the trading venue in relation to any events affecting an order. The exact time must be measured according to the methodology prescribed under the RTS on clock synchronisation.
34. The date and exact time any message that is transmitted to and received from another investment firm in relation to any events affecting an order. The exact time must be measured according to the methodology prescribed under the standards on clock synchronisation under Article 50(2) of Directive 2014/65/EU.
35. Any message that is transmitted to and received from the trading venue in relation to orders placed by the investment firm
36. Any other details and conditions that was submitted to and received from another investment firm in relation with the order
37. Each placed order's sequences in order to reflect the chronology of every event affecting it, including but not limited to modifications, cancellations and execution

- 38. Short selling flag
- 39. SSR exemption flag
- 40. Waiver flag

COBS 11.6 (Use of dealing commission) is deleted in its entirety. The deleted text is not shown.

## 11.6 Use of dealing commission [deleted]

Amend the following as shown.

## 11.7 Personal account dealing

### Application

- 11.7.-1 R This section does not apply to a *firm* in relation to *MiFID, equivalent third country or optional exemption business* (but see *COBS 11.7A (Personal account dealing relating to MiFID, equivalent third country or optional exemption business)*).

Rule on personal account dealing

- 11.7.1 R A *firm* that conducts *designated investment business* must establish, implement and maintain adequate arrangements aimed at preventing the following activities in the case of any *relevant person* who is involved in activities that may give rise to a conflict of interest, or who has access to inside information as defined in the *Market Abuse Regulation* or to other confidential information relating to *clients* or transactions with or for *clients* by virtue of an activity carried out by him or her on behalf of the *firm*:
- (1) ...
  - ...
  - (3) disclosing, other than in the normal course of his or her employment or contract for services, any information or opinion to any other *person* if the *relevant person* knows, or reasonably ought to know, that as a result of that disclosure that other *person* will or would be likely to take either of the following steps:
    - (a) to enter into a transaction in ~~designated investments~~ *designated investments* which, if a personal transaction of the *relevant person*, would be covered by (1) or a relevant

provision;

- (b) to advise or procure another *person* to enter into such a transaction.

[~~Note: article 12(1) of MiFID implementing Directive and article 13(1) of the UCITS implementing Directive~~]

11.7.2 R For the purposes of this section, the relevant provisions are:

- (1) ~~the rules~~ article 37(2)(a) and (b) of the MiFID Org Regulation on personal transactions undertaken by financial analysts in COBS 12.2.5R (1) and (2) copied out in COBS 12.2.21EU which apply as rules as a result of COBS 12.2.15R;
- (2) ~~the rule~~ article 67(3) of the MiFID Org Regulation on the misuse of information relating to pending *client* orders in COBS 11.3.5R copied out in COBS 11.3.5AEU which applies as a rule as a result of COBS 11.3.1AR.

...

11.7.4 R The arrangements required under this section must in particular be designed to ensure that:

- (1) ...

[~~Note: article 12(2) of MiFID implementing Directive and article 13(2) of the UCITS implementing Directive~~]

Disapplication of rule on personal account dealing

11.7.5 R This section does not apply to the following kinds of *personal transaction*:

- (1) ...

[~~Note: article 12(3) of MiFID implementing Directive and article 13(3) of the UCITS implementing Directive~~]

...

Successive personal transactions

11.7.7 R Where successive *personal transactions* are carried out on behalf of a *person* in accordance with prior instructions given by that *person*, the obligations under this section do not apply:

- (1) ...

[~~Note: recital 17 to MiFID implementing Directive~~]

Insert the new *COBS* 11.7A after *COBS* 11.7 (Personal account dealing). All of the text is new and is not underlined.

**11.7A Personal account dealing relating to MiFID, equivalent third country or optional exemption business**

Application

- 11.7A.1 R This chapter applies to a *firm* in relation to its *MiFID, equivalent third country or optional exemption business*.
- 11.7A.2 R (1) Subject to (2), in this chapter provisions marked “EU” apply to a *firm* in relation to its *equivalent third country or optional exemption business* as if they were *rules*.
- (2) In this chapter, provisions marked “EU” which derive from recitals to *MiFID* or the *MiFID Org Regulation* apply to a *firm* in relation to its *equivalent third country or optional exemption business* as *guidance*.
- 11.7A.3 R A *firm* that conducts *designated investment business* must establish appropriate rules governing personal transactions undertaken by managers, *employees* and *tied agents*.

[**Note:** article 16(2) of *MiFID*]

Scope of personal transactions

- 11.7A.4 EU Article 28 of the *MiFID Org Regulation* sets out the scope of personal transactions.
- 28 For the purposes of the Article 29 and Article 37, a personal transaction be a trade in a financial instrument effected by or on behalf of a relevant person, where at least one of the following criteria are met:
- (a) the relevant person is acting outside the scope of the activities he carries out in this professional capacity;
- (b) the trade is carried out for the account of any of the following persons:
- (i) the relevant person;
- (ii) any person with who he has a family relationship, or with whom he has close links;
- (iii) a person in respect of whom the relevant person has a direct or indirect material interest in the outcome of the trade, other than obtaining a fee or commission for the execution of the trade.



11.7A.5 EU Article 29 of the *MiFID Org Regulation* sets out detailed provision concerning personal transactions.

- 29
- (1) Investment firms shall ensure that relevant persons do establish, implement and maintain adequate arrangements aimed at preventing the activities set out in paragraphs 2 and 3 in the case of any relevant person who is involved in activities that may give rise to a conflict of interest, or who has access to inside information within the meaning of Article 7(1) of Regulation (EU) No 596/2014 or to other confidential information relating to clients or transactions with of for clients by virtue of an activity carried out by him on behalf of the firm.
  - (2) Investment firms shall not enter into a personal transaction which meets at least one of the following criteria:
    - (a) that person is prohibited from entering into it under Regulation (EU) No 596/2014;
    - (b) it involves the misuse or improper disclosure of that confidential information;
    - (c) it conflicts or is likely to conflict with an obligation of the investment firm under Directive 2014/65/EU.
  - (3) Investment firms shall ensure that relevant persons do not advise or recommend, other than in the proper course of employment or contract for services, any other person to enter into a transaction in financial instruments which, if it were a personal transaction of the relevant person, would be cover by point (a) or Article 37(2)(a) or (b) or Article 67(3);
  - (4) Without prejudice to Article 10 (1) of Regulation (EU) No 596/2014, investment firms shall ensure that relevant persons do not disclose, other than in the normal course of his employment or contract for services, any information or opinion to any other person where the relevant person knows, or reasonably ought to know, that as a result of that disclosure that other person will or would be likely to take either of the following steps:
    - (a) to enter into a transaction in financial instruments which, if it were a personal transaction of the relevant person, would be covered by point (a) or Article 37(2)(a) or (b) or Article 67(3);
    - (b) to advise or procure another person to enter into such a transaction.
  - (5) The arrangements required under paragraph 1 shall be

designed to ensure that:

- (a) each relevant person covered by paragraphs 1, 2, 3 and 4 is aware of the restrictions on personal transactions, and of the measures established by the investment firms in connection with personal transactions and disclosure, in accordance with paragraphs 1, 2, 3 and 4;
- (b) the firm is informed promptly of any personal transaction entered into by a relevant persons, either by notification of that transaction or by other procedures enabling the firm to identify such transactions;
- (c) a record is kept of the personal transaction notified to the firm of identified by it, including any authorisation or prohibition in connection with such a transaction.

In the case of outsourcing arrangements, the investment firm shall ensure that the firm to which the activity is outsourced maintains a record of personal transactions entered into by any relevant person and provides that information to the investment firm promptly on request.

- (6) Paragraphs 1 to 5 shall not apply to the following personal transactions:
  - (a) personal transactions effected under a discretionary portfolio management service where there is no prior communication in connection with the transaction between the portfolio manager and the relevant person or other person for whose account the transaction is executed;
  - (b) personal transactions in undertakings for collective investments in transferable securities (UCITS) or AIFs that are subject to supervision under the law of a Member State which requires an equivalent level of risk spreading in their assets, where the relevant person and any other person for whose account the transactions are effected are not involved in the management of that undertaking.

11.7A.6 R (1) Where successive *personal transactions* are carried out on behalf of a *person* in accordance with prior instructions given by that *person*, the obligations under this section do not apply:

- (a) separately to each successive transaction if those instructions remain in force and unchanged; or

- (b) to the termination or withdrawal of such instructions, provided that any *financial instruments* which had previously been acquired pursuant to the instructions are not disposed of at the same time as the instructions terminate or are withdrawn.
- (2) Obligations under this section do apply in relation to a *personal transaction*, or the commencement of successive *personal transactions*, that are carried out on behalf of the same *person* if those instructions are changed or if new instructions are issued.

[**Note:** recital 42 to the *MiFID Org Regulation*]

COBS 11.8 (Recording telephone conversations and electronic communications) is deleted in its entirety. The deleted text is not shown.

## **11.8 Recording telephone conversations and electronic communications [deleted]**

Insert new COBS 11 Annex 1EU after COBS 11.8 (Recording telephone conversations and electronic communications). The material in this Annex comprises the text of Regulatory Technical Standard 28 (C(2016) 3337) made under Directive 2014/65/EU (MiFID II) and the annexes to that text. All the text is new and is not underlined.

### **11 Annex Regulatory Technical Standard 28 (RTS 28) 1EU**

**COMMISSION DELEGATED REGULATION (EU) .../... of 8.6.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the annual publication by investment firms of information on the identity of execution venues and on the quality of execution (Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2004/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p.349), and in particular point (b) of the first subparagraph of Article 27(10),

Whereas:

(1) It is essential to enable the public and investors to evaluate the quality of an investment firm's execution practices and to identify the top five execution venues in terms of trading volumes where investment firms executed client orders in the preceding year. In order to make meaningful comparisons and analyse the choice of top five execution venues it is necessary that information is published by investment firms specifically in respect of each class of financial instruments. In order to be able to fully evaluate the order flow of client orders to execution venues, investors and the public should be able to clearly identify if the investment firm itself was one of the top five execution venues for each class of financial instrument.

(2) In order to fully assess the extent of the quality of execution being obtained on execution venues used by investment firms to execute client orders, including execution venues in third countries, it is appropriate that investment firms publish information required under this Regulation in relation to trading venues, market makers or other liquidity providers or any entity that performs a similar function in a third country to the functions performed by any of the foregoing.

(3) In order to provide precise and comparable information, it is necessary to set out classes of financial instruments based on their characteristics relevant for publication purposes. A class of financial instruments should be narrow enough to reveal differences in order execution behaviour between classes but at the same time broad enough to ensure that the reporting obligation on investment firms is proportionate. Given the breadth of the equity class of financial instruments, it is appropriate to divide this class into subclasses based on liquidity. As liquidity is an essential factor governing execution behaviours and as execution venues are often competing to attract flows of the most frequently traded stocks, it is appropriate that equity instruments are classified according to their liquidity as determined under the tick size regime as set out in Directive 2014/65/EU of the European Parliament and the Council.

(4) When publishing the identity of the top five execution venues on which they execute client orders it is appropriate for investment firms to publish information on the volume and number of orders executed on each execution venue, so that investors may be able to form an opinion as to the flow of client orders from the firm to execution venue. Where, for one or several classes of financial instruments, an investment firm only executes a very small number of orders, information on the top five execution venues would not be very meaningful nor representative of order execution arrangements. It is therefore appropriate to require investment firms to clearly indicate the classes of financial instruments for which they execute a very small number of orders.

(5) To prevent potentially market sensitive disclosures on the volume of business being conducted by the investment firm, the volume of execution and the number

of executed orders should be expressed as a percentage of the investment firm's total execution volumes and total number of executed orders in that class of financial instrument, respectively, rather than as absolute values.

(6) It is appropriate to require investment firms to publish information which is relevant to their order execution behaviour. To ensure that investment firms are not held accountable for order execution decisions for which they are not responsible, it is appropriate for investment firms to disclose the percentage of orders executed on each of the top five execution venues where the choice of execution venue has been specified by clients.

(7) There are several factors which may potentially influence the order execution behaviour of investment firms such as close links between investment firms and execution venues. Given the potential materiality of these factors it is appropriate to require analysis of such factors in assessing the quality of execution obtained on all execution venues.

(8) The different order types can be an important factor in explaining how and why investment firms execute orders on a given execution venue. It may also impact the way an investment firm will set its execution strategies, including programming of smart order routers to meet the specific objectives of those orders. It is therefore appropriate that a distinction between the different categories of order types be clearly marked in the report.

(9) In order to properly analyse information it is important that users are in a position to differentiate between execution venues used for professional client orders and execution venues used for retail client orders, given the notable differences in how investment firms obtain the best possible result for retail clients as compared to professional clients, namely that investment firms must predominantly assess the factors of price and cost when executing orders from retail clients. Therefore it is appropriate that information on the top five execution venues be provided separately for retail clients and for professional clients respectively, permitting a qualitative assessment to be made of the order flow to such venues.

(10) In order to comply with the legal obligation of best execution, investment firms, when applying the criteria for best execution for professional clients, will typically not use the same execution venues for securities financing transactions (SFTs) and other transactions. This is because the SFTs are used as a source of funding subject to a commitment that the borrower will return equivalent securities on a future date and the terms of SFTs are typically defined bilaterally between the counterparties ahead of the execution. Therefore, the choice of execution venues for SFTs is more limited than in the case of other transactions, given that it depends on the particular terms defined in advance between the counterparties and on whether there is a specific demand on those execution venues for the financial instruments involved. It is therefore appropriate that

investment firms summarise and make public the top five execution venues in terms of trading volumes where they executed SFTs in a separate report so that a qualitative assessment can be made of the order flow to such venues. Due to the specific nature of SFTs, and given that their large size would likely distort the more representative set of client transactions (namely, those not involving SFTs), it is also necessary to exclude them from the tables concerning the top five execution venues on which investment firms execute other client orders.

(11) It is appropriate that investment firms should publish an assessment of quality of execution obtained on all venues used by the firm. This information will provide a clear picture of the execution strategies and tools used to assess the quality of execution obtained on those venues. This information will also allow investors to assess the effectiveness of the monitoring carried out by investment firms in relation to those execution venues.

(12) In specifically assessing the quality of execution obtained on all execution venues in relation to cost, it is appropriate that an investment firm also performs an analysis of the arrangements it has with these venues in relation to payments made or received and to discounts, rebates or non-monetary benefits received. Such an assessment should also allow the public to consider how such arrangements impact the costs faced by the investor and how they comply with Article 27(2) of Directive 2004/65/EC.

(13) It is also appropriate to determine the scope of such publication and its essential features, including the use that investment firms make of the data on execution quality available from execution venues under Commission Delegated Regulation (EU) 2017/575.

(14) Information on identity of execution venues and on the quality of execution should be published annually and should refer to order execution behaviour for each class of financial instruments in order to capture relevant changes within the preceding calendar year.

(15) Investment firms should not be prevented from adopting an additional level of reporting which is more granular, provided that in such case the additional report complements and does not replace what is required under this Regulation.

(16) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the related national provisions transposing Directive 2014/65/EU apply from the same date.

(17) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(18) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.

HAS ADOPTED THIS REGULATION:

*Article 1 Subject matter*

**This Regulation lays down rules on the content and the format of information to be published by investment firms on an annual basis in relation to client orders executed on trading venues, systematic internalisers, market makers or other liquidity providers or entities that perform a similar function to those performed by any of the foregoing in a third country.**

*Article 2 Definitions*

- (a) ‘Passive order’ means an order entered into the order book that provided liquidity;**
- (b) ‘Aggressive order’ means an order entered into the order book that took liquidity;**
- (c) ‘Directed order’ means an order where a specific execution venue was specified by the client prior to the execution of the order.**

*Article 3 Information on the top five execution venues and quality of execution obtained*

**1. Investment firms shall publish the top five execution venues in terms of trading volumes for all executed client orders per class of financial instruments referred to in Annex I. Information regarding retail clients shall be published in the format set out in Table 1 of Annex II and information regarding professional clients shall be published in the format set out in Table 2 of Annex II. The publication shall exclude orders in Securities Financing Transactions (SFTs) and shall contain the following information:**

- (a) class of financial instruments;**
- (b) venue name and identifier;**
- (c) volume of client orders executed on that execution venue expressed as a percentage of total executed volume;**
- (d) number of client orders executed on that execution venue expressed as a percentage of total executed orders;**
- (e) percentage of the executed orders referred to in point (d) that were passive and aggressive orders;**
- (f) percentage of orders referred to in point (d) that were directed orders;**
- (g) confirmation of whether it has executed an average of less than one trade per business day in the previous year in that class of financial instruments.**

**2. Investment firms shall publish the top five execution venues in terms of trading volumes for all executed client orders in SFTs for class of financial instruments referred to in Annex I in the format set out in Table 3 of Annex II. The publication shall contain the following information:**

- (a) volume of client orders executed on that execution venue expressed as a percentage of total executed volume;**
- (b) number of client orders executed on that execution venue expressed as a percentage of total executed orders;**
- (c) confirmation of whether the investment firm has executed an average of less than one trade per business day in the previous year in that class of financial instruments.**

**3. Investment firms shall publish for each class of financial instruments, a summary of the analysis and conclusions they draw from their detailed monitoring of the quality of execution obtained on the execution venues where they executed all client orders in the previous year. The information shall include:**

- (a) an explanation of the relative importance the firm gave to the execution factors of price, costs, speed, likelihood of execution or any other consideration including qualitative factors when assessing the quality of execution;**
- (b) a description of any close links, conflicts of interests, and common ownerships with respect to any execution venues used to execute orders;**
- (c) a description of any specific arrangements with any execution venues regarding payments made or received, discounts, rebates or non-monetary benefits received;**
- (d) an explanation of the factors that led to a change in the list of execution venues listed in the firm's execution policy, if such a change occurred;**
- (e) an explanation of how order execution differs according to client categorisation, where the firm treats categories of clients differently and where it may affect the order execution arrangements;**
- (f) an explanation of whether other criteria were given precedence over immediate price and cost when executing retail client orders and how these other criteria were instrumental in delivering the best possible result in terms of the total consideration to the client;**
- (g) an explanation of how the investment firm has used any data or tools relating to the quality of execution, including any data published under Commission Delegated Regulation (EU) 2017/575;**
- (h) where applicable, an explanation of how the investment firm has used output of a consolidated tape provider established under Article 65 of Directive 2014/65/EU.**

***Article 4 Format***

**Investment firms shall publish the information required in accordance with Article 3(1) and 3(2) on their websites, by filling in the templates set out in Annex II, in a machine-readable electronic format, available for**



**downloading by the public and the information required in accordance with Article 3(3) shall be published on their websites in an electronic format available for downloading by the public.**

***Article 5 Entry into force and application***

**This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.**

**It shall apply from the date that appears first in the second subparagraph of Article 93(1) of Directive 2014/65/EU**

**This Regulation shall be binding in its entirety and directly applicable in all Member States.**

**Done at Brussels, 8.6.2016**

***For the Commission***

***The President Jean-Claude JUNCKER***

ANNEXES to the COMMISSION DELEGATED REGULATION supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the annual publication by investment firms of information on the identity of execution venues and on the quality of execution

**ANNEXES**

**Annex I: Classes of financial instruments**

- (a) Equities – Shares & Depositary Receipts
  - (i) Tick size liquidity bands 5 and 6 (from 2000 trades per day)
  - (ii) Tick size liquidity bands 3 and 4 (from 80 to 1999 trades per day)
  - (iii) Tick size liquidity band 1 and 2 (from 0 to 79 trades per day)
- (b) Debt instruments
  - (i) Bonds
  - (ii) Money markets instruments
- (c) Interest rates derivatives
  - (i) Futures and options admitted to trading on a trading venue
  - (ii) Swaps, forwards, and other interest rates derivatives
- (d) credit derivatives
  - (i) Futures and options admitted to trading on a trading venue
  - (ii) Other credit derivatives
- (e) currency derivatives

- (i) Futures and options admitted to trading on a trading venue
- (ii) Swaps, forwards, and other currency derivatives
- (f) Structured finance instruments
- (g) Equity Derivatives
  - (i) Options and Futures admitted to trading on a trading venue
  - (ii) Swaps and other equity derivatives
- (h) Securitized Derivatives
  - (i) Warrants and Certificate Derivatives
  - (ii) Other securitized derivatives
- (i) Commodities derivatives and emission allowances Derivatives
  - (i) Options and Futures admitted to trading on a trading venue
  - (ii) Other commodities derivatives and emission allowances derivatives
- (j) Contracts for difference
- (k) Exchange traded products (Exchange traded funds, exchange traded notes and exchange traded commodities)
- (l) Emission allowances
- (m) Other instruments

## Annex II

**Table 1**

Class of Instrument					
Notification if <1 average trade per business day in the previous year	Y/N				
Top five execution venues ranked in terms of trading volumes (descending order)	Proportion of volume traded as a percentage of total in that class	Proportion of volume traded as a percentage of total in that class	Percentage of passive orders	Percentage of aggressive orders	Percentage of directed orders
Name and Venue Identifier (MIC or LEI)					
Name and Venue Identifier (MIC or LEI)					

Name and Venue Identifier (MIC or LEI)					
Name and Venue Identifier (MIC or LEI)					
Name and Venue Identifier (MIC or LEI)					

**Table 2**

Class of Instrument					
Notification if <1 average trade per business day in the previous year	Y/N				
Top five execution venues ranked in terms of trading volumes (descending order)	Proportion of volume traded as a percentage of total in that class	Proportion of orders executed as percentage of total in that class	Percentage of passive orders	Percentage of aggressive orders	Percentage of directed orders
Name and Venue Identifier (MIC or LEI)					
Name and Venue Identifier (MIC or LEI)					
Name and Venue Identifier (MIC or LEI)					
Name and Venue Identifier (MIC or LEI)					

Name and Venue Identifier (MIC or LEI)					
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**Table 3**

Class of Instrument		
Notification if < 1 average trade per business day in the previous year	<b>Yes/No</b>	
Top 5 Venues ranked in terms of volume (descending order)	Proportion of volume executed as a percentage of total in that class	Proportion of orders executed as percentage of total in that class.
Name and Venue Identifier (MIC or LEI)		
Name and Venue Identifier (MIC or LEI)		
Name and Venue Identifier (MIC or LEI)		
Name and Venue Identifier (MIC or LEI)		
Name and Venue Identifier (MIC or LEI)		

Insert the new chapter COBS 11A after COBS 11 (Dealing and managing). All of the text is new and is not underlined.

## **11A Underwriting and placing**

## General requirements concerning underwriting and placing

- 11A.1.1 R (1) This chapter applies only to *MiFID* or *equivalent third country business*.
- (2) Subject to (3), in this chapter provisions marked “EU” apply to the *equivalent business of a third country investment* as if they were *rules*.
- (3) In this chapter, provisions marked “EU” which derive from recitals to *MiFID* or the *MiFID Org Regulation* apply to the *equivalent business of a third country investment firm* as *guidance*.
- 11A.1.2 EU Article 38(1) of the *MiFID Org Regulation* sets out requirements for *firms* to provide specified information to issuer *clients* before accepting a mandate to manage an offering.
- 38 (1) Investment firms which provide advice on corporate finance strategy, as set out in Section B(3) of Annex I, and provide the service of underwriting or placing of financial instruments, shall, before accepting a mandate to manage the offering, have arrangements in place to inform the issuer client of the following:

  - (a) the various financing alternatives available with the firm, and an indication of the amount of transaction fees associated with each alternative;
  - (b) the timing and the process with regard to the corporate finance advice on pricing of the offer;
  - (c) the timing and the process with regard to the corporate finance advice on placing of the offering;
  - (d) details of the targeted investors, to whom the firm intends to offer the financial instruments;
  - (e) the job titles and departments of the relevant persons individuals involved in the provision of corporate finance advice on the price and allotment; and
  - (f) firm’s arrangements to prevent or manage conflicts of interest that may arise where the firm places the relevant financial instruments with its investment clients of with its own proprietary book.
- 11A.1.3 EU Article 38(2) and (3) of the *MiFID Org Regulation* sets out requirements to identify all underwriting and placing operations of a *firm* and to ensure that adequate controls are in place to manage any potential conflicts of interest.

- 38 (2) Investment firms shall have in place a centralised process to identify all underwriting and placing operations of the firm and record such information, including the date on which the firm was informed of potential underwriting and placing operations. Firms shall identify all potential conflicts of interest arising from other activities of the investment firm, or group, and implement appropriate management procedures. In cases where an investment firm cannot manage a conflict of interest by way of implementing appropriate procedures, the investment firm shall not engage in the operation.
- (3) Investment firms providing execution and research services as well as carrying out underwriting and placing activities shall ensure adequate controls are in place to manage any potential conflicts of interest between these activities and between their different clients receiving those services.

11A.1.4 EU Article 39(1) of the *MiFID Org Regulation* sets out additional requirements in relation to pricing of offerings in relation to issuance of *financial instruments*.

- 39 (1) Investment firms shall have in place systems, controls and procedures to identify and prevent or manage conflicts of interest that arise in relation to possible under-pricing or over-pricing of an issue or involvement of relevant parties in the process. In particular, investment firms shall as a minimum requirement establish, implement and maintain internal arrangements to ensure both of the following:
- (a) that the pricing of the offer does not promote the interests of other clients or firm's own interests, in a way that may conflict with the issuer client's interests; and
- (b) the prevention or management of a situation where persons responsible for providing services to the firm's investment clients are directly involved in decisions about corporate finance advice on pricing to the issuer client.

11A.1.5 EU Article 39(2) of the *MiFID Org Regulation* sets out additional requirements concerning the provision of information.

- 39 (2) Investment firms shall provide clients with information about how the recommendation as to the price of the offering and the timings involved is determined. In particular, the firm shall inform and engage with the issuer client about any hedging or stabilisation strategies it intends to undertake with respect to the offering, including how these strategies may

impact the issuer clients' interests. During the offering process, firms shall also take all reasonable steps to keep the issuer client informed about developments with respect to the pricing of the issue.

11A.1.6 EU Article 40 of the *MiFID Org Regulation* sets out additional requirements in relation to placing.

- 40
- (1) Investment firms placing financial instruments shall establish, implement and maintain effective arrangements to prevent recommendations on placing from being inappropriately influenced by any existing or future relationships.
  - (2) Investment firms shall establish, implement and maintain effective internal arrangements to prevent or manage conflicts of interests that arise where persons responsible for providing services to the firm's investment clients are directly involved in decisions about recommendations to the issuer client on allocation.
  - (3) Investment firms shall not accept any third-party payments or benefits unless such payments or benefits comply with the inducements requirements laid down in Article 24 or Directive 2014/65/EU. In particular, the following practices shall be considered not compliant with those requirements and shall therefore be considered not acceptable:
    - (a) an allocation made to incentivise the payment of disproportionately high fees for unrelated services provided by the investment firm ('laddering'), such as disproportionately high fees or commissions paid by an investment client, or disproportionately high volumes of business at normal levels of commission provided by the investment client as a compensation for receiving an allocation of the issue;
    - (b) an allocation made to a senior executive or a corporate officer of an existing or potential issuer client, in consideration for the future or past award of corporate finance business ('spinning');
    - (c) an allocation that is expressly or implicitly conditional on the receipt of future orders or the purchase of any other service from the investment firm by an investment client, or any entity of which the investor is a corporate officer.
  - (4) Investment firms shall establish, implement and maintain an allocation policy that sets out the process for developing

allocation recommendations. The allocation policy shall be provided to the issuer client before agreeing to undertake any placing services. The policy shall set out relevant information that is available at that stage, about the proposed allocation methodology for the issue.

- (5) Investment firms shall involve the issuer client in discussions about the placing process in order for the firm to be able to understand and take into account the client's interests and objectives. The investment firm shall obtain the issuer client's agreement to its proposed allocation per type of client for the transaction in accordance with the allocation policy.

11A.1.7 EU Article 41 of the MiFID Org Regulation sets out additional requirements in relation to advice, distribution and self-placement.

- 41 (1) Investment firms shall have in place systems, controls and procedures to identify and manage the conflicts of interest that arise when providing investment service to an investment client to participate in a new issue, where the investment firm receives commissions, fees or any monetary or non-monetary benefits in relation to arranging the issuance. Any commissions, fees or monetary or non-monetary benefits shall comply with the requirements in Article 24(7), 24(8) and 24(9) of Directive 2014/65/EU and be documented in the investment firm's conflicts of interest policies and reflected in the firm's inducements arrangements.
- (2) Investment firms engaging in the placement of financial instruments issued by themselves or by entities within the same group, to their own clients, including their existing depositor clients in the case of credit institutions, or investment funds managed by entities of their group, shall establish, implement and maintain clear and effective arrangements for the identification, prevention or management of the potential conflicts of interest that arise in relation to this type of activity. Such arrangements shall include consideration of refraining from engaging in the activity, where conflicts of interest cannot be appropriately managed so as to prevent any adverse effects on clients.
- (3) When disclosure of conflicts of interest is required, investment firms shall comply with the requirements in Article 34(4), including an explanation of the nature and source of the conflicts of interest inherent to this type of activity, providing details about the specific risks related to such practices in order to enable clients to make an informed investment decision.



- (4) Investment firms engaging in the offering of financial instruments issued by themselves or other group entities to their clients and those instruments are included in the calculation of prudential requirements specified in Regulation (EU) No 575/2013 of the European Parliament and of the Council<sup>1</sup>, Directive 2013/36/EU of the European Parliament and of the Council<sup>2</sup> or Directive 2014/59/EU of the European Parliament and of the Council<sup>3</sup>, shall provide such clients with additional information explaining the differences between the financial instrument and bank deposits in terms of yield, risk, liquidity and any protection provided in accordance with Directive 2014/49/EU of the European Parliament and of the Council.

11A.1.8 EU Article 42 of the MiFID Org Regulation sets out additional requirements in relation to lending on provision of credit in the context of underwriting or placement.

- 41 (1) Where any previous lending or credit to the issuer client by an investment firm, or an entity within the same group, may be repaid with the proceeds of an issue, the investment firm shall have arrangements in place to identify and prevent or manage any conflicts of interest that may arise as a result.
- (2) Where the arrangements taken to manage conflicts of interest prove insufficient to ensure that the risk of damage to the issuer client would be prevented, investment firms shall disclose to the issuer client the specific conflicts of interest that have arisen in relation to their, or group entities', activities in a capacity of credit provider, and their activities related to the securities offering.
- (3) Investment firms' conflict of interest policy shall require the sharing of information about the issuer's financial situation with group entities acting as credit providers, provided this would not breach information barriers set up by the firm to protect the interests of a client.

11A.1.9 EU Article 43 of the MiFID Org Regulation sets out record keeping requirements in relation to underwriting or placing.

<sup>1</sup> Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p.1)

<sup>2</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p.338)

<sup>3</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulation (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ L 173, 12.6.2014, p190)

Investment firms shall keep records of the content and timing of instructions received from clients. A record of the allocation decisions taken for each operation shall be kept to provide for a complete audit trail between the movements registered in clients' accounts and the instructions received by the investment firm. In particular, the final allocation made to each investment client shall be clearly justified and recorded. The complete audit trail of the material steps in the underwriting and placing process shall be made available to competent authorities upon request.

COBS 11.8 [delete]

COBS Sch [delete]  
1.3G, row  
24 (COBS  
11.8.5R)

COBS [delete]  
18.2.3, row  
7 (COBS  
11.8)

COBS [delete]  
18.3.1, row  
9 (COBS  
11.8)

## 12 Investment research

### 12.1 Purpose and application

...

Application: Where?

12.1.3 G The *EEA territorial scope rule* modifies the general *rule* of application to the extent necessary to be compatible with European law (see paragraph 1.1 of Part 2 of *COBS 1 Annex 1*). This means that *COBS 12.2* and *COBS 12.3.4G* also apply applies to *passported activities* carried on by a *UK MiFID investment firm* from a *branch* in another *EEA state*, but ~~do~~ does not apply to the *United Kingdom branch* of an *EEA MiFID investment firm* in relation to its *MiFID business*.

### 12.2 Investment research and non-independent research

Application

12.2.1 R This section ~~applies to a firm which produces, or arranges for the~~

~~production of, *investment research* that is intended or likely to be subsequently disseminated to *clients* of the *firm* or to the public, under its own responsibility or that of a member of its *group*. [deleted]~~

~~[Note: article 25(1) of the *MiFID implementing Directive*]~~

- 12.2.2 G ~~The concept of dissemination of *investment research* to *clients* or to the public is not intended to include dissemination exclusively to *persons* within the *group* of the *firm*. [deleted]~~

~~[Note: recital 33 of the *MiFID implementing Directive*]~~

~~Measures and arrangements required for investment research~~

- 12.2.3 R ~~A *firm* must ensure the implementation of all of the measures for managing conflicts of interest in SYSC 10.1.11R in relation to the *financial analysts* involved in the production of *investment research* and other *relevant persons* whose responsibilities or business interests may conflict with the interests of the *persons* to whom *investment research* is disseminated. [deleted]~~

~~[Note: article 25(1) of the *MiFID implementing Directive*]~~

- 12.2.4 G ~~*Persons* whose responsibilities or business interests may reasonably be considered to conflict with the interests of the *persons* to whom *investment research* is disseminated include corporate finance personnel and *persons* involved in sales and trading on behalf of *clients* or the *firm*. [deleted]~~

~~[Note: recital 30 of the *MiFID implementing Directive*]~~

- 12.2.5 R ~~A *firm* must have in place arrangements designed to ensure that the following conditions are satisfied: [deleted]~~

~~(1) if a *financial analyst* or other *relevant person* has knowledge of the likely timing or content of *investment research* which is not publicly available or available to *clients* and cannot readily be inferred from information that is so available, that *financial analyst* or other *relevant person* must not undertake *personal transactions* or trade on behalf of any other *person*, including the *firm*, other than as *market maker* acting in good faith and in the ordinary course of market making or in the execution of an unsolicited *client order*, in *financial instruments* to which the *investment research* relates, or in any *related financial instruments*, until the recipients of the *investment research* have had a reasonable opportunity to act on it;~~

~~[Note: article 25(2)(a) of the *MiFID implementing Directive*]~~

~~(2) in circumstances not covered by (1), *financial analyst* and any other *relevant persons* involved in the production of *investment research* must not undertake *personal transactions* in *financial instruments* to which the *investment research* relates, or in any *related financial instrument*, contrary to current recommendations, except in~~

~~exceptional circumstances and with the prior approval of a member of the firm's legal or compliance function;~~

~~[Note: article 25(2)(b) of the MiFID implementing Directive]~~

- ~~(3) the firm itself, financial analysts, and other relevant persons involved in the production of investment research must not accept inducements from those with a material interest in the subject matter of the investment research;~~

~~[Note: article 25(2)(c) of the MiFID implementing Directive]~~

- ~~(4) the firm itself, financial analysts, and other relevant persons involved in the production of investment research must not promise issuers favourable research coverage; and~~

~~[Note: article 25(2)(d) of the MiFID implementing Directive]~~

- ~~(5) issuers, relevant persons other than financial analysts, and any other persons must not, before the dissemination of investment research, be permitted to review a draft of the investment research for the purpose of verifying the accuracy of factual statements made in that investment research, or for any other purpose other than verifying compliance with the firm's legal obligations, if the draft includes a recommendation or a target price.~~

~~[Note: article 25(2)(e) of the MiFID implementing Directive]~~

- 12.2.5A G ~~Firms are reminded that they must also comply with COBS 11.7 (Rule on personal account dealing). [deleted]~~
- 12.2.6 G ~~Knowledge by a financial analyst or other relevant person that the firm intends to produce or disseminate investment research to its clients or to the public (including in circumstances where research material has not yet been written) could constitute knowledge of the likely timing and content of investment research under COBS 12.2.5R(1). [deleted]~~
- 12.2.7 G ~~For the purposes of COBS 12.2.5R(2):~~
- ~~(1) current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed; and~~
- ~~[Note: recital 34 of the MiFID implementing Directive]~~
- ~~(2) exceptional circumstances in which financial analysts and other relevant persons may, with prior written approval, undertake personal transactions in financial instruments to which investment research relates should include those circumstances where, for personal reasons relating to financial hardship, the financial analyst or other relevant person is required to liquidate a position. [deleted]~~

~~[Note: recital 31 of the MiFID implementing Directive]~~

- 12.2.8 G ~~Small gifts or minor hospitality below a level specified in the firm's conflicts of interest policy and mentioned in the description of that policy that is made available to clients in accordance with COBS 6.1.4R(8) should not be considered as inducements for the purposes of COBS 12.2.5R(3).  
[deleted]~~

~~[Note: recital 32 of the MiFID implementing Directive]~~

- 12.2.9 G ~~A financial analyst should not become involved in activities other than the preparation of investment research where such involvement is inconsistent with the maintenance of the financial analysts' objectivity. The following should ordinarily be considered as inconsistent with the maintenance of a financial analyst's objectivity:~~

- ~~(1) participating in investment banking activities such as corporate finance business and underwriting; or~~
- ~~(2) participating in 'pitches' for new business or 'road shows' for new issues of financial instruments; or~~
- ~~(3) being otherwise involved in the preparation of issuer marketing.  
[deleted]~~

~~[Note: recital 36 of the MiFID implementing Directive]~~

#### ~~Exemption from investment research measures and arrangements~~

- 12.2.10 R ~~A firm which disseminates investment research produced by another person to the public or to clients is exempt from complying with the requirements in COBS 12.2.3R and COBS 12.2.5R if the following criteria are met:~~

- ~~(1) the person that produces the investment research is not a member of the group to which the firm belongs;~~
- ~~(2) the firm does not substantially alter the recommendations within the investment research;~~
- ~~(3) the firm does not present the investment research as having been produced by it; and~~
- ~~(4) the firm verifies that the producer of the investment research is subject to requirements equivalent to those in COBS 12.2.3R and COBS 12.2.5R in relation to the production of that investment research, or has established a policy setting such requirements.  
[deleted]~~

~~[Note: article 25(3) of the MiFID implementing Directive]~~

~~Means and timing of publication of investment research~~

- 12.2.11 G ~~The FCA would expect a firm's conflicts of interest policy to provide for investment research to be published or distributed to its clients in an appropriate manner. For example, the FCA considers it will be:~~
- ~~(1) appropriate for a firm to take reasonable steps to ensure that its investment research is published or distributed only through its usual distribution channels; and~~
  - ~~(2) inappropriate for an employee (whether or not a financial analyst) to communicate the substance of any investment research, except as set out in the firm's conflicts of interest policy. [deleted]~~
- 12.2.12 G ~~The FCA would expect a firm to consider whether or not other business activities of the firm could create the reasonable perception that its investment research may not be an impartial analysis of the market in, or the value or prospects of, a financial instrument. A firm would therefore be expected to consider whether its conflicts of interest policy should contain any restrictions on the timing of the publication of investment research. For example, a firm might consider whether it should restrict publication of relevant investment research around the time of an investment offering. [deleted]~~

~~Investment research for internal use~~

- 12.2.13 G ~~The FCA considers that the significant conflicts of interest which could arise are likely to mean it is inappropriate for a financial analyst or other relevant person to prepare investment research which is intended firstly for internal use for the firm's own advantage, and then for later publication to its clients (in circumstances in which it might reasonably be expected to have a material influence on its clients' investment decisions). [deleted]~~

Application

- 12.2.14 G This section applies to a firm that:
- (1) produces, or arranges for the production of, investment research that is intended or likely to be subsequently disseminated to clients of the firm or to the public, under its own responsibility or that of a member of its group; or
  - (2) produces or disseminates non-independent research.
- 12.2.15 R Where this section applies to a firm in relation to business other than its MiFID business, provisions in this section marked "EU" shall apply as if they were rules, other than those that copy out recitals, which shall apply as if they were guidance.
- 12.2.16 G (1) This section applies to both investment research and non-independent research.

- (2) Non-independent research is not presented as objective or independent and is accordingly considered a marketing communication.
- (3) Both investment research and non-independent research are sub-categories of the type of information defined as an investment recommendation in COBS 12.4.

#### Investment research and non-independent research

- 12.2.17 EU Article 36(1) of the MiFID Org Regulation defines investment research.
- 36(1) For the purposes of Article 37 investment research shall be research or other information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers of financial instruments, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public, and in relation to which the following conditions are met:
- (a) the research or information is labelled or described as investment research or in similar terms, or is otherwise presented as an objective or independent explanation of the matters contained in the recommendation;
- (b) if the recommendation in question were made by an investment firm to a client, it would not constitute the provision of investment advice for the purposes of Directive 2014/65/EU.
- 12.2.18 EU Article 36(2) of the MiFID Org Regulation deals with the treatment of non-independent research with reference to investment recommendations as defined in the Market Abuse Regulation (see COBS 12.4) and in contrast to investment research as defined in article 36(1) (see COBS 12.2.17EU).
- 36(2) A recommendation of the type covered by point (35) of Article 3(1) of Regulation (EU) 596/2014 that does not meet the conditions set out in paragraph 1 shall be treated as a marketing communication for the purposes of Directive 2014/65/EU and investment firms that produce or disseminate that recommendation shall ensure that it is clearly identified as such.
- Additionally, firms shall ensure that any such recommendation contains a clear and prominent statement that (or, in the case of an oral recommendation, to the effect that) it has not been prepared in accordance with legal requirements designed to promote the independence of investment research, and that it is not subject to any prohibition on dealing ahead of the dissemination of investment research.

Conflicts of interest

12.2.19

EU Article 37(1) of the *MiFID Org Regulation* requires *firms* to apply the conflicts requirements set out in article 34(3) of the *MiFID Org Regulation* to *persons* involved in the production of *investment research* and *non-independent research*. Recitals 51, 52 and 55 to the *MiFID Org Regulation* relate to the required measures and arrangements.

37(1) Investment firms which produce, or arrange for the production of, investment research that is intended or likely to be subsequently disseminated to clients of the firm or to the public, under their own responsibility or that of a member of their group, shall ensure the implementation of all the measures set out in Article 34(3) in relation to the financial analysts involved in the production of the investment research and other relevant persons whose responsibilities or business interests may conflict with the interests of the persons to whom the investment research is disseminated.

The obligations in the first subparagraph shall also apply in relation to recommendations referred to in Article 36(2).

Recital 51

The measures and arrangements adopted by an investment firm to manage the conflicts of interests that might arise from the production and dissemination of material that is presented as investment research should be appropriate to protect the objectivity and independence of financial analysts and of the investment research they produce. Those measures and arrangements should ensure that financial analysts enjoy an adequate degree of independence from the interests of persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom the investment research is disseminated.

Recital 52

Persons whose responsibilities or business interests may reasonably be considered to conflict with the interests of the persons to whom investment research is disseminated should include corporate finance personnel and persons involved in sales and trading on behalf of clients or the firm.

Recital 55

The concept of dissemination of investment research to clients or the public should not include dissemination exclusively to persons within the group of the investment firm. Current recommendations should be considered to be those recommendations contained in investment research which have not been withdrawn and which have not lapsed. The substantial alteration of investment research produced by a third party should be governed by the same requirements as the production of



research.

- 12.2.20      G      (1)      Firms which produce, or arrange for the production of, investment research or non-independent research are also reminded of their obligations under SYSC 10 (Conflicts of interest).
- (2)      COBS 12.2.19EU relates to the management of conflicts of interest in relation to investment research.
- (3)      In relation to non-independent research, firms may wish to consider whether conflicts arise in relation to:
- (a)      relevant persons trading in financial instruments that are the subject of non-independent research which they know the firm has published or intends to publish before clients have had a reasonable opportunity to act on it (other than when the firm is acting as market maker in good faith and in the ordinary course of market making, or in the execution of an unsolicited client order); and
- (b)      the preparation of non-independent research which is intended first for internal use by the firm and then for later publication to clients.

Measures and arrangements required for investment research

- 12.2.21      EU      Article 37(2) of the MiFID Org Regulation requires firms to put arrangements in place around the production of investment research to ensure the conditions set out in that article are satisfied. Recitals 53, 54 and 56 relate to those arrangements and the article 37(2) conditions.
- 37(2)      Investment firms referred to in the first subparagraph of paragraph 1 shall have in place arrangements designed to ensure that the following conditions are satisfied:
- (a)      financial analysts and other relevant persons do not undertake personal transactions or trade, other than as market makers acting in good faith and in the ordinary course of market making or in the execution of an unsolicited client order, on behalf of any other person, including the investment firm, in financial instruments to which investment research relates, or in any related financial instruments, with knowledge of the likely timing or content of that investment research which is not publicly available or available to clients and cannot readily be inferred from information that is so available, until the recipients of the investment research have had a reasonable opportunity to act on it;
- (b)      in circumstances not covered by point (a), financial analysts and any other relevant persons involved in the

production of investment research do not undertake personal transactions in financial instruments to which the investment research relates, or in any related financial instruments, contrary to current recommendations, except in exceptional circumstances and with the prior approval of a member of the firm's legal or compliance function;

- (c) a physical separation exists between the financial analysts involved in the production of investment research and other relevant persons whose responsibilities or business interests may conflict with the interests of the persons to whom the investment research is disseminated or, when considered not appropriate to the size and organisation of the firm as well as the nature, scale and complexity of its business, the establishment and implementation of appropriate alternative information barriers;
- (d) the investment firms themselves, financial analysts, and other relevant persons involved in the production of the investment research do not accept inducements from those with a material interest in the subject-matter of the investment research;
- (e) the investment firms themselves, financial analysts, and other relevant persons involved in the production of the investment research do not promise issuers favourable research coverage;
- (f) before the dissemination of investment research issuers, relevant persons other than financial analysts, and any other persons are not permitted to review a draft of the investment research for the purpose of verifying the accuracy of factual statements made in that research, or for any purpose other than verifying compliance with the firm's legal obligations, where the draft includes a recommendation or a target price.

For the purposes of this paragraph, 'related financial instrument' shall be any financial instrument the price of which is closely affected by price movements in another financial instrument which is the subject of investment research, and includes a derivative on that other financial instrument.

### Recital 53

Exceptional circumstances in which financial analysts and other persons connected with the investment firm who are involved in the production of investment research may, with prior written approval, undertake personal transactions in instruments to which the research relates should include those circumstances where, for personal reasons relating to financial hardship, the financial analyst or other person is required to liquidate a

position.

Recital 54

Fees, commissions, monetary or non-monetary benefits received by the firm providing investment research from any third party should only be acceptable when they are provided in accordance with requirements specified in Article 24(9) of Directive 2014/65/EU and Article 13 of Commission Delegated Directive (EU) .../... [to be inserted before adoption] of XXX supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits.

Recital 56

Financial analysts should not engage in activities other than the preparation of investment research where engaging in such activities are inconsistent with the maintenance of that person's objectivity. These include participating in investment banking activities such as corporate finance business and underwriting, participating in 'pitches' for new business or 'road shows' for new issues of financial instruments; or being otherwise involved in the preparation of issuer marketing.

12.2.22

EU

Article 37(3) of the *MiFID Org Regulation* provides for exemptions from article 37(1) of the *MiFID Org Regulation* (COBS 12.2.19EU).

37(3) Investment firms which disseminate investment research produced by another person to the public or to clients shall be exempt from complying with paragraph 1 if the following criteria are met:

- (a) the person that produces the investment research is not a member of the group to which the investment firm belongs;
- (b) the investment firm does not substantially alter the recommendations within the investment research;
- (c) the investment firm does not present the investment research as having been produced by it;
- (d) the investment firm verifies that the producer of the research is subject to requirements equivalent to the requirements under this Regulation in relation to the production of that research, or has established a policy setting such requirements.

12.2.23

G

The FCA would expect a firm's conflicts of interest policy to provide for investment research to be published or distributed to its clients in an

appropriate manner. For example, the FCA considers it will be:

- (1) appropriate for a firm to take reasonable steps to ensure that its investment research is published or distributed only through its usual distribution channels;
- (2) inappropriate for an employee (whether or not a financial analyst) to communicate the substance of any investment research, except as set out in the firm's conflicts of interest policy; and
- (3) inappropriate for a financial analyst or other relevant person to prepare investment research which is intended first for internal use for the firm's own advantage, and then for later publication to its clients (in circumstances in which it might reasonably be expected to have a material influence on its clients' investment decisions).

- 12.2.24 G The FCA would expect a firm to consider whether or not other business activities of the firm could create the reasonable perception that its investment research may not be an impartial analysis of the market in, or the value or prospects of, a financial instrument. A firm would therefore be expected to consider whether its conflicts of interest policy should contain any restrictions on the timing of the publication of investment research. For example, a firm might consider whether it should restrict publication of relevant investment research around the time of an investment offering.

COBS 12.3 (Non-independent research) is deleted in its entirety as shown below.

## **12.3 Non-independent research [deleted]**

### **Application**

- ~~12.3.1 R This section applies to a firm that produces or disseminates non-independent research.~~

~~[Note: article 24(2) of the MiFID implementing Directive]~~

### **Labelling of non-independent research**

- ~~12.3.2 R A firm which produces or disseminates non-independent research must ensure that it:~~
- ~~(1) is clearly identified as a marketing communication; and~~
  - ~~(2) contains a clear and prominent statement that (or, in the case of an oral recommendation, to the effect that) it:~~
    - ~~(a) has not been prepared in accordance with legal requirements designed to promote the independence of investment research; and~~

- (b) ~~is not subject to any prohibition on dealing ahead of the dissemination of *investment research*.~~

~~[Note: article 24(2) of the *MiFID implementing Directive*]~~

- 12.3.3 R ~~The *financial promotion rules* apply to *non-independent research* as though it were a marketing communication.~~

~~[Note: article 24(2) of the *MiFID implementing Directive*]~~

~~Management of conflicts of interest in area of non-independent research~~

- 12.3.4 G ~~In accordance with SYSC 10, a *firm* will be expected to take reasonable steps to identify and manage conflicts of interest which may arise in the production of *non-independent research*. Situations where conflicts of interest can arise include:~~

- (1) ~~*relevant persons* trading in *financial instruments* that are the subject of *non-independent research* which they know the *firm* has published or intends to publish before *clients* have had a reasonable opportunity to act on it (other than when the *firm* is acting as *market maker* in good faith and in the ordinary course of market making, or in the execution of an unsolicited *client* order); and~~
- (2) ~~preparation of *non-independent research* which is intended firstly for internal use by the *firm* and then for later publication to *clients*.~~

## 13 Preparing product information

...

### 13.4 Contents of a key features illustration

...

- 13.4.5 G Although there may be no obligation to include a projection in a *key features illustration*, where a *firm* chooses to include one, the *projection* must follow the appropriate requirements, as outlined in this section, or for *financial instruments* under COBS 4.6.7R should:

- (1) Comply with the requirements in this section unless the *projection* relates to an investment that is a *financial instrument*.
- (2) Where the *projection* relates to a *financial instrument*, the *firm* should comply with either:
- (a) the requirements in article 44(6) of the *MiFID Org Regulation* (see COBS 4.5A.14EU) where the *firm* is carrying on *MiFID*, *equivalent third country* or *optional exemption business*); or

- (b) the requirements in COBS 4.6.7R where the firm is not carrying on MiFID, equivalent third country or optional exemption business.

### 13.5 Preparing product information: other projections

...

Exceptions to the projection rules: projections for more than one product

- 13.5.3 R A firm that communicates a *projection* of benefits for a *packaged product* which is not a *financial instrument*, as part of a combined *projection* where other benefits being projected include those for a *financial instrument* or *structured deposit*, is not required to comply with the *projection rules* in COBS 13.4, COBS 13.5 and COBS 13 Annex 2 to the extent that ~~it~~ the combined projection complies with the future performance ~~rule (COBS 4.6.7R)~~ requirements in either:
- (1) article 44(6) of the MiFID Org Regulation (see COBS 4.5A.14EU) where the firm is carrying on MiFID, equivalent third country or optional exemption business; or
- (2) COBS 4.6.7R where the firm is not carrying on MiFID, equivalent third country or optional exemption business.
- 13.5.4 G The general requirement that communications be fair, clear and not misleading will nevertheless mean that a firm that elects to comply with the future performance ~~rule~~ in article 44(6) of the MiFID Org Regulation (see COBS 4.5A.14EU), will need to explain how the combined *projection* differs from other information that has been or could be provided to the *client*, including a *projection* provided under the *projection rules* in COBS 13.4, COBS 13.5 and COBS 13 Annex 2, ~~and, in~~ In particular, the firm should identify where a *projection* in real terms is required under COBS 13.

...

## 14 Providing product information to clients

...

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

Application

- 14.3.1 R This section applies to a firm in relation to:
- (1) ~~MiFID or equivalent third country business; and~~ [deleted]

- (2) any of the following *regulated activities* when carried on for a *retail client*:
- (a) making a *personal recommendation* about a *designated investment*; or
  - (b) *managing investments* that are *designated investments* (other than a *P2P agreement*); or
  - (c) *arranging (bringing about) or executing a deal* in a *warrant, non-readily realisable security or derivative*; or
  - (d) engaging in *stock lending activity*; or
  - (e) *operating an electronic system in relation to lending*, but only in relation to facilitating a person becoming a lender under a *P2P agreement*,

except to the extent that the carrying on of such a *regulated activity* constitutes *MiFID, equivalent third country or optional exemption business*.

14.3.1A G A firm carrying on *MiFID, equivalent third country or optional exemption business* should consider whether the requirements in articles 46 and 48 of the *MiFID Org Regulation* apply; see *COBS 14.3A (Information about financial instruments (MiFID provisions))*.

Providing a description of the nature and risks of designated investments

14.3.2 R ...

~~[Note: article 31(1) and (2) of the *MiFID implementing Directive*]~~

14.3.3 R ...

~~[Note: article 31(3) of the *MiFID implementing Directive*]~~

14.3.4 R ...

~~[Note: article 31(4) of the *MiFID implementing Directive*]~~

14.3.5 R ...

~~[Note: article 31(5) of the *MiFID implementing Directive*]~~

Satisfying the provision rules

14.3.6 G (1) ~~A firm need not treat each of several transactions in respect of the same type of *financial instrument* as a new or different service and so does not need to comply with the *provision rules* (*COBS 14.3.2R* to *COBS 14.3.5R*) in relation to each transaction.~~

(2) ~~But a firm should ensure that the *client* has received all relevant~~

~~information in relation to a transaction, such as details of product charges that differ from those already disclosed. [deleted]~~

~~[Note: in respect of (1), recital 50 to the *MiFID implementing Directive*]~~

...

Product information: form

14.3.8 R ...

~~[Note: article 29(4) of the *MiFID implementing Directive*]~~

The timing rules

14.3.9 R (1) The information to be provided in accordance with the *rules* in this section must be provided in good time before a *firm* carries on *designated investment business* ~~or ancillary services~~ with or for a *retail client*.

...

~~[Note: article 29(2) and (5) of the *MiFID implementing Directive*]~~

Keeping the client up-to-date

14.3.10 R ...

~~[Note: article 29(6) of the *MiFID implementing Directive*]~~

Information about UCITS schemes

14.3.11 R ...

~~[Note: article 34 of the *MiFID implementing Directive*]~~

...

Distributor disclosure requirements for UCITS or KII-compliant NURS

14.3.12 G ...

~~[Note: recital 55 to the *MiFID implementing Directive*]~~

After COBS 14.3 (Information about designated investments (non-MiFID provisions)) insert the following new section. All the text is new and is not underlined.

### **14.3A Information about financial instruments (MiFID provisions)**



## Application

- 14.3A.1 R This section applies to a *firm* in relation to its *MiFID*, *equivalent third country or optional exemption business*.

Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms

- 14.3A.2 R Provisions in this section marked “EU” apply in relation to *MiFID optional exemption business* as if they were *rules* (see *COBS 1.2.2G*).
- 14.3A.2 G The effect of *GEN 2.2.22AR* is that provisions in this section marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

Providing a description of the nature and risks of financial instruments

- 14.3A.3 R A *firm* must provide a *client* with:
- (1) appropriate guidance on, and warnings of, the risks associated with investments in *financial instruments* or in respect of particular investment strategies;
  - (2) information on whether a particular *financial instrument* is intended for *retail* or *professional clients*, taking account of the identified target market in accordance with the *rules* in *PROD 3*; and
  - (3) the information required by this section in a comprehensible form in such a manner that the *client* is reasonably able to understand the nature and risks of the *investment service* and of the specific type of *financial instrument* that is being offered and, consequently, to take investment decisions on an informed basis. That information may be provided in a standardised format.

[**Note:** article 24(4)(b) and article 25 of *MiFID*]

- 14.3A.4 G *COBS 14.3A.3R* supplements *COBS 2.2A.2R* (Information disclosure before providing services (MiFID provisions)).

- 14.3A.5 EU 48(1) Investment firms shall provide clients or potential clients in good time before the provision of investment services or ancillary services to clients or potential clients with a general description of the nature and risks of financial instruments, taking into account, in particular, the client’s categorisation as either a retail client, professional client or eligible counterparty. That description shall explain the nature of the specific type of instrument concerned, the functioning and performance of the financial instrument in different market conditions, including both positive and negative conditions, as well as the risks particular to that specific type of instrument in sufficient detail to enable the client to take investment decisions on an informed basis.

- 48(2) The description of risks referred to in paragraph 1 shall include, where relevant to the specific type of instrument concerned and the status and level of knowledge of the client, the following elements:
- (a) the risks associated with that type of financial instrument including an explanation of leverage and its effects and the risk of losing the entire investment including the risks associated with insolvency of the issuer or related events, such as bail in;
  - (b) the volatility of the price of such instruments and any limitations on the available market for such instruments;
  - (c) information on impediments or restrictions for disinvestment, for example as may be the case for illiquid financial instruments or financial instruments with a fixed investment term, including an illustration of the possible exit methods and consequences of any exit, possible constraints and the estimated time frame for the sale of the financial instrument before recovering the initial costs of the transaction in that type of financial instruments;
  - (d) the fact that an investor might assume, as a result of transactions in such instruments, financial commitments and other additional obligations, including contingent liabilities, additional to the cost of acquiring the instruments;
  - (e) any margin requirements or similar obligations, applicable to instruments of that type.
- 48(3) Where an investment firm provides a retail client or potential retail client with information about a financial instrument that is the subject of a current offer to the public and a prospectus has been published in connection with that offer in accordance with Directive 2003/71/EC, that firm shall in good time before the provision of investment services or ancillary services to clients or potential clients inform the client or potential client where that prospectus is made available to the public.
- 48(4) Where a financial instrument is composed of two or more different financial instruments or services, the investment firm shall provide an adequate description of the legal nature of the financial instrument, the components of that instrument and the way in which the interaction between the components affects the risks of the investment.
- 48(5) In the case of financial instruments that incorporate a guarantee or capital protection, the investment firm shall provide a client or a potential client with information about the scope and nature of such guarantee or capital protection. When the guarantee is provided by

a third party, information about the guarantee shall include sufficient detail about the guarantor and the guarantee to enable the client or potential client to make a fair assessment of the guarantee.

[**Note:** article 48 of the *MiFID Org Regulation*]

Satisfying the provision rules

- 14.3A.6 G (1) Where a *firm* is required to provide information to a *client* before the provision of a service, each transaction in respect of the same type of *financial instrument* should not be considered as the provision of a new or different service.

[**Note:** recital 69 to the *MiFID Org Regulation*]

- (2) But a *firm* should ensure that the *client* has received all relevant information in relation to a transaction which subsequently takes place, such as details of product charges that differ from those disclosed in respect of the prior transaction or transactions.

Timing of disclosure

- 14.3A.7 EU 46(2) Investment firms shall, in good time before the provision of investment services or ancillary services to clients or potential clients, to provide the information required under Articles 47 to 50.

[**Note:** article 46(2) of the *MiFID Org Regulation*]

- 14.3A.8 G The provisions in *COBS* that reproduce the information requirements contained in articles 47 to 50 of the *MiFID Org Regulation* are: *COBS* 6.1ZA.2.1 EU, *COBS* 6.1ZA.2.4EU, *COBS* 6.1ZA.2.5 EU, *COBS* 6.1ZA.2.10EU and *COBS* 14.3A.5EU.

Medium of disclosure

- 14.3A.9 EU 46(3) The information referred to in paragraphs 1 and 2 shall be provided in a durable medium or by means of a website (where it does not constitute a durable medium) provided that the conditions specified in Article 3(2) are satisfied.

[**Note:** article 46(3) of the *MiFID Org Regulation*]

Keeping the client up-to-date

- 14.3A.10 EU 46(4) Investment firms shall notify a client in good time about any material change to the information provided under Articles 47 to 50 which is relevant to a service that the firm is providing to that client. That notification shall be given in a durable medium if the information to which it relates is given in a durable medium.

[**Note:** article 46(4) of the *MiFID Org Regulation*]

Information provided in accordance with the UCITS Directive and the PRIIPs Regulation

- 14.3A.11 EU 51 Investment firms distributing units in collective investment undertakings or PRIIPs shall additionally inform their clients about any other costs and associated charges related to the product which may have not been included in the UCITS KID or PRIIPs KID and about the costs and charges relating to their provision of investment services in relation to that financial instrument.

[**Note:** article 51 of the *MiFID Org Regulation*]

...

## 14 Annex Lifetime ISA information

1

...

### 4 Projections

- 4.1 R Where a *firm* chooses to provide a *projection*, including a *personal projection*, in relation to investing in a *lifetime ISA* in addition to the information in *COBS* 14 Annex 1 3 (Example outcome of retirement saving by a retail client in a *lifetime ISA*), a *firm* must ensure that:

...

- (2) where a *firm* that communicates a *projection* for a *lifetime ISA* in relation to its *MiFID* or *equivalent third country business*, the *projection* complies with the future performance ~~rule in *COBS* 4.6.7R~~ requirements in article 44(6) of the *MiFID Org Regulation* (see *COBS* 4.5A.14EU); and

...

...

Amend the following as shown.

## 16 Reporting information to clients (non-MiFID provisions)

### 16.1 General client reporting requirement Application

- 16.1.1 R ~~A *firm* must ensure in relation to *MiFID* or *equivalent third country business* that a *client* receives adequate reports on the services provided to it by the *firm*. The reports must include, where applicable, the costs associated with the transactions and services undertaken by the *firm* on behalf of the *client*.~~

[deleted]

~~[Note: article 19(8) of MiFID]~~

- 16.1.2 R This chapter applies in relation to *designated investment business* other than *MiFID, equivalent third country or optional exemption business*.

## 16.2 Occasional reporting

Execution of orders other than when managing investments

- 16.2.1 R ...

~~[Note: article 40 paragraphs (1) to (4) of the *MiFID implementing Directive* and article 24 of the *UCITS implementing Directive*]~~

...

- 16.2.3 R ...

~~[Note: article 40(4) of the *MiFID implementing Directive*]~~

...

Special cases

- 16.2.6 R ~~In relation to business that is not *MiFID or equivalent third country business*, a A firm need not despatch a confirmation if:~~

...

Record keeping: occasional reporting

- 16.2.7 R A firm must retain a copy of any confirmation despatched to a *client* under this section:

(a) ~~for *MiFID or equivalent third country business*, for a period of at least five years; or~~

(b) ~~for business that is not *MiFID or equivalent third country business*, for a period of at least three years;~~

from the date of despatch.

~~[Note: see article 51(3) of the *MiFID implementing Directive*]~~

## 16.3 Periodic reporting

Provision by the firm and contents

- 16.3.1 R (1) If a *firm* is *managing investments* on behalf of a *client*, it must provide the *client* with a *periodic statement* in a *durable medium* unless:
- (a) such a statement is provided by another *person*; or
  - (b) all of the conditions in (1A) are satisfied.
- (1A) The conditions are that:
- (a) the *firm* provides the *client* with access to an online system which qualifies as a *durable medium*;
  - (b) the online system provides the *client* with easy access to:
    - (i) up-to-date valuations of the *client's designated investments* and *client money*; and
    - (ii) the information that would otherwise be contained in a *periodic statement*; and
  - (c) the *firm* has evidence that the *client* has accessed a valuation of their *designated investments* or *client money* at least once during the previous quarter.
- (2) ...
- ~~[Note: article 41(1) and (2) of the *MiFID implementing Directive*]~~
- 16.3.2 R ...
- ~~[Note: article 41(3) of the *MiFID implementing Directive*]~~
- 16.3.3 R ...
- (2) If the *client* is a *retail client*, the *firm* must send ~~him~~ the *client* a notice confirming the transaction and containing such of the information identified in column (1) of the table in *COBS 16 Annex 1R* as is applicable:
- ...
- ~~[Note: article 41(4) of the *MiFID implementing Directive*]~~
- ...
- 16.3.5 R ...
- ~~[Note: article 40(4) of the *MiFID implementing Directive*]~~
- 16.3.6 R ...

~~[Note: article 42 of the *MiFID implementing Directive*]~~

Contingent liability transactions

16.3.7 R ...

~~[Note: recital 63 of the *MiFID implementing Directive*]~~

...

Guidance on contingent liability transactions

...

Periodic reporting: special situations

16.3.10 R ~~In relation to business that is not *MiFID* or equivalent third country business, a A firm need not provide a *periodic statement*:~~

...

Record keeping: periodic reporting

16.3.11 R A *firm* must make, and retain, a copy of any *periodic statement*:

~~(1) for *MiFID* or equivalent third country business, for a period of at least five years; or~~

~~(2) for business that is not *MiFID* or, for a period of at least three years;~~

from the date of despatch.

~~[Note: see article 51(3) of the *MiFID implementing Directive*]~~

**16.4 Statements of client designated investments or client money**

16.4.1 R (1) A *firm* that holds *client designated investments* or *client money* for a *client* must send that *client* at least once a year a statement in a *durable medium* of those *designated investments* or that *client money* unless:

(a) such a statement has been provided in a *periodic statement*;  
or

(b) the *firm*:

(i) provides the *client* with access to an online system, which qualifies as a *durable medium*, where up-to-date statements of a *client's designated investments* or *client money* can be easily accessed by the *client*; and

(ii) the firm has evidence that the client has accessed an up-to-date statement at least once during the previous quarter.

...

(3) This rule does not apply in relation to a firm holding client designated investments or client money under a personal pension scheme or a stakeholder pension scheme, ~~where doing so is not MiFID or equivalent third country business~~

(4) A CTF account provider holding client designated investments or client money under a CTF ~~where doing so is not MiFID or equivalent third country business~~ must provide a statement but need not do so more frequently than required by Regulation 10 of the CTF Regulations.

~~[Note: article 43(1) of the MiFID implementing Directive]~~

16.4.2 R A firm must include the following information in a statement of client assets referred to under this section ~~the following information:~~

...

~~[Note: see article 43(2) of the MiFID implementing Directive]~~

16.4.3 R ...

~~[Note: see article 43(2) of the MiFID implementing Directive]~~

16.4.4 R ...

~~[Note: see article 43(3) of the MiFID implementing Directive]~~

...

**16 Annex 1R Trade confirmation and periodic information**

This annex forms part of COBS 16.2.1R

	<p><b>The information below must be provided, where relevant for the purposes of reporting to a retail client, in accordance with SUP 17 Annex 1</b></p>	<p><b>(1) Trade confirmation information</b></p>	<p><b>(2) Periodic information (where trade confirmation information is not provided on a transaction by transaction basis, to be provided for each transaction carried out during the reporting period)</b></p>
--	--	--	--



General			
...			
7.	...		
7A.	<u>the underlying instrument identification (Note 1);</u>	<u>Y</u>	<u>Y</u>
7B.	<u>the instrument type (Note 2);</u>	<u>Y</u>	<u>Y</u>
7C.	<u>the maturity date (Note 3);</u>	<u>Y</u>	<u>Y</u>
7D.	<u>the derivative type (Note 4);</u>	<u>Y</u>	<u>Y</u>
7E.	<u>put/call (Note 5);</u>	<u>Y</u>	<u>Y</u>
7F.	<u>the strike price (Note 6);</u>	<u>Y</u>	<u>Y</u>
7G.	<u>the price multiplier (Note 7);</u>	<u>Y</u>	<u>Y</u>
...			
9.	...	...	...
9A.	<u>the counterparty;</u>	<u>Y</u>	<u>Y</u>
10.	...	...	...
10A.	<u>the quantity notation (Note 8);</u>	<u>Y</u>	<u>Y</u>
...			
17.	the <i>client's</i> responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the <i>client</i> ; <del>and</del>	Y	
18.	if the <i>client's</i> counterparty was the <i>firm</i> itself or any person in the <i>firm's group</i> or another <i>client</i> of the <i>firm</i> , the fact that this was the case unless the order was <i>executed</i> through a trading system that facilitates	Y	

	anonymous trading;		
19.	<u>the transaction reference number (Note 9); and</u>	<u>Y</u>	<u>Y</u>
20.	<u>the customer / client identification (Note 10).</u>	<u>Y</u>	<u>Y</u>
A <i>firm</i> may provide the <i>client</i> with the information referred to in this Annex using standard codes if it also provides an explanation of the codes used.			
<u><i>Firms</i> are reminded that COBS 16.2.1R only requires a <i>retail client</i> to be provided with the <i>trade confirmation information</i> that applies to them. Where a piece of information is not applicable to the circumstances of a particular trade, the <i>firm</i> is not required to report that information to the <i>client</i> or to include the field on the confirmation.</u>			
The following Notes explain certain of the information requirements in the table above.			
<u>Note 1</u>	<u>This is the instrument identification applicable to the security that is the underlying asset in a derivative contract.</u>		
<u>Note 2</u>	<u>This is the harmonised classification of the instrument that is the subject of the transaction (e.g. equity, bond). This item is only required when an explanation of the instrument type has not been provided in relation to the instrument identification in line 7.</u>		
<u>Note 3</u>	<u>This is the maturity date of a bond or other form of securitised debt, or the exercise date/maturity date of a derivative contract. Where the derivative type is spread bet on an equity option or contract for difference on an equity option, the expiry of the option must be indicated.</u>		
<u>Note 4</u>	<u>This is the harmonised description of the derivative type (e.g. option, future, contract for difference, complex derivative, warrant, spread bet, credit default swap or other swap).</u>		
<u>Note 5</u>	<u>This is only relevant when the instrument is an option, warrant, spread bet on an equity option or contract for difference on an equity option. Where the instrument is a spread bet on an equity option or a contract for difference on an equity option this field should be used to indicate the put/call status of the equity option.</u>		
<u>Note 6</u>	<u>This is only relevant when the instrument is an option, warrant, spread bet on an equity option or contract for difference on an equity option. Where the instrument is a spread bet on an equity option or a contract for difference on an equity option this field should be used to indicate the strike price of the equity option.</u>		

<u>Note 7</u>	<u>This is the number of units of the instrument in question which are contained in a trading lot; for example, the number of derivatives or securities represented by one contract.</u>
<u>Note 8</u>	<u>This should be used to indicate whether the quantity is the number of units of the instrument, the nominal value of bonds, or the number of derivative contracts.</u>
<u>Note 9</u>	<u>This should be the unique identification number for the transaction provided by the <i>firm</i>.</u>
<u>Note 10</u>	<u>This is the identity of the <i>client</i> or customer on whose behalf the <i>firm</i> was acting.</u>

...

## 16 Annex Information to be included in a Periodic periodic report 2R

This annex forms part of COBS 16.3.1R.

...		
[ <del>Note: article 41(2) of MiFID implementing Directive</del> ]		

After COBS 16 (Reporting information to clients (non-MiFID provisions)) insert the following new chapter. All the text is new and is not underlined.

### 16A Reporting information to clients (MiFID provisions)

#### 16A.1 Application

- 16A.1.1 R This chapter applies to a *firm* in relation to its *MiFID*, *equivalent third country or optional exemption business*.

Effect of provisions marked “EU” for third country investment firms and MiFID optional exemption firms

- 16A.1.2 R Provisions in this chapter marked “EU” apply in relation to *MiFID optional exemption business* as if they were *rules* (see COBS 1.2.2G).
- 16A.1.2A G The effect of *GEN 2.2.22AR* is that provisions in this chapter marked “EU” also apply in relation to the *equivalent business of a third country investment firm* as if they were *rules*.

## 16A.2 General client reporting and record keeping requirements

- 16A.2.1 R (1) A *firm* must provide a *client* with adequate reports on the service provided in a *durable medium*.
- (2) The reports must include:
- (a) periodic communications to the *client*, taking into account the type and the complexity of the *financial instruments* involved and the nature of the service provided to the *client*; and
  - (b) where applicable, the costs associated with the transactions and services undertaken on behalf of the *client*.

[**Note:** article 25(6) of *MIFID*]

- 16A.2.2 G A *firm* should refer to SYSC 9 (Record-keeping) for the requirements that apply in relation to the retention of records.

## 16A.3 Occasional reporting

Execution of orders other than when undertaking portfolio management

- 16A.3.1 EU 59(1) Investment firms having carried out an order on behalf of a client, other than for portfolio management, shall, in respect of that order:
- (a) promptly provide the client, in a durable medium, with the essential information concerning the execution of that order;
  - (b) send a notice to the client in a durable medium confirming execution of the order as soon as possible and no later than the first business day following execution or, where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.
- Point (b) shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the client by another person.
- Points (a) and (b) shall not apply where orders executed on behalf of clients relate to bonds funding mortgage loan agreements with the said clients, in which case the report on the transaction shall be made at the same time as the terms of the mortgage loan are communicated, but no later than one month after the execution of the order.
- 59(2) In addition to the requirements under paragraph 1, investment

firms shall supply the client, on request, with information about the status of his order.

- 59(3) In the case of client orders relating to units or shares in a collective investment undertaking which are executed periodically, investment firms shall either take the action specified in point (b) of paragraph 1 or provide the client, at least once every six months, with the information listed in paragraph 4 in respect of those transactions.
- 59(4) The notice referred to in point (b) of paragraph 1 shall include such of the following information as is applicable and, where relevant, in accordance with the regulatory technical standards on reporting obligations adopted in accordance with Article 26 of Regulation (EU) No 600/2014:
- (a) the reporting firm identification;
  - (b) the name or other designation of the client;
  - (c) the trading day;
  - (d) the trading time;
  - (e) the type of the order;
  - (f) the venue identification;
  - (g) the instrument identification;
  - (h) the buy/sell indicator;
  - (i) the nature of the order if other than buy/sell;
  - (j) the quantity;
  - (k) the unit price;
  - (l) the total consideration;
  - (m) a total sum of the commissions and expenses charged and, where the client so requests, an itemised breakdown including, where relevant, the amount of any mark-up or mark-down imposed where the transaction was executed by an investment firm when dealing on own account, and the investment firm owes a duty of best execution to the client;
  - (n) the rate of exchange obtained where the transaction involves a conversion of currency;
  - (o) the client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or

delivery as well as the appropriate account details where these details and responsibilities have not previously been notified to the client;

- (p) where the client's counterparty was the investment firm itself or any person in the investment firm's group or another client of the investment firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.

For the purposes of point (k), where the order is executed in tranches, the investment firm may supply the client with information about the price of each tranche or the average price. Where the average price is provided, the investment firm shall supply the client with information about the price of each tranche upon request.

- 59(5) The investment firm may provide the client with the information referred to in paragraph 4 using standard codes if it also provides an explanation of the codes used.

[**Note:** article 59 of the *MiFID Org Regulation*]

- 16A.3.2 G In determining what is essential information, a *firm* should consider including:
- (1) for transactions in a *derivative*:
    - (a) the maturity, delivery or expiry date of the *derivative*;
    - (b) in the case of an *option*, a reference to the last exercise date, whether it can be exercised before maturity and the strike price; and
    - (c) if the transaction *closes out* an open *futures* position, all essential details required in respect of each contract comprised in the open position and each contract by which it was *closed out* and the profit or loss to the *client* arising out of *closing out* that position (a difference account);
  - (2) for the exercise of an *option*:
    - (a) the date of exercise, and either the time of exercise or that the *client* will be notified of that time on request;
    - (b) whether the exercise creates a sale or purchase in the underlying asset; and
    - (c) the strike price of the *option* (for a currency *option*, the rate of exchange will be the same as the strike price) and, if applicable, the total consideration from or to the *client*; and

- (3) the fact that the transaction involves any dividend or capitalisation or other right which has been declared, but which has not been paid, allotted or otherwise become effective in respect of the *investment*, and under the terms of the transaction the benefit of which will not pass to the purchaser.

#### Guidance on the requirements

- 16A.3.3 G Where a *firm* executes an order in tranches, the *firm* may, where appropriate, indicate the trading time and the execution venue in a way that is consistent with this, such as, “multiple”. In accordance with the *client’s best interests rule*, a *firm* should provide additional information at the *client’s* request.
- 16A.3.4 G In accordance with COBS 2.4.9R, a *firm* may dispatch confirmation to an agent, other than the *firm* or an *associate* of the *firm*, nominated by the *client* in writing.

#### Reporting obligations in respect of eligible counterparties

- 16A.3.5 EU 61 The requirements applicable to reports for *retail* and *professional clients* under Articles 49 and 59 shall apply unless *investment firms* enter into agreements with *eligible counterparties* to determine content and timing of reporting.

[**Note:** article 61 of the *MiFID Org Regulation*]

## 16A.4 Periodic reporting

#### Provision by a firm and contents

- 16A.4.1 EU 60(1) Investments firms which provide the service of portfolio management to clients shall provide each such client with a periodic statement in a durable medium of the portfolio management activities carried out on behalf of that client unless such a statement is provided by another person.
- 60(2) The periodic statement required under paragraph 1 shall provide a fair and balanced review of the activities undertaken and of the performance of the portfolio during the reporting period and shall include, where relevant, the following information:
- (a) the name of the investment firm;
  - (b) the name or other designation of the client’s account;
  - (c) a statement of the contents and the valuation of the portfolio, including details of each financial instrument held, its market value, or fair value if market value is unavailable and the cash balance at the beginning and at the

end of the reporting period, and the performance of the portfolio during the reporting period;

- (d) the total amount of fees and charges incurred during the reporting period, itemising at least total management fees and total costs associated with execution, and including, where relevant, a statement that a more detailed breakdown will be provided on request;
- (e) a comparison of performance during the period covered by the statement with the investment performance benchmark (if any) agreed between the investment firm and the client;
- (f) the total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio;
- (g) information about other corporate actions giving rights in relation to financial instruments held in the portfolio;
- (h) for each transaction executed during the period, the information referred to in Article 59(4)(c) to (l) where relevant, unless the client elects to receive information about executed transactions on a transaction-by-transaction basis, in which case paragraph 4 of this Article shall apply.

60(3) The periodic statement referred to in paragraph 1 shall be provided once every three months, except in the following cases:

- (a) where the investment firm provides its clients with access to an online system, which qualifies as a durable medium, where up-to-date valuations of the client's portfolio can be accessed and where the client can easily access the information required by Article 63(2) and the firm has evidence that the client has accessed a valuation of their portfolio at least once during the relevant quarter;
- (b) in cases where paragraph 4 applies, the periodic statement must be provided at least once every 12 months;
- (c) where the agreement between an investment firm and a client for a portfolio management service authorises a leveraged portfolio, the periodic statement must be provided at least once a month.

The exception provided for in point (b) shall not apply in the case of transactions in financial instruments covered by Article 4(1)(44)(c) of, or any of points 4 to 11 of Section C in Annex I to Directive 2014/65/EU.

60(4) Investment firms, in cases where the client elects to receive information about executed transactions on a transaction-by-



transaction basis, shall provide promptly to the client, on the execution of a transaction by the portfolio manager, the essential information concerning that transaction in a durable medium.

The investment firm shall send the client a notice confirming the transaction and containing the information referred to in Article 59(4) no later than the first business day following that execution or, where the confirmation is received by the investment firm from a third party, no later than the first business day following receipt of the confirmation from the third party.

The second subparagraph shall not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the client by another person.

[**Note:** article 60 of the *MiFID Org Regulation*]

- 16A.4.2 G In accordance with *COBS 2.4.9R*, a *firm* may dispatch a *periodic statement* (as required by article 60(1) of the *MiFID Org Regulation*, see *COBS 16A.4.1EU*) to an agent, other than the *firm* or an *associate* of the *firm*, nominated by the *client* in writing.

Additional reporting obligations for portfolio management or contingent liability transactions

- 16A.4.3 EU 62(1) Investment firms providing the service of portfolio management shall inform the client where the overall value of the portfolio, as evaluated at the beginning of each reporting period, depreciates by 10% and thereafter at multiples of 10%, no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.
- 62(2) Investment firms that hold a retail client account that includes positions in leveraged financial instruments or contingent liability transactions shall inform the client, where the initial value of each instrument depreciates by 10% and thereafter at multiples of 10%. Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client, and shall take place no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the close of the next business day.

[**Note:** article 62 of the *MiFID Org Regulation*]

- 16A.4.4 G For the purposes of this section, a contingent liability transaction should be understood as being a transaction that involves any actual or potential liability for the *client* that exceeds the cost of acquiring the instrument.

[**Note:** recital 96 to the *MiFID Org Regulation*]

## Guidance on contingent liability transactions

- 16A.4.5 G When providing a *periodic statement* to a *retail client*, a *firm* should consider whether to include:
- (1) the *collateral* value in respect of any contingent liability transaction in the *client's* portfolio during the relevant period; and
  - (2) *option* account valuations in respect of each open *option* written by the *client* in the *client's* portfolio at the end of the relevant period; stating:
    - (a) the *share, future*, index or other *investment* involved;
    - (b) the trade price and date for the opening transaction, unless the valuation statement follows the statement for the period in which the option was opened;
    - (c) the market price of the contract; and
    - (d) the exercise price of the contract.
  - (3) *Option* account valuations may show an average trade price and market price in respect of an *option* series if the *client* buys a number of contracts within the same series.

**16A.5 Statements of client financial instruments or client funds**

- 16A.5.1 EU 63(1) Investment firms that hold client financial instruments or client funds shall send at least on a quarterly basis, to each client for whom they hold financial instruments or funds, a statement in a durable medium of those financial instruments or funds unless such a statement has been provided in any other periodic statement. Upon client request, firms shall provide such statement more frequently at a commercial cost.
- The first subparagraph shall not apply to a credit institution authorised under Directive 2000/12/EC of the European Parliament and of the Council in respect of deposits within the meaning of that Directive held by that institution.
- 63(2) The statement of client assets referred to in paragraph 1 shall include the following information:
- (a) details of all the financial instruments or funds held by the investment firm for the client at the end of the period covered by the statement;

- (b) the extent to which any client financial instruments or client funds have been the subject of securities financing transactions;
- (c) the extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions, and the basis on which that benefit has accrued;
- (d) a clear indication of the assets or funds which are subject to the rules of Directive 2014/65/EU and its implementing measures and those that are not, such as those that are subject to Title Transfer Collateral Agreement;
- (e) a clear indication of which assets are affected by some peculiarities in their ownership status, for instance due to a security interest;
- (f) the market or estimated value, when the market value is not available, of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity. The evaluation of the estimated value shall be performed by the firm on a best effort basis.

In cases where the portfolio of a client includes the proceeds of one or more unsettled transactions, the information referred to in point (a) may be based either on the trade date or the settlement date, provided that the same basis is applied consistently to all such information in the statement.

The periodic statement of client assets referred to in paragraph 1 shall not be provided where the investment firm provides its clients with access to an online system, which qualifies as a durable medium, where up-to-date statements of client's financial instruments or funds can be easily accessed by the client and the firm has evidence that the client has accessed this statement at least once during the relevant quarter.

- 63(3) Investment firms which hold financial instruments or funds and which carry out the service of portfolio management for a client may include the statement of client assets referred to in paragraph 1 in the periodic statement it provides to that client pursuant to Article 60(1).

[**Note:** article 63 of the *MiFID Org Regulation*]

- 16A.5.2 G *Firms* subject to either or both the *custody chapter* and the *client money chapter* are reminded of the reporting obligations to *clients* in *CASS 9.2* (Prime broker's daily report to clients) and *CASS 9.5* (Reporting to clients on request).

Amend the following as shown.

## 18 Specialist Regimes

...

### 18.1 Trustee Firms

Application

- 18.1.1 R (1) This section applies to the ~~*MiFID or equivalent third country business*~~ *MiFID, equivalent third country or optional exemption business* carried on by a trustee firm.

...

Application of COBS to trustee firms

- 18.1.2 R The provisions of *COBS* in the table do not apply to a trustee firm to which this section applies:

COBS	Description
...	
<del>6.2A</del>	<del>Describing advice services</del>
...	
<del>9.4</del>	<del>Suitability reports</del>
<del>9.6</del>	<del>Special rules for providing basic advice on a stakeholder product</del>
<del>16.3.9</del> <del>16A.4.5</del>	<del>Guidance on contingent liability transaction</del> <u>transactions</u>
<del>16.5</del>	<del>Quotations for surrender values</del>
<del>16.6</del>	<del>Life insurance contracts – communications to clients</del>
<del>16 Annex 1R</del> <del>(1)14</del>	<del>Information to be provided in accordance with COBS</del> <del>16.2.1 R and 16.3</del>

- 18.1.2A G This section applies to the *MiFID, equivalent third country or optional exemption business* carried on by a trustee firm. As such, the list in *COBS* 18.1.2R above does not include any provisions in *COBS* which do not

apply to MiFID, equivalent third country or optional exemption business.

...

## 18.2 Energy market activity and oil market activity

Energy market activity and oil market activity – MiFID business

- 18.2.1 R The provisions of *COBS* in the table do not apply in relation to any *energy market activity* or *oil market activity* carried on by a *firm* which is *MiFID* or *equivalent third country business*:

COBS	Description
...	
<del>6.2A</del> <u>6.2B</u>	Describing advice services
...	
<del>11.6</del>	Use of dealing commission
...	

...

Energy market activity and oil market activity – non-MiFID business

- 18.2.3 R Only the *COBS* provisions in the table apply to *energy market activity* or *oil market activity* carried on by a *firm* which is not:
- (1) *MiFID* or *equivalent third country business*; or
  - (2) *energy market activity* or *oil market activity* set out in *COBS* 18.2.4R.

COBS	Description
...	
<del>11.8</del>	<del>Recording telephone conversations and electronic communications</del>
12	Investment research <u>and non-independent research</u>
...	

...

## 18.3 Corporate finance business

Corporate finance business – MiFID business

- 18.3.1 R The provisions of *COBS* in the table do not apply in respect of any *corporate finance business* carried on by a *firm* which is *MiFID* or *equivalent third country business*:

COBS	Description
...	
<del>6.2A</del> <u>6.2B</u>	Describing advice services
...	
<del>11.6</del>	<del>Use of dealing commission</del>
<del>11.8</del>	<del>Recording telephone conversations and electronic communications</del>
...	
<del>16.3.9</del> <u>16.3.7</u>	Guidance on contingent liability transaction
...	

...

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* or *optional exemption business*.

COBS	Description
...	
<del>2.3</del> <u>2.3A</u>	Inducements
...	
<del>11.7</del> <u>11.7A</u>	Personal account dealing
12	Investment research <u>and non-independent research</u>
...	

Corporate finance business – optionally exempt business

- 18.3.3A R Only the provisions of *COBS* in the table apply to *corporate finance business* which is *MiFID optional exemption business*.

<b><u>COBS</u></b>	<b><u>Description</u></b>
<u>1</u>	<u>Application</u>
<u>2.1.1</u>	<u>Acting honestly, fairly and professionally</u>
<u>2.2A</u>	<u>Information disclosures before providing services</u>
<u>2.3A</u>	<u>Inducements</u>
<u>2.4</u>	<u>Agent as client and reliance on others</u>
<u>3</u>	<u>Client categorisation</u>
<u>4</u>	<u>Communication to clients including financial promotions, except COBS 4.5- COBS 4.6 and COBS 4.8 - COBS 4.11</u>
<u>5.1</u>	<u>The information and other requirements of the Distance Marketing Directive, but only in relation to distance contracts concluded with consumers</u>
<u>5.2</u>	<u>E-commerce</u>
<u>6.1A</u>	<u>Information about the firm, its services and remuneration</u>
<u>6.2B</u>	<u>Describing advice services</u>
<u>8A</u>	<u>Client agreements</u>
<u>9A</u>	<u>Suitability</u>
<u>11.7A</u>	<u>Personal account dealing</u>
<u>12</u>	<u>Investment research</u>
<u>14.3.1A</u>	<u>Information about financial instruments</u>
<u>15</u>	<u>Cancellation, but only in relation to distance contracts concluded with consumers</u>
<u>16A</u>	<u>Reporting information to clients</u>

...

## 18.4 Stock lending activity

- 18.4.1 R The provisions of *COBS* in the table do not apply in relation to any *stock lending activity* carried on by a *firm* which is ~~*MiFID* or equivalent third country business~~:

COBS	Subject
...	
<del>6.2A</del> <u>6.2B</u>	Describing advice services
...	
11.6	Use of dealing commission
<del>16.3.9</del> <u>16A.4.5</u>	Guidance on contingent liability transaction
...	

- 18.4.2 G The provisions of *COBS* in the table are unlikely to be relevant in relation to any *stock lending activity* carried on by a *firm* which is ~~*MiFID* or equivalent third country business~~:

COBS	Description
...	
18.3	Corporate finance business
...	

...

## 18.5 Residual CIS operators, UCITS management companies and small authorised UK AIFMs

### Application

- 18.5.1 R Subject to *COBS* 18.5.1AR and ~~*COBS* 18.5.1BR~~, this section applies to a *firm* which is:
- (1) ~~a UCITS management company;~~ [deleted]
  - (2) ~~a full scope UK AIFM;~~ [deleted]
  - (3) a small authorised UK AIFM; or
  - (4) a residual CIS operator; ~~or~~
  - (5) ~~an incoming EEA AIFM branch.~~ [deleted]



...

- 18.5.1B R (1) The following apply to a *full-scope UK AIFM* in relation to its *AIF management functions*:
- (a) ~~COBS 18.5.1R to COBS 18.5.2 AG;~~
  - (b) ~~COBS 18.5.3R;~~
  - (c) ~~COBS 18.5.4AR; and~~
  - (d) ~~COBS 18.5.10AR and COBS 18.5.10BG, except as set out in (2).~~
- (2) ~~COBS 18.5.10AR does not apply to a full-scope UK AIFM of:~~
- (a) ~~a UK ELTIF or an EEA ELTIF; or~~
  - (b) ~~an unauthorised AIF which is not a collective investment scheme.~~
- (3) ~~In addition to (1) and (2), COBS 18.5.4CR to COBS 18.5.4DG apply to a full-scope UK AIFM that is an internally managed AIF. [deleted]~~

#### Application or modification of general COBS rules

- 18.5.2 R A firm when it is carrying on *scheme management activity* or, for an *AIFM*, *AIFM investment management functions*:
- (1) must comply with the *COBS rules* specified in the table, as modified by this section; and
  - (2) need not comply with any other *rule* in *COBS*.

<u>Table: Application of conduct of business rules</u>	
<u>Chapter, section, rule</u>	<u>Small authorised UK AIFM and a residual CIS operator</u>
<u>1 (Application)</u>	<u>Applies</u>
<u>2.1.1R (The client's best interests rule)</u>	<u>Applies</u>
<u>2.3 (Inducements relating to business other than MiFID, equivalent third country or optional exemption business)</u>	<u>Applies</u>
<u>2.3B (Inducements and research)</u>	<u>Applies, as modified by COBS 18 Annex 1</u>
<u>2.4 (Agent as client and reliance on others)</u>	<u>Applies</u>

<u>4.2.1R, 4.2.2G and 4.2.3G (The fair, clear and not misleading rule)</u>	<u>Applies</u>
<u>5.2 (E-commerce)</u>	<u>Applies</u>
<u>11.2 (Best execution for AIFMs and residual CIS operators)</u>	<u>Applies to a <i>small authorised UK AIFM</i> of an <i>authorised AIF</i>. Applies (as modified by <i>COBS 18.5.4R</i>) to a <i>small authorised UK AIFM</i> of an <i>unauthorised AIF</i> or <i>residual CIS operator</i>.</u>
<u>11.3 (Client order handling)</u>	<u>Applies</u>
<u>16.3 (Periodic reporting)</u>	<u>Applies to a <i>small authorised UK AIFM</i> of an <i>unauthorised AIF</i> which is not a <i>collective investment scheme</i>, as modified by <i>COBS 18.5.4BR</i>. Otherwise does not apply.</u>
<u>18.5 (Residual CIS operators and small authorised UK AIFMs)</u>	<u>Applies</u>
<u>18 Annex 1 (Research and inducements for collective portfolio managers)</u>	<u>Applies (subject to <i>COBS 18.5.3CR</i>)</u>
<u>18 Annex 2 (Record keeping: client orders and transactions)</u>	<u>Applies</u>

- 18.5.2-A G For activities carried on by *firms* which are not *scheme management activities* or, for an *AIFM*, *AIFM investment management functions*, the *COBS rules* apply under the general application rule, as modified in *COBS 1 Annex 1*.

Table: Application of conduct of business rules

This table belongs to *COBS 18.5.2R* [deleted]

<b>Chapter, section, rule</b>	<b><i>Full-scope UK AIFM</i></b>	<b><i>Small authorised UK AIFM and a residual CIS operator</i></b>	<b><i>Incoming EEA AIFM branch</i></b>	<b><i>UCITS management company</i></b>
†	Applies	Applies	Applies	Applies
2.1.1	Does not apply	Applies	Does not apply	Applies
2.1.4	Applies	Does not apply	Applies	Does not apply

2.3	Does not apply	Applies	Does not apply	Applies
2.4	Does not apply	Applies	Does not apply	Applies
4.2.1–4.2.3	Applies	Applies	Applies	Applies
5.2	Applies	Applies	Applies	Applies
6.1G.2	Applies	Applies	Applies	Applies
11.2	Applies as modified by <i>COBS 18.5.4AR</i>	Applies to a <i>small authorised UK AIFM</i> of an <i>authorised AIF</i> . Applies (as modified by <i>COBS 18.5.4R</i> ) to a <i>small authorised UK AIFM</i> of an <i>unauthorised AIF</i> or <i>residual CIS operator</i>	Applies as modified by <i>COBS 18.5.4AR</i>	Applies
11.3	Does not apply	Applies	Does not apply	Applies
11.5	Does not apply	Applies as <i>rules</i>	Does not apply	Does not apply
11.6	Applies, but as modified by <i>COBS 18.5.4CR</i> for <i>internally managed AIFs</i> .	Applies	Applies	Applies
11.8	Applies	Applies	Applies	Applies
16.3	Does not apply	Applies to a <i>small authorised UK AIFM</i> of an <i>unauthorised AIF</i> which is not a <i>collective investment scheme</i> , as	Does not apply	Does not apply

		modified by <i>COBS</i> 18.5.4BR. Otherwise does not apply.		
18.5	Applies as modified by <i>COBS</i> 18.5.1BR	Applies	Applies	Applies

18.5.2-B G (1) For activities which are not *scheme management activity* or, for an *AIFM*, *AIFM investment management functions*, the *COBS rules* apply under the general application rule, as modified in *COBS 1 Annex 1*.

(2) This may include, for example, activities relating to the administration of the *fund* and *marketing*.

~~Additional application of *COBS* rules for management companies~~

18.5.2A R ~~A *management company* must:~~

(1) ~~in addition to complying with the *COBS rules* specified in *COBS 18.5.2R*, comply with *COBS 11.7 (Personal account dealing)*; and~~

(2) ~~comply with *COBS 2.3 (Inducements)* as modified by *COBS 2.3.2AR [deleted]*~~

~~[Note: article 13(1) to 13(4) of the *UCITS implementing Directive*]~~

~~General modifications~~

18.5.3 R Where *COBS rules* specified in the table in *COBS 18.5.2R* apply to a *firm* carrying on *scheme management activities activity* or, for an *AIFM*, *AIFM investment management functions*, the following modifications apply:

(1) subject to (2), references to *customer* or *client* are to be construed as references to any *fund* ~~in respect of~~ for which the *firm* is acting or intends to act, ~~and with or for the benefit of which the relevant activity is to be carried on;~~

(2) in the case of a *small authorised UK AIFM* of an *unauthorised AIF* or a *residual CIS operator*, when a *firm* is required by the ~~rules~~ rules in *COBS* to provide information to, or obtain consent from, a *customer* or *client*, the *firm* must ensure that the information is provided to, or consent obtained from, an investor or a potential investor in the *fund* as the case may be; and

(3) references to the service of *portfolio management* in *COBS 11.2 (Best execution for AIFMs and residual CIS operators)*; and *11.3 (Client order handling)* ~~and *COBS 11.5 (Record keeping: client*~~

~~orders and transactions~~) are to be read as references to the management by a *firm* of *financial instruments* held for or within the *fund*; and .

- (4) ~~references to *investment firm* in COBS 11.5 are to be read as references to *small authorised UK AIFM* or *residual CIS operator*.  
[deleted]~~

- 18.5.3A G (1) COBS 1.2 (Markets in Financial Instruments Directive) contains modifications to the text of the *MiFID Org Regulation* where this is applied as *rules* to *firms* that are not subject to those provisions directly.
- (2) These modifications apply to COBS 11.3 (Client order handling), which is applied in the table at COBS 18.5.2R.

#### Research and inducements

- 18.5.3B R Subject to COBS 18.5.3CR, a *firm* must comply with COBS 18 Annex 1 (Research and inducements for collective portfolio managers) when *executing* orders, or placing orders with other entities for execution, that relate to *financial instruments* for, or on behalf of, the *fund*.

- 18.5.3C R COBS 18 Annex 1 does not apply in relation to an *AIF* or *CIS* which in accordance with its core investment policy:
- (1) does not generally invest in *financial instruments* that can be:
- (a) registered in a *financial instruments* account opened in the books of a *depository*; or
- (b) physically delivered to the *depository*; or
- (2) generally invests in *issuers* or *non-listed companies* to potentially acquire *control* over such companies, either individually or jointly with other *funds*.

#### Modification of best execution

- 18.5.4 R The best execution provisions ~~applying in COBS 11.2 (Best execution for AIFMs and residual CIS operators)~~ do not apply to a *small authorised UK AIFM* of an *unauthorised AIF* or a *residual CIS operator* ~~do not apply in relation to~~ of a *fund* whose fund documents include a statement that best execution does not apply in relation to the *fund* and in which:
- (1) no investor is a *retail client*; or
- (2) no current investor in the *fund* was a *retail client* when it invested in the *fund*.
- 18.5.4A R Only the following provisions in COBS 11.2 apply to a *full scope UK AIFM*:

- (1) ~~COBS 11.2.5G;~~
- (2) ~~COBS 11.2.17G;~~
- (3) ~~COBS 11.2.23AR, but references to *management company* should be read as references to an *AIFM* and references to *Unitholders* read as references to investors. This obligation only applies for the execution policy required under article 27(3) of the *AIFMD level 2 regulation* (Execution of decisions to deal on behalf of the managed AIF);~~
- (4) ~~COBS 11.2.24R;~~
- (5) ~~COBS 11.2.25R(1) and COBS 11.2.26R, but only where an *AIF* itself has a governing body which can provide prior consent; and~~
- (6) ~~COBS 11.2.27R, but only regarding the obligation on an *AIFM* to notify the *AIF* of any material changes to their order execution arrangements or execution policy. [deleted]~~

...

#### Modification of dealing commission rules for internally managed AIFs

- 18.5.4C R Only ~~COBS 11.6.1G to COBS 11.6.11G~~ apply to a *full-scope UK AIFM* that is an *internally managed AIF* and references to an *investment manager* in ~~COBS 11.6~~ are to be read as including an *internally managed AIF* which manages *designated investments* on its own account and references to a *customer order* as a decision by an *internally managed AIF* to execute a transaction for these purposes. [deleted]
- 18.5.4D G To be an *investment manager*, a *person* needs to manage *designated investments* on a discretionary or non-discretionary basis under the terms of a management agreement. The purpose of ~~COBS 18.5.4CR~~ is to modify ~~COBS 11.6.1G to COBS 11.6.11G~~ so that these provisions apply to a *full-scope UK AIFM* that is an *internally managed AIF* because such *firms* manage *designated investments* on their own account rather than under the terms of a management agreement. [deleted]

...

#### Adequate information

- 18.5.10 E (1) In order to provide adequate information to describe how the *fund* is governed, a *small authorised UK AIFM* of an *unauthorised AIF* or a *residual CIS operator* should include in the fund documents a provision about each of the items of relevant information set out in the following table (Content of fund documents).
- (2) Compliance with (1) may be relied on as tending to establish compliance with *COBS 18.5.5R*.

- (3) Contravention of (1) may be relied on as tending to establish contravention of *COBS* 18.5.5R.

Table: Content of fund documents

Content of fund documents

The fund documents should include provision about:	
...	
(16)	<p><del>Use of dealing commission</del> <u>Research and inducements</u>  if the <i>firm</i> receives goods or services in addition to the <i>execution</i> of its <i>customer orders</i> in accordance with the section on the use of dealing commission, the prior disclosure required by the <i>rule</i> on prior disclosure (see <i>COBS</i> 11.6.2R) <u>how the <i>firm</i> intends to pay for research. For example, whether the <i>firm</i> proposes to pay for research directly or to use a <i>research</i> payment account;</u></p>
...	

Application of *COBS* 18.5.10E to a full-scope UK AIFM

18.5.10 R ~~A full-scope UK AIFM which markets an unauthorised AIF to a retail~~  
A ~~client must, in addition to providing the information in *FUND* 3.2, take reasonable steps to offer and, if requested, provide to that potential investor information about the following items in the *COBS* 18.5.10E table (content of fund documents): [deleted]~~

- (1) ~~(1) (Regulator);~~
- (2) ~~(4) (Commencement);~~
- (3) ~~(5) (Accounting);~~
- (4) ~~(6) (Termination method);~~
- (5) ~~(7) (Complaints procedure);~~
- (6) ~~(8) (Compensation);~~
- (7) ~~(13) (Exchange rates);~~
- (8) ~~(14) (Stabilised investments);~~
- (9) ~~(16) (Use of dealing commission);~~
- (10) ~~(17) (Acting as principal);~~
- (11) ~~(23) (Underwriting commitments);~~

~~(12) (24) (Investments in other funds); and~~

~~(13) (25) (Investments in securities underwritten by the firm).~~

18.5.10B G ~~Where a *full-scope UK AIFM* is required to publish a *key information document*, only information that is additional to that contained in the *key information document* needs to be disclosed under *COBS 18.5.10AR*.  
[deleted]~~

...

Insert the following new sections after COBS 18.5 (Residual CIS operators and small authorised UK AIFMs). The text is not underlined.

## **18.5A Full-scope UK AIFMs and incoming EEA AIFM branches**

### Application

18.5A.1 R Subject to *COBS 18.5A.2R*, this section applies to a *firm* which is:

(1) a *full-scope UK AIFM* of:

(a) a *UK AIF*;

(b) an *EEA AIF*; and

(c) a *non-EEA AIF*; or

(2) an *incoming EEA AIFM branch*.

18.5A.2 R The adequate information provisions in *COBS 18.5A.11R* do not apply to a *full-scope UK AIFM* of:

(1) a *UK ELTIF* or an *EEA ELTIF*; or

(2) an *unauthorised AIF* which is not a *collective investment scheme*.

### Application or modification of general COBS rules

18.5A.3 R A *firm* when it is carrying on *AIFM investment management functions*:

(1) must comply with the *COBS rules* specified in the table, as modified by this section; and

(2) need not comply with any other *rule* in *COBS*.

Table: Application of conduct of business rules

---



Chapter, section, rule	Full-scope UK AIFM	Incoming EEA AIFM branch
1 (Application)	Applies	Applies
2.1.4R (AIFMs best interest rule)	Applies	Applies
2.3B (Inducements and research)	Applies, as modified by <i>COBS</i> 18 Annex 1	Applies, as modified by <i>COBS</i> 18 Annex 1
4.2.1R, 4.2.2G and 4.2.3G (The fair, clear and not misleading rule)	Applies	Applies
5.2 (E-commerce)	Applies	Applies
11.2 (Best execution for AIFMs and residual CIS operators)	Applies as modified by <i>COBS</i> 18.5A.8R	Applies as modified by <i>COBS</i> 18.5A.8R
18.5A (Full-scope AIFMs and incoming EEA AIFM branches)	Applies as modified by <i>COBS</i> 18.5A.2R	Applies
18 Annex 1 (Research and inducements for collective portfolio managers)	Applies (subject to <i>COBS</i> 18.5A.7R)	Applies (subject to <i>COBS</i> 18.5A.7R)

- 18.5A.4 G (1) For activities that are not *AIFM investment management functions*, the *COBS rules* apply under the general application rule, as modified in *COBS* 1 Annex 1.
- (2) This may include, for example, activities relating to the administration of the *AIF*, *marketing* and activities related to the assets of the *AIF*.

#### General modifications

- 18.5A.5 R Where *COBS rules* specified in the table in *COBS* 18.5A.3R apply to a *firm* carrying on *AIFM investment management functions*, references to *customer* or *client* are to be construed as references to any *AIF* for which the *firm* is acting or intends to act.

#### Research and inducements

- 18.5A.6 R Subject to *COBS* 18.5A.7R, a *firm* must comply with *COBS* 18 Annex 1 (Research and inducements for collective portfolio managers) when

*executing* orders, or placing orders with other entities for execution, that relate to *financial instruments* for, or on behalf of, the *fund*.

- 18.5A.7 R *COBS* 18 Annex 1 does not apply in relation to an *AIF* which in accordance with its core investment policy:
- (1) does not generally invest in *financial instruments* that can be:
    - (a) registered in a *financial instruments* account opened in the books of a *depository*; or
    - (b) physically delivered to the *depository*; or
  - (2) generally invests in *issuers* or *non-listed companies* to potentially acquire *control* over such companies either individually or jointly with other *funds*.

#### Modification of best execution

- 18.5A.8 R Only the following provisions in *COBS* 11.2 apply:
- (1) *COBS* 11.2.5G;
  - (2) *COBS* 11.2.17G;
  - (3) *COBS* 11.2.23AR;
  - (4) *COBS* 11.2.24R;
  - (5) *COBS* 11.2.25R(1) and *COBS* 11.2.26R, but only where an *AIF* itself has a governing body which can provide prior consent; and
  - (6) *COBS* 11.2.27R, but only regarding the obligation on an *AIFM* to notify the *AIF* of any material changes to its order execution arrangements or execution policy.

- 18.5A.9 R References to the service of *portfolio management* in *COBS* 11.2 (Best execution for *AIFMs* and residual *CIS* operators) are to be read as references to the management by a *firm* of *financial instruments* held for or within the *AIF*.

#### Distance marketing

- 18.5A.10 G *Firms* should also be aware that if they are carrying on distance marketing activity from an establishment in the *UK*, with or for a *consumer* in the *UK* or another *EEA State*, *COBS* 5.1 applies specific requirements for that activity.

#### Adequate information

- 18.5A.11 R A *full-scope UK AIFM* that markets an *unauthorised AIF* to a *retail client* must, in addition to providing the information in *FUND* 3.2 (Investor

information), take reasonable steps to offer and, if requested, provide to that potential investor information about the following items:

- (1) regulator – the *firm's* statutory status in accordance with *GEN 4* Annex 1R (Statutory status disclosure);
- (2) commencement – when and how the *firm* is appointed;
- (3) accounting – the arrangements for accounting to the *AIF* or investors in the *AIF* for any transaction effected;
- (4) termination method – how the appointment of the *firm* may be terminated;
- (5) complaints procedure – how to complain to the *firm* and a statement that the investors in the *AIF* may subsequently complain directly to the *Financial Ombudsman Service*;
- (6) compensation – whether or not compensation may be available from the *compensation scheme* should the *firm* be unable to meet its liabilities, and information about any other applicable compensation scheme; and for each applicable compensation scheme, the extent and level of cover and how further information can be obtained;
- (7) exchange rates – if a liability of the *AIF* in one currency is to be matched by an asset in a different currency, or if the services to be provided to the *firm* for the *AIF* may relate to an *investment* denominated in a currency other than the currency in which the *investments* of the *AIF* are valued, a warning that a movement of exchange rates may have a separate effect, unfavourable or favourable, on the gain or loss otherwise made on the portfolio of the *AIF*;
- (8) stabilised investments – if it is the case, that the *firm* will have the right under the *AIF documents* to effect transactions in *investments*, the prices of which may be the subject of stabilisation;
- (9) research and inducements – how the *firm* intends to pay for *research*. For example, whether the *firm* proposes to pay for *research* directly or to use a *research* payment account;
- (10) acting as principal – if it is the case, that the *firm* may act as *principal* in a transaction with the *AIF*;
- (11) underwriting commitments – if it is the case, that the *firm* may for the account of the portfolio of the *AIF* underwrite or sub-underwrite any issue or offer for sale of *securities*, and:
  - (a) whether there are any restrictions on the categories of *securities* which may be underwritten and, if so, what these restrictions are; and

- (b) whether there are any financial limits on the extent of the underwriting and, if so, what these limits are;
- (12) investments in other funds – whether or not the *AIF* may invest in *funds* either managed or advised by the *firm* or by an *associate* of the *firm* or in a *fund* which is not a *regulated collective investment scheme*; and
- (13) investments in securities underwritten by the firm – whether or not the portfolio of the *AIF* may contain *securities* of which any issue or offer for sale was underwritten, managed or arranged by the *firm* or by an *associate* of the *firm* during the preceding 12 months.
- 18.5A.12 G Where a *full-scope UK AIFM* is required to publish a *key information document*, only information that is additional to that contained in the *key information document* needs to be disclosed under *COBS* 18.5A.11R.

## 18.5B UCITS management companies

### Application

- 18.5B.1 R This section applies to a *UCITS management company*.

### Application or modification of general COBS rules

- 18.5B.2 R A *firm* when it is carrying on *scheme management activity*:
- (1) must comply with the *COBS rules* specified in the table, as modified by this section; and
- (2) need not comply with any other *rule* in *COBS*.

Table: Application of conduct of business rules

Chapter, section, rule	UCITS management company
1 (Application)	Applies
2.1.1 (The client's best interests rule)	Applies
2.3 (Inducements relating to business other than MiFID, equivalent third country or optional exemption business)	Applies, as modified by <i>COBS</i> 2.3.1AR and <i>COBS</i> 2.3.2AR
2.3B (Inducements and research)	Applies, as modified by <i>COBS</i> 18 Annex 1
2.4 (Agent as client and reliance on others)	Applies

4.2.1R, 4.2.2G and 4.2.3G (The fair, clear and not misleading rule)	Applies
5.2 (E-commerce)	Applies
11.2B (Best execution for UCITS management companies)	Applies
11.3 (Client order handling)	Applies
11.7 (Personal account dealing)	Applies
11 Annex 1EU (Regulatory technical standard 28)	Applies as <i>rules</i>
18.5B (UCITS management companies)	Applies
18 Annex 1 (Research and inducements for collective portfolio managers)	Applies

- 18.5B.3 G (1) For activities which are not *scheme management activity*, the *COBS rules* apply under the general application rule, as modified in *COBS 1 Annex 1*.
- (2) This may include, for example, activities relating to the administration and *marketing* of the *scheme*.

#### General modifications

- 18.5B.4 R Where *COBS rules* specified in the table in *COBS 18.5B.2R* apply to a *firm* carrying on *scheme management activities*, the following modifications apply:
- (1) subject to (2), references to *customer* or *client* are to be construed as references to any *scheme* in respect of which the *firm* is acting or intends to act; and
- (2) references to the service of *portfolio management* in *COBS 11.3 (Client order handling)* are to be read as references to *collective portfolio management*.
- 18.5B.5 G (1) *COBS 1.2 (Markets in Financial Instruments Directive)* contains modifications to the text of the *MiFID Org Regulation* where this is applied as *rules* to *firms* that are not subject to those provisions directly.
- (2) These modifications apply to the following sections that are applied in the table in *COBS 18.5B.2R*:
- (a) *COBS 11.3 (Client order handling)*; and

(b) COBS 11 Annex 1EU (Regulatory technical standard 28).

Research and inducements

- 18.5B.6 R A *firm* must comply with COBS 18 Annex 1 (Research and inducements for collective portfolio managers) when *executing* orders, or placing orders with other entities for execution, that relate to *financial instruments* for, or on behalf of, the *fund*.

Distance marketing

- 18.5B.7 G *Firms* should also be aware that if they are carrying on distance marketing activity from an establishment in the *UK*, with or for a *consumer* in the *UK* or another *EEA State*, COBS 5.1 applies specific requirements for that activity.

Amend the following as shown. Underlining indicates new text and striking though indicates deleted text.

**18.9 ICVCs**

...

- 18.9.2 G *Firms* should note that the *operator* of an *ICVC* when it is undertaking *scheme management activity* will be subject to:
- (1) COBS 18.5.2R if the *operator* is a *small authorised UK AIFM*; or
  - (2) COBS 18.5A.3R if the *operator* is a *full-scope UK AIFM* or an *incoming EEA AIFM branch*; or
  - (3) COBS 18.5B.2R if the *operator* is a *UCITS management company*.

...

**18.11 Authorised professional firms**

...

- 18.11.1 A G In certain respects, the application of COBS to an *authorised professional firm* will be determined by the *firm's* status as a *MiFID investment firm*, a *MiFID optional exemption firm* or a *firm* to which *MiFID* does not apply.

...

After COBS 18.11 (Authorised professional firms) insert the following new Annexes. The text is all new and is not underlined.

## 18 Research and inducements for collective portfolio managers

### Annex 1

1	Application	
1.1	G	This section applies to:
	(1)	a <i>small authorised UK AIFM</i> and a <i>residual CIS operator</i> , in accordance with <i>COBS 18.5.2R</i> ;
	(2)	a <i>full-scope UK AIFM</i> and an <i>incoming EEA AIFM branch</i> , in accordance with <i>COBS 18.5A.3R</i> ;
	(3)	a <i>UCITS management company</i> , in accordance with <i>COBS 18.5B.2R</i> .
1.2	G	In accordance with <i>COBS 18.5.3CR</i> and <i>COBS 18.5A.7R</i> , this section does not apply in relation to an <i>AIF</i> or <i>CIS</i> which in accordance with its core investment policy:
	(1)	does not generally invest in <i>financial instruments</i> that can be:
	(a)	registered in a <i>financial instruments</i> account opened in the books of a <i>depository</i> ; or
	(b)	physically delivered to the <i>depository</i> ; or
	(2)	generally invests in <i>issuers</i> or <i>non-listed companies</i> to potentially acquire <i>control</i> over such companies either individually or jointly with other <i>funds</i> .
2	Rule on research and inducement	
2.1	R	When <i>executing</i> orders, or placing orders with other entities for execution, that relate to <i>financial instruments</i> for, or on behalf of, the <i>fund</i> , a <i>firm</i> must not:
	(1)	accept and retain any fees, commissions or monetary benefits; or
	(2)	accept any non-monetary benefits,
		where these are paid or provided by any third party or a <i>person</i> acting on behalf of a third party.
2.2	R	A <i>firm</i> must:
	(1)	return to the <i>fund</i> as soon as reasonably possible after receipt any fees, commissions or any monetary benefits paid or provided by any third party or a <i>person</i> acting on behalf of a third party in relation to the services provided to that <i>fund</i> ; and

		(2)	inform the investors in the <i>fund</i> about the fees, commissions or any monetary benefits transferred to them (see paragraph 2.4G).
2.3	R	Paragraph 2.1R does not apply to:	
		(1)	minor non-monetary benefits that are:
		(a)	capable of enhancing the quality of service provided to the <i>fund</i> (see paragraph 3.1R); and
		(b)	of a scale and nature such that they could not be judged to impair the <i>firm's</i> compliance with its duty to act honestly, fairly and professionally in the best interests of the <i>fund</i> ; and
		(2)	<i>research</i> if the requirements of COBS 2.3B (Inducements and research) as modified by paragraph 4 are met.
2.4	G	A <i>firm</i> may inform investors in the <i>fund</i> about the fees, commissions or monetary benefits transferred to them through:	
		(1)	the periodic reporting statements provided to <i>participants</i> in an <i>unregulated collective investment scheme</i> in accordance with COBS 18.5.11R for a <i>small authorised UK AIFM</i> or a <i>residual CIS operator</i> ; or
		(2)	the annual reports provided on request to investors, for a <i>small authorised UK AIFM</i> in relation to an <i>authorised AIF</i> , a <i>full-scope UK AIFM</i> , an <i>incoming EEA AIFM branch</i> or a <i>UCITS management company</i> .
3	Acceptable minor non-monetary benefits		
3.1	R	A <i>firm</i> must not accept a non-monetary benefit unless it is a minor non-monetary benefit which is reasonable, proportionate and of a scale that is unlikely to influence the <i>firm's</i> behaviour in any way that is detrimental to the interests of the <i>fund</i> , and which consists of:	
		(1)	information or documentation relating to a <i>financial instrument</i> that is generic in nature; or
		(2)	written material from a third party that:
		(a)	is either:
		(i)	commissioned and paid for by a corporate <i>issuer</i> or potential <i>issuer</i> to promote a new issuance by the company; or
		(ii)	produced on an ongoing basis, where the third party is contractually engaged and paid by the <i>issuer</i> ;



		(b)	clearly discloses the relationship between the third party and the <i>issuer</i> ; and
		(c)	is made available at the same time to any <i>firm</i> wishing to receive it, or to the general public; or
		(3)	participation in conferences, seminars and other training events on the benefits and features of a specific <i>financial instrument</i> ; or
		(4)	hospitality of a reasonable de minimis value, such as food and drink during a business meeting or another training event mentioned under (3); or
		(5)	<i>research</i> relating to an issue of <i>shares, debentures, warrants</i> or <i>certificates representing certain securities</i> by an <i>issuer</i> , which is:
		(a)	produced by a <i>person</i> that is providing underwriting or placing services to the <i>issuer</i> on that issue;
		(b)	made available to prospective investors in the issue; and
		(c)	disseminated before the issue is completed; or
		(6)	free sample <i>research</i> provided for a limited trial period where:
		(a)	the trial period lasts no longer than three months;
		(b)	the trial period is not commenced with a provider within 12 <i>months</i> from the termination of an arrangement for the provision of <i>research</i> (including a previous trial period) with that provider;
		(c)	the research provider offering the free trial has no existing relationship with the recipient <i>firm</i> for the provision of <i>research</i> or <i>execution</i> services; and
		(d)	the recipient <i>firm</i> keeps records of the dates of any trial periods, and sufficient records to demonstrate compliance with the conditions in (a) to (c) above.
3.2	G	An acceptable minor non-monetary benefit consisting of information or documentation relating to a <i>financial instrument</i> that is generic in nature may include material provided by a third party that:	
		(1)	consists of:
		(a)	short term market commentary on the latest economic statistics; or
		(b)	company results or information on upcoming releases or events;
		(2)	contains only a brief unsubstantiated summary of the third party's own

			opinion on such information; and
		(3)	does not include any substantive analysis (for example, where the third party simply reiterates a view based on an existing recommendation or substantive research).
3.3	G	A non-monetary benefit that involves a third party allocating valuable resources to the <i>firm</i> is not a minor non-monetary benefit.	
4	Inducements and research		
4.1	R	A <i>firm</i> must comply with <i>COBS</i> 2.3B, as modified by this section, when <i>executing</i> orders, or placing orders with other entities for execution, that relate to <i>financial instruments</i> for, or on behalf of, the <i>fund</i> .	
	General modifications		
4.2	R	The application provision in <i>COBS</i> 2.3B.1R (Application) and associated <i>guidance</i> in <i>COBS</i> 2.3B.2G do not apply.	
4.3	R	Where <i>COBS</i> 2.3B applies to a <i>firm</i> , the following modifications apply:	
		(1)	in <i>COBS</i> 2.3B.3R:
		(a)	the reference to “providing <i>investment services</i> or <i>ancillary services</i> to <i>clients</i> ” is to be construed as a reference to “ <i>executing</i> orders, or placing orders with other entities for execution, that relate to <i>financial instruments</i> for, or on behalf of, the <i>fund</i> ”; and
		(b)	the reference to “ <i>COBS</i> 2.3A.5R, <i>COBS</i> 2.3A.15R or <i>COBS</i> 2.3A.16R” is to be construed as a reference to <i>COBS</i> 18 Annex 1 2.1R;
		(2)	in <i>COBS</i> 2.3B.4R(1)(a), the reference to “third party <i>research</i> in respect of <i>investment services</i> rendered to its <i>clients</i> ” is to be construed as a reference to “third party <i>research</i> in respect of <i>scheme management activity</i> or, for an <i>AIFM</i> , <i>AIFM investment management functions</i> ”;
		(3)	in <i>COBS</i> 2.3B.11R(3)(b)(ii), the reference to “the <i>firm</i> ’s policy for using third party <i>research</i> established under <i>COBS</i> 2.3B.12R” is to be construed as a reference to “the <i>firm</i> ’s written statement made in accordance with <i>COBS</i> 18 Annex 1 4.8R”;
		(4)	in <i>COBS</i> 2.3B.22G:
		(a)	the reference to “ <i>COBS</i> 2.3A.19R or <i>COBS</i> 2.3A” is to be construed as a reference to “ <i>COBS</i> 18 Annex 1 3.1R or <i>COBS</i> 18 Annex 1 3.2G”; and

		(b)	the reference to “ <i>COBS 2.3A.15R</i> or <i>COBS 2.3A</i> ” is to be construed as a reference to “ <i>COBS 18 Annex 1 2.1R</i> ”; and
		(5)	in <i>COBS 2.3B.24G</i> , the reference to <i>COBS 11.2A</i> is to be construed as a reference to:
		(a)	<i>COBS 11.2</i> for <i>small authorised UK AIFMs, residual CIS operators, full-scope UK AIFMs</i> and <i>incoming EEA AIFM branches</i> ; and
		(b)	<i>COBS 11.2B</i> for <i>UCITS management companies</i> .
4.4	R		<i>COBS 2.3B.8R(1)</i> and the reference to “agreeing the <i>research charge</i> with its <i>clients</i> ” in <i>COBS 2.3B.4R(2)(a)</i> only apply if the <i>fund</i> has its own <i>governing body</i> which is independent of the <i>firm</i> .
4.5	G	(1)	An example of a <i>fund</i> that has its own <i>governing body</i> which is independent of the <i>firm</i> is a <i>fund</i> that is a <i>body corporate</i> where the <i>firm</i> is not a <i>director</i> of the <i>fund</i> .
		(2)	An example of a <i>fund</i> that does not have its own <i>governing body</i> which is independent of the <i>firm</i> is a <i>fund</i> that is a <i>body corporate</i> where the <i>firm</i> is the sole <i>director</i> of the <i>fund</i> .
4.6	G		In accordance with <i>COBS 18.5.3R(1)</i> , <i>COBS 18.5A.5R</i> and <i>COBS 18.5B.4R(1)</i> , references to <i>client</i> are to be construed as references to any <i>fund</i> in respect of which the <i>firm</i> is acting or intends to act.
			Disapplication of disclosure provisions
4.7	R		The following provisions do not apply and references to them in <i>COBS 2.3B</i> are to be ignored:
		(1)	<i>COBS 2.3B.5R</i> ;
		(2)	<i>COBS 2.3B.6G</i> ;
		(3)	<i>COBS 2.3B.8R(2)</i> ;
		(4)	<i>COBS 2.3B.9G</i> ;
		(5)	<i>COBS 2.3B.12R</i> ; and
		(6)	<i>COBS 2.3B.20R</i> .
			Prior disclosure of the research account to investors
4.8	R		A <i>firm</i> using a <i>research payment account</i> must set out in writing:
		(1)	how the <i>firm</i> will comply with the elements of <i>COBS 2.3B.4R(4)</i> ;

		(2)	how <i>research</i> purchased through the <i>research</i> payment account may benefit the <i>fund</i> , taking into account its investment objective, policy and strategy;
		(3)	the approach the <i>firm</i> will take to allocate the costs of research fairly among the <i>funds</i> it manages;
		(4)	the manner in which, and the frequency at which, the <i>research</i> charge will be deducted from the assets of the <i>fund</i> ; and
		(5)	a statement as to where up-to-date information on the matters covered in <i>COBS</i> 18 Annex 1 4.11R can be obtained.
4.9	R		An <i>authorised fund manager</i> of an <i>authorised fund</i> must publish the information in paragraph 4.8 in the <i>fund's prospectus</i> .
4.10	G	(1)	A <i>full-scope UK AIFM</i> of an <i>unauthorised AIF</i> may wish to publish the information in paragraph 4.8 with the information to be made available about <i>AIFs</i> in accordance with <i>FUND</i> 3.2.2R(9) (Prior disclosure of information to investors).
		(2)	A <i>small authorised UK AIFM</i> of an <i>unauthorised AIF</i> or a <i>residual CIS operator</i> may wish to publish the information in paragraph 4.8 with the information to be made available about <i>AIFs</i> in accordance with <i>COBS</i> 18.5.5R (Scheme documents for an unauthorised fund).
4.11	R	(1)	A <i>firm</i> using a <i>research</i> payment account must publish:
		(a)	the budgeted amount for <i>research</i> ; and
		(b)	the amount of the estimated <i>research</i> charge for each <i>fund</i> .
		(2)	A <i>firm</i> must not increase its <i>research</i> budget or <i>research</i> charge unless it has provided clear information about the increase in good time before it is to take effect.
		(3)	The information in (1) and (2) must be made available to investors and potential investors in the <i>fund</i> .
			Periodic disclosure of the research payment account to investors
4.12	R		A <i>firm</i> using a <i>research</i> payment account must, for each <i>fund</i> it manages, provide information to investors on the total costs the <i>fund</i> has incurred for third-party <i>research</i> in the most recent annual accounting period.
4.13	R		An <i>authorised fund manager</i> of an <i>authorised fund</i> must publish the information in paragraph 4.12 in the annual long report of the <i>authorised fund</i> .
4.13	G		A <i>full-scope UK AIFM</i> of an <i>unauthorised AIF</i> may wish to publish the information in paragraph 4.12 with the information to be made available about <i>AIFs</i> in accordance with <i>FUND</i> 3.3 (Annual report of an AIF).

4.14	R	A <i>firm</i> using a <i>research</i> payment account must, on request, make available a summary of the following information to investors for the most recent annual accounting period:	
		(1)	the providers paid from the account;
		(2)	the total amount each provider was paid;
		(3)	the benefits and services received by the <i>firm</i> ; and
		(4)	how the total amount spent from the account compares to the budget set by the <i>firm</i> , noting any rebate or carry-over if residual monies are held in the account.

## 18 Record keeping: client orders and transactions

### Annex 2

1	Application		
1.1	R	This section applies to:	
		(1)	a <i>firm</i> in respect of non- <i>MiFID</i> business related to commodity derivative instruments;
		(2)	a <i>small authorised UK AIFM</i> and a <i>residual CIS operator</i> ;
		(3)	an <i>OPS firm</i> when it carries on business which is not <i>MiFID</i> or <i>equivalent third country business</i> ; and
		(4)	an <i>authorised professional firm</i> with respect to activities other than <i>non-mainstream regulated activities</i> .
1.2	G	In accordance with <i>COBS 18.5.3R(1)</i> , references to <i>client</i> in relation to a <i>small authorised UK AIFM</i> or a <i>residual CIS operator</i> are to be construed as references to any <i>fund</i> in respect of which the <i>firm</i> is acting or intends to act.	
2	Record keeping of client orders and decisions to deal		
2.1	R	(1)	A <i>firm</i> must immediately make a record of the details in (2), to the extent they are applicable to the order or decision to deal in question, in relation to:
		(a)	every order received from a <i>client</i> ;
		(b)	every decision to deal taken in providing the service of <i>portfolio management</i> ; and
		(c)	for a <i>small authorised UK AIFM</i> and <i>residual CIS operator</i> , every decision to deal taken in managing <i>financial instruments</i>

			held for or within a <i>fund</i> .
		(2)	The details referred to in (1) are:
		(a)	the name or other designation of the <i>client</i> ;
		(b)	the name or other designation of any relevant <i>person</i> acting on behalf of the <i>client</i> ;
		(c)	the details specified in points (3), (4), and in points (5) to (8), of the table in 4.1;
		(d)	the nature of the order if other than buy or sell;
		(e)	the type of the order;
		(f)	any other details, conditions and particular instructions from the <i>client</i> that specify how the order must be carried out; and
		(g)	the date and exact time of the receipt of the order, or of the decision to deal by the <i>firm</i> .
3		Record-keeping of transactions	
3.1	R	Immediately after executing a <i>client</i> order, or, in the case of <i>firms</i> that transmit orders to another <i>person</i> for <i>execution</i> , immediately after receiving confirmation that an order has been <i>executed</i> , <i>firms</i> must record the following details of the transaction in question:	
		(1)	the name or other designation of the <i>client</i> ;
		(2)	the details specified in points (1) to (10) of the table in 4.1R;
		(3)	the total price, being the product of the unit price and the quantity;
		(4)	the nature of the transaction if other than buy or sell; and
		(5)	the natural person who <i>executed</i> the transaction or who is responsible for the <i>execution</i> .
3.2	R	If a <i>firm</i> transmits an order to another <i>person</i> for <i>execution</i> , the <i>firm</i> must immediately record the following details after making the transmission:	
		(1)	the name or other designation of the <i>client</i> whose order has been transmitted;
		(2)	the name or other designation of the <i>person</i> to whom the order was transmitted;
		(3)	the terms of the order transmitted; and

		(4)	the date and exact time of transmission.
4	Details to be recorded		
4.1	R	(1)	Trading day The trading day on which the transaction was executed.
		(2)	Trading time The time at which the transaction was executed, reported in the local time of the <i>competent authority</i> to which the transaction will be reported, and the basis in which the transaction is reported expressed as Co-ordinated Universal Time (UTC) +/- hours.
		(3)	Buy/sell indicator Identifies whether the transaction was a buy or sell from the perspective of the reporting <i>firm</i> or, in the case of a report to a <i>client</i> , of the <i>client</i> .
		(4)	Instrument identification This must consist of: a unique code to be decided by the <i>competent authority</i> (if any) to which the report is made identifying the <i>financial instrument</i> which is the subject of the transaction; and if the <i>financial instrument</i> in question does not have a unique identification code, the name of the instrument or, in the case of a <i>derivative</i> contract, the characteristics of the contract.
		(5)	Unit price The price per <i>security</i> or <i>derivative</i> contract excluding <i>commission</i> and (where relevant) accrued interest. In the case of a debt instrument, the price may be expressed either in terms of currency or as a percentage.
		(6)	Price notation The currency in which the price is expressed. If, in the case of a bond or other form of securitised debt the price is expressed as a percentage, that percentage must be included.
		(7)	Quantity The number of units of the <i>financial instruments</i> , the nominal value of bonds, or the number of <i>derivative</i> contracts included in the transaction.
		(8)	Quantity notation An indication as to whether the quantity is the number of units of <i>financial instruments</i> , the nominal value of bonds or the number of <i>derivative</i> contracts.
		(9)	Counterparty Identification of the counterparty to the transaction.

				(a) Where the counterparty is an <i>investment firm</i> , that identification must consist of a unique code for that <i>firm</i> , to be determined by the <i>competent authority</i> (if any) to which the report is made; where the counterparty is a <i>regulated market</i> , an <i>MTF</i> or an entity acting as its central counterparty, the unique harmonised identification code for that market, <i>MTF</i> or entity acting as central counterparty, as specified in the list published by the <i>competent authority</i> of the home Member State of that entity.
				(b) Where the counterparty is not an <i>investment firm</i> , a <i>regulated market</i> , an <i>MTF</i> or an entity acting as central counterparty, it should be identified as ‘customer/client’ of the <i>investment firm</i> which executed the transaction.
		(10)	Venue identification	Identification of the venue where the transaction was executed.  That identification must consist of: where the venue is a <i>trading venue</i> , its unique harmonised identification code; otherwise, the code ‘OTC’.

### TP 1 Transitional Provisions relating to Client Categorisation

(1)	(2)	(3)	(4)	(5)	(6)
	Material to which the transitional provision applies		Transitional provision	Transitional provision: dates in force	Handbook provisions: coming into force
			Overview of transitional provisions for client categorisation		
1.1	COBS 3	G	COBS TP 1.2 contains default transitional categorisation provisions in relation to the existing <i>clients</i> of a <i>firm</i> on 1	From 1 November 2007 indefinitely	1 November 2007



		<p>November 2007. In many cases, they allow a <i>client</i> to be automatically provided with the nearest equivalent categorisation under <i>COBS 3</i> to their previous categorisation.</p> <p><i>COBS</i> TP 1.3 explains how the transitional provisions for <i>client</i> categorisation relate to the requirement for a <i>firm</i> to act if it becomes aware that an <i>elective professional client</i> no longer satisfies the initial conditions for its categorisation. The default provisions do not prevent a <i>firm</i> categorising such a <i>client</i> differently in accordance with <i>COBS 3</i>.</p> <p><i>COBS</i> TP 1.4 provides guidance on how some of the procedural requirements in <i>COBS 3</i> apply in some such cases.</p> <p><i>COBS</i> TP 1.5 contains transitional notification obligations, which apply if the default provisions do not allow that <i>client</i> to be provided with the nearest equivalent categorisation or a <i>firm</i> chooses not to take advantage of those provisions in relation to a <i>client</i>.</p> <p><i>COBS</i> TP 1.6 contains a transitional notification obligation that applies to a <i>firm</i> that, in relation to <i>MiFID or equivalent third country business</i>, takes advantage of the default transitional categorisation provisions to classify a <i>client</i> as a <i>per se professional client</i>.</p>		
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			COBS TP 1.9 contains transitional categorisation provisions in relation to <i>clients</i> of a <i>firm</i> that are taken on between 1 November 2007 and 30 June 2008 in relation to business that is not <i>MiFID</i> or equivalent third country business.		
			Categorisation of existing clients		
1.2	COBS 3	R	<p>An existing <i>client</i> that was correctly categorised as a <i>private customer</i> immediately before 1 November 2007 is a <i>retail client</i> unless and to the extent it is given a different categorisation by the <i>firm</i> under COBS 3.</p> <p>An existing <i>client</i> that was correctly categorised as an <i>intermediate customer</i> immediately before 1 November 2007:</p> <p>is an <i>elective professional client</i> if it was an expert <i>private customer</i> that had been re-classified as an <i>intermediate customer</i> on the basis of its experience and understanding;</p> <p>or</p> <p>is otherwise a <i>per se professional client</i>;</p> <p>unless and to the extent it is given a different categorisation by the <i>firm</i> under COBS 3.</p> <p>An existing <i>client</i> that was correctly categorised as a <i>market counterparty</i> immediately before 1 November 2007 is:</p>	From 1 November 2007 indefinitely to 2 January 2018	1 November 2007

			<p>for <i>eligible counterparty business</i> that is not <i>MiFID</i> or <i>equivalent third country business</i>, an <i>eligible counterparty</i>; and</p> <p>otherwise, a <i>per se professional client</i>;</p> <p>unless and to the extent it is given a different categorisation by the <i>firm</i> under <i>COBS 3</i>.</p>		
			<p>[<b>Note:</b> Article 71(6) of, and third paragraph of section II.2 of Annex II to, <del><i>MiFID</i></del> <u>Directive 2004/39/EC of the European Parliament and of the Council</u>]</p>		
1.3	<i>COBS 3</i>	G	<p>Under <i>COBS 3.5.9R</i>, if a <i>firm</i> becomes aware that a <i>client</i> no longer fulfils the initial conditions that made it eligible for categorisation as an <i>elective professional client</i>, the <i>investment firm</i> must take the appropriate action. In the case of a <i>client</i> that has been classified as an <i>elective professional client</i> under <i>COBS TP 1.2R(2)(a)</i>, the initial conditions are those that applied to the <i>client's</i> initial categorisation as an <i>intermediate customer</i>.</p>	<p>From 1 November 2007 <del>indefinitely</del> <u>to 2 January 2018</u></p>	1 November 2007
			Former inter-professional business		
1.4	<i>COBS 3</i>	G	<p>The requirement to provide notices under <i>COBS 3.3.1R</i> only applies in relation to new <i>clients</i>. The requirement to obtain confirmation under <i>COBS 3.6.4R(2)</i> only applies in relation to prospective counterparties. These obligations are therefore</p>	<p>From 1 November 2007 <del>indefinitely</del> <u>to 2 January 2018</u></p>	1 November 2007

			not relevant to the extent that an existing <i>client</i> with whom a <i>firm</i> conducted <i>inter-professional business</i> before 1 November 2007 is categorised as an <i>eligible counterparty</i> under <i>COBS 3</i> in relation to <i>eligible counterparty business</i> .		
			Transitional notification obligations		
1.5	<i>COBS 3</i>	R	<p>(1) If a <i>firm</i> does not categorise a <i>client</i> that was a <i>private customer</i> immediately before 1 November 2007 as a <i>retail client</i>, it must notify that <i>client</i> of its categorisation as a <i>professional client</i> or <i>eligible counterparty</i>, as appropriate, on or before that date, or if later, before conducting any further business to which <i>COBS</i> applies for that <i>client</i>.</p> <p>(2) If a <i>firm</i> does not categorise a <i>client</i> that was an <i>intermediate customer</i> immediately before 1 November 2007 as a <i>professional client</i>, it must notify that <i>client</i> of its categorisation as a <i>retail client</i> or <i>eligible counterparty</i>, as appropriate, on or before that date, or if later, before conducting any further business to which <i>COBS</i> applies for that <i>client</i>.</p> <p>(3) If a <i>firm</i> does not categorise a <i>client</i> that was a <i>market counterparty</i> immediately before 1 November 2007 as an <i>eligible counterparty</i>, it must notify that <i>client</i> of its</p>	From 1 November 2007 <del>indefinitely</del> to <u>2 January 2018</u>	1 November 2007

			categorisation as a <i>retail client</i> or <i>professional client</i> on or before that date, or if later, before conducting any further business to which <i>COBS</i> applies for that <i>client</i> .		
			[ <b>Note:</b> article 28(1) of the <i>MiFID implementing Directive</i> ]		
1.6	<i>COBS</i> 3	R	If a <i>firm</i> , in relation to <i>MiFID</i> or equivalent third country business, categorises a <i>client</i> who would not otherwise have been a <i>professional client</i> as a <i>professional client</i> under <i>COBS</i> TP 1.2(2)(b) or (3)(b), it must inform that <i>client</i> about the relevant conditions for the categorisation of <i>clients</i> . This notification must be made on or before 1 November 2007, or if later, before conducting any further business to which <i>COBS</i> applies for that <i>client</i> .	From 1 November 2007 <del>indefinitely</del> to 2 January 2018	1 November 2007
			[ <b>Note:</b> article 71(6) of <i>MiFID Directive</i> 2004/39/EC of the <u>European Parliament and of the Council</u> ]		
1.7		G	A notice to a <i>professional client</i> under <i>COBS</i> TP 1.6 should inform that <i>client</i> : that they have been categorised as a <i>professional client</i> ; and of the main differences between the treatment of a <i>retail client</i> and a <i>professional client</i> .	From 1 November 2007 <del>indefinitely</del> to 2 January 2018	1 November 2007
1.8		R	The record-keeping	From 1	1 November

			requirements under <i>COBS</i> 3.8.2R apply in relation to any <i>client</i> categorisations or re-categorisations made under the transitional provisions for <i>COBS</i> 3.	November 2007 indefinitely	2007
...					

## TP 2 Other Transitional Provisions

(1)	(2)	(3)	(4)	(5)	(6)
	<b>Material to which the transitional provision applies</b>		<b>Transitional provision</b>	<b>Transitional provision: dates in force</b>	<b>Handbook provisions: coming into force</b>
...					
<u>2.- 2B</u>	<u>COBS 2.3A</u>	<u>R</u>	<u>The rules and guidance on inducements in COBS 2.3A:</u>	<u>From 3 January 2018</u>	<u>3 January 2018</u>
			(1) <u>apply to fees, commission, monetary and non-monetary benefits which are paid, provided or received by a firm in respect of services that are provided to a client on or after 3 January 2018; and</u>		
			(2) <u>do not apply to fees, commission, monetary or non-monetary benefits which are paid, provided or received in respect of services that are provided to a client before 3 January 2018.</u>		
...					

## Sch 1 Record keeping requirements

...

Sch 1.2A G A MiFID investment firm, third country investment firm or MiFID optional exemption firm should refer to the requirements on record keeping in the MiFID Org Regulation and SYSC 9. In particular, Annex I to the MiFID Org Regulation contains a minimum list of records to be kept by those firms to which it applies.

**[Note: article 72 of the MiFID Org Regulation]**

Sch 1.3 G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
...				
<u>COBS 2.3.17R(2)</u>	Each benefit given to another <i>firm</i> which does not have to be disclosed to the <i>client</i> in accordance with <u>COBS 2.3.1R (2)(b)(ii)</u>	Each benefit given	When benefit is given	5 years from date of benefit
<u>COBS 2.3A.19R(f) (iv)</u>	<u>Trial periods of research received in accordance with COBS 2.3A.19(f).</u>	<u>Dates of any trial periods, and sufficient records to demonstrate compliance with the conditions in COBS 2.3A.19(f)(i) to (iii).</u>	<u>When the trial period is received</u>	
<u>COBS 2.3A.32R</u>	<u>Evidence that any fees, commissions and non-monetary benefits paid or received are designed to enhance the quality of the relevant</u>	<u>(1) List of all fees, commissions and non-monetary benefits received; and (2) record of how any fees, commissions or non-</u>	<u>When the relevant fee, commission or non-monetary benefit is paid or received</u>	<u>Not specified</u>

	<u>service to the client</u>	<u>monetary benefits enhance the quality of the services provided and the steps taken in order not to impair compliance with the duty to act honestly, fairly and professionally in the best interests of the client</u>		
<u>COBS 2.3B.11R</u>	<u>Audit trail in relation to the operation of any research payment accounts</u>	<u>(1) Payments made to research providers; and (2) how the amounts paid were determined</u>	<u>When a payment for research is made</u>	<u>Not specified</u>
<u>COBS 2.3B.20R</u>	<u>Summary details in relation to the operation of a research payment account</u>	<u>A summary of: (1) the providers paid from the account; (2) the total amount paid over a defined period; (3) the benefits and services received; and (4) how the total amount spent compares to</u>	<u>From when the research payment account is established</u>	<u>Not specified</u>



		<u>the budget</u>		
...				
<i>COBS</i> 4.11.2G	Compliance of <i>financial</i> <i>promotions</i>	<i>Firms</i> encouraged to consider recording why a <i>financial</i> <i>promotion</i> is considered compliant.	Date of assessment of compliance	
<u><i>COBS</i></u> <u>6.1A.5AR</u> <u>(2)(e)(vi)(D)</u>	<u>Trial periods</u> <u>of research</u> <u>received in</u> <u>accordance</u> <u>with <i>COBS</i></u> <u>6.1A.5AR(2)</u> <u>(e)(vi)</u>	<u>Dates of any</u> <u>trial periods,</u> <u>and sufficient</u> <u>records to</u> <u>demonstrate</u> <u>compliance</u> <u>with the</u> <u>conditions in</u> <u><i>COBS</i></u> <u>6.1A.5AR(2)</u> <u>(e)(vi)(A) to</u> <u>(C)</u>	<u>When the trial</u> <u>period is</u> <u>received</u>	
...				
<i>COBS</i> 6.3.11R	<i>Menu</i>	Copy of each <i>menu</i>	From date on which it was updated or replaced	5 years
<i>COBS</i> 8.1.4R	<i>Client</i> <i>agreements</i> <u>Client</u> <u>agreements</u> <u>(non-MiFID</u> <u>provisions)</u>	Documents setting out rights and obligations of the <i>firm</i> and the <i>client</i>	From date of agreement	<del>From</del> <del>whichever</del> <del>is the longer</del> <del>of 5 years</del> <del>or</del> <u>At least</u> the duration of the relationship with the <i>client</i> . <del>Records</del> <del>relating</del> <del>unless the</del> <del>record</del> <del>relates to a</del> <del>pension</del> <del>transfer,</del>

				<i>pension conversion, pension opt-out or FSAVC in which case it must be retained indefinitely</i>
<u>COBS 8A.1.9R</u>	<u>Client agreements (MiFID provisions)</u>	<u>Documents setting out rights and obligations of the firm and the client</u>	<u>From date of agreement</u>	<u>At least the duration of the relationship with the client</u>
...				
<u>COBS 9.5.1G</u>	<u>Suitability (non-MiFID provisions)</u>	<i>Client information for suitability report and suitability report</i>	From date of <i>suitability report</i>	See <i>COBS 9.5.2R</i>
...				
<u>COBS 9A.4.1G</u>	<u>Suitability (MiFID provisions)</u>	<u>Client information for suitability report</u>	<u>From date of suitability report</u>	<u>At least 5 years</u>
<u>COBS 10.7.1G</u>	<u>Appropriateness (non-MiFID provisions)</u>	<i>Client information obtained in making assessment of appropriateness and the appropriateness assessment</i>	Date of assessment	<u>At least 5 years</u>
<u>COBS 10A.7.2EU</u>	<u>Appropriateness (MiFID provisions)</u>	<u>Records of appropriateness assessments including the results of such assessments</u>	<u>Date of assessment</u>	<u>At least 5 years</u>

		and any warnings given to <u>clients</u>		
<i>COBS</i> 11.3.2R	Client orders	Orders executed for <i>clients</i>	See <i>COBS</i> 11.5	5 years
<i>COBS</i> 11.5.1EU	<i>Client</i> orders and decisions to deal in <i>portfolio management</i>	Orders received from <i>clients</i> and decisions taken – details in <i>COBS</i> 11.5.1 EU	See <i>COBS</i> 11.5.1 EU	5 years
<i>COBS</i> 11.5.2EU	<i>Client</i> orders	Execution of orders	See <i>COBS</i> 11.5.1 EU	5 years
<i>COBS</i> 11.5.3EU	<i>Client</i> orders	Transmission details (see <i>COBS</i> 11.5.3 EU)	Date of transmission	5 years
<i>COBS</i> 11.5A.4EU	<u>Client orders</u>	<u>Initial orders from clients and decisions to deal</u>	<u>Immediately</u>	<u>At least 5 years</u>
<i>COBS</i> 11.5A.5EU	<u>Client orders</u>	<u>Transactions and order processing</u>	<u>Immediately</u>	<u>At least 5 years</u>
<i>COBS</i> 11.6.19R	Prior and periodic disclosure	Prior and periodic disclosure on use of dealing commission	From date of disclosure to <i>customers</i>	5 years
...				
<i>COBS</i> 11.7A.5EU	<u>Personal account dealing (MiFID provisions)</u>	<u>A record of any personal transaction notified or identified, including any authorisation</u>	<u>Date of notification, identification or decision</u>	<u>At least 5 years</u>

		<u>or prohibition</u>		
<i>COBS</i> 11.8.5R	Telephone conversations and electronic communications subject to the taping obligation (see <i>COBS</i> 11.8.5R)	Telephone conversations and electronic communications recorded under <i>COBS</i> 11.8.5R	When the conversation or electronic communication is made, sent or received	6 months
<u><i>COBS</i></u> <u>11A.1.9EU</u>	<u>Underwriting and placing</u>	<u>Content and timing of instructions received from clients and allocation decisions</u>	<u>Date of receipt of instructions or of allocation decision</u>	<u>5 years</u>
...				
<i>COBS</i> 16.2.7R	Confirmation to <i>clients</i> (non-MiFID provisions)	Copy of a confirmation	From date of despatch to <i>client</i>	<i>MiFID or equivalent third country business</i> – 5 years Other business – <u>At least 3 years</u>
<i>COBS</i> 16.3.11R	<i>Periodic statements</i> (non-MiFID provisions)	A copy of a <i>periodic statement</i> sent to a <i>client</i>	From date of despatch to <i>client</i>	<i>MiFID or equivalent third country business</i> – 5 years Other business – <u>At least 3 years</u>
<u><i>COBS</i></u> <u>16A.3.1EU</u>	<u>Confirmation to clients</u> (MiFID provisions)	<u>A copy of a confirmation</u>	<u>From date of despatch to client</u>	<u>At least 5 years</u>
<u><i>COBS</i></u>	<u>Periodic statements</u>	<u>A copy of a periodic</u>	<u>From date of despatch to</u>	<u>At least 5</u>

<u>16A.4.1EU</u>	<u>(MiFID provisions)</u>	<u>statement sent to a client</u>	<u>client</u>	<u>years</u>
...				
<u>COBS 18 Annex 2 2.1R</u>	<u>Client orders and decisions to deal in portfolio management</u>	<u>Orders received from clients and decisions taken - details in COBS 18 Annex 2 2.1R(2)</u>	<u>Immediately</u>	<u>5 years</u>
<u>COBS 18 Annex 2 3.1R</u>	<u>Client orders</u>	<u>Execution of orders</u>	<u>Immediately after executing a client order, or, in the case of firms that transmit orders to another person for execution, immediately after receiving confirmation that an order has been executed</u>	<u>5 years</u>
<u>COBS 18 Annex 2 3.2R</u>	<u>Client orders</u>	<u>Transmission details (see COBS 18 Annex 2 3.2R)</u>	<u>Immediately on transmitting an order to another person for execution</u>	<u>5 years</u>

## Annex G

### Amendments to the Banking: Conduct of Business sourcebook (BCOBS)

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

#### 1 Application

##### 1.1 General application

...

Limitations on the general application rule

1.1.2 R The general application *rule* is modified:

(1) in the chapters of this sourcebook for particular purposes; and

(2) in BCOBS 1 Annex 1 for certain types of firm in relation to the sale of structured deposits.

...

Structured deposits

1.1.8 G A firm that carries on the activity of accepting deposits which are structured deposits should refer to BCOBS 1 Annex 1.

Insert the following new Annex after BCOBS 1 (Application). All the text is new and is not underlined.

#### 1 Annex Structured deposit business

1

Application of BCOBS to firms selling structured deposits

1.1 R The BCOBS provisions shown below do not apply to a *MiFID investment firm*, a *third country investment firm* or a *MiFID optional exemption firm* in relation to the sale of *structured deposits* subject to the rules specified in COBS 1.1.1AR(2).

BCOBS provision	Description
<i>BCOBS 2</i>	Communications with banking customers

	and financial promotions
<i>BCOBS 4</i> (other than <i>BCOBS 4.1.4AG</i> and <i>BCOBS 4.3</i> )	Information to be communicated to banking customers

- 1.2 G A *firm* to which *BCOBS 1 Annex 1* paragraph 1.1R applies should read and understand the reference to the appropriate information *rule* in *BCOBS 4.1.4AG* as referring to *COBS 2.2A.2R*.
- 1.3 G A *MiFID investment firm*, a *third country investment firm* or a *MiFID optional exemption firm* that sells *structured deposits* should consider *COBS 1.1.1AR* to *COBS 1.1.1ABR*. These *rules* specify how certain provisions in *COBS* apply to a *firm* in relation to the sale of *structured deposits*.

#### Financial promotions relating to structured deposits

- 1.4 G (1) *BCOBS 2* contains *rules* which apply to a *firm* when it *communicates* a *financial promotion* that is not an *excluded communication* or when the *firm* *approves* a *financial promotion*.
- (2) If a *financial promotion* relates to a *structured deposit*, *rules* relating to past, simulated past and future performance in *COBS 4.5A* or *COBS 4.6* will also apply.

#### Structured deposits as PRIIPs

- 1.5 G *Firms* are reminded that *structured deposits* are *PRIIPs* and that the provisions of the *PRIIPs Regulation* are also relevant to such products. The *PRIIPs Regulation* requires a *person* who advises on, or sells, a *PRIIP* to provide a retail investor (as defined in the *PRIIPs Regulation*) with the *key information document* for that *PRIIP*.
- 1.6 G Where a *firm* is required to provide information in a *key information document*, it will not be required to provide the same information under *BCOBS 4.1*.

[**Note:** *BCOBS 1.1.4R(3)* and article 13 of the *PRIIPs Regulation*]

Amend the following as shown.

## **2 Communications with banking customers and financial promotions**

### **2.1 Purpose and Application: Who and what?**

...

- 2.1.4 G In accordance with *BCOBS 1 Annex 1* paragraph 1.1R, *BCOBS 2* does not

apply to a MiFID investment firm, a third country investment firm or a MiFID optional exemption firm in relation to the sale of structured deposits. A MiFID investment firm, a third country investment firm or a MiFID optional exemption firm is subject to the rules specified in COBS 1.1.1AR(2) in relation to the sale of structured deposits.

...

## 2.3 Other general requirements for communications and financial promotions

...

- 2.3.6 G ~~The Credit Institutions (Protection of Deposits) Regulations 1995~~ Depositor Protection Part of the PRA Rulebook may apply in relation to communications with a *banking customer*.

...

## 2.4 ~~Structured deposits, cash~~ Cash deposit ISAs and cash deposit CTFs

- 2.4.1 G ~~If a financial promotion relates to a structured deposit, rules in COBS 4.6 (Past, simulated past and future performance) will also apply.~~ [deleted]

...



## Annex H

## Amendments to the Client Assets sourcebook (CASS)

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

## 1 Application and general provisions

...

### 1.4 Application: particular activities

...

#### Auction regulation bidding

- 1.4.9 R ~~Where a *firm* carries on *auction regulation bidding* it may elect to comply with CASS (but not CASS 5) in respect of this activity, subject to the general modifications in CASS 1.4.10R. [deleted]~~
- 1.4.10 R ~~Where a *firm* has made an election in accordance with CASS 1.4.9R, CASS is modified so that in relation to that *firm*: [deleted]~~
- (1) ~~each reference to:~~
- (a) ~~*designated investments*;~~
- (b) ~~*safe custody assets*; and~~
- (c) ~~*contingent liability investments*;~~
- ~~includes a reference to a *two day emissions spot*;~~
- (2) ~~each reference to *designated investment business* includes *auction regulation bidding*;~~
- (3) ~~each reference to *safeguarding and administering investments*, including *safeguarding and administration of assets (without arranging)* and *arranging safeguarding and administration of assets*, includes those activities where they are carried on in relation to a *two day emissions spot*; and~~
- (4) ~~the reference in CASS 6.2.3AR to an ‘*emissions auction product*’ that is a *financial instrument*’ includes a *two day emissions spot*;~~
- 1.4.11 G ~~The effect of CASS 1.4.10R is that when a *firm* makes an election in accordance with CASS 1.4.9R: [deleted]~~

- (1) ~~a two-day emissions spot falls within the scope of each chapter in CASS (save for CASS 5), for example:~~
- (a) ~~the reference in CASS 6.1.1R(1)(b) to *safeguarding and administering investments* is modified to include the activity of safeguarding and administering a two-day emissions spot; and~~
  - (b) ~~any money that the firm receives or holds for or on behalf of a client in the course of or in connection with its *auction regulation bidding* activities will be treated as *client money* and so will need to be dealt with in accordance with the *client money rules*; and~~
- (2) ~~that election also has effect in relation to *rules and guidance* elsewhere in the *Handbook*, including:~~
- (a) ~~COBS 3 (Client categorisation);~~
  - (b) ~~COBS 6.1.7R (Information concerning safeguarding of designated investments belonging to clients and client money);~~
  - (c) ~~COBS 6.1.11R (Timing of disclosure);~~
  - (d) ~~COBS 16.4 (Statements of client designated investments or client money);~~
  - (e) ~~SUP 3 (Auditors);~~
  - (f) ~~SUP 10A.4.4R (the *table of controlled functions*) and SUP 10A.7.9R (CASS operational oversight function (CF10a));~~
  - (fa) ~~SUP 10 (Table of FCA controlled functions for relevant authorised persons), SYSC 5.2.30R (Table: FCA specified significant harm functions) and SYSC 5.2.32R (CASS oversight and the certification regime); and~~
  - (g) ~~SUP 16.14 (Client money and asset return).~~
- 1.4.12 G The option to elect to comply with CASS set out in CASS 1.4.9R only applies to the extent the *firm* is carrying on *auction regulation bidding*. Where a *firm* is carrying on *MiFID business bidding*, CASS applies to it in accordance with the general application *rules* in CASS for a *firm* that is carrying on *MiFID business*. ~~[deleted]~~
- 1.4.13 R Where a *firm* makes an election in accordance with CASS 1.4.9R it must: ~~[deleted]~~
- (1) ~~make a written record of the election, including the date from which the election is to be effective, on the date it makes the election;~~

~~(2) keep that record from the date that it is made for a period of five years after ceasing to use the opt in.~~

1.4.14 R ~~Where a *firm* that has opted in to CASS under CASS 1.4.9R subsequently decides to cease its use of that opt in it must: [deleted]~~

~~(1) make a written record of this decision, including the date from which the decision is to be effective, on the date it takes the decision;~~

~~(2) keep that record from the date that it is made for a period of five years after the date it is to be effective; and~~

~~(3) discharge any outstanding fiduciary obligations that had arisen because the *firm* had elected to comply with CASS.~~

...

## 1A CASS firm classification and operational oversight

...

### 1A.3 Responsibility for CASS operational oversight

...

1A.3.1 R (1) A CASS *small firm* must allocate to a single director or a senior manager of sufficient skill and authority responsibility for:

...

...

[Note: article 7, first paragraph of the MiFID Delegated Directive]

...

The approved persons regime and the certification regime

1A.3.1A R A CASS *medium firm* and a CASS *large firm* must allocate to a single director or senior manager of sufficient skill and authority the function of:

...

[Note: article 7, first paragraph of the MiFID Delegated Directive]

...

1A.3.2A R Where a *firm* allocates the responsibilities in CASS 1A.3.1R or CASS 1A.3.1AR (“the CASS oversight responsibilities”) to a *director* or *senior manager* (“P”), the *firm* must not allocate any other responsibilities to P in addition to the CASS oversight responsibilities, unless the *firm* is satisfied on

reasonable grounds that:

- (1) P will still be able to discharge the CASS oversight responsibilities effectively; and
- (2) the firm's full compliance with CASS will not be compromised.

[Note: article 7, second paragraph of the MiFID Delegated Directive]

1A.3.2B R A firm may allow the CASS oversight responsibilities to be shared amongst one or more directors or senior managers where this is done as part of a job share between those persons.

...

### **3 Collateral**

...

### **3.2 Requirements**

...

3.2.4 G When appropriate, *firms* that enter into the arrangements with *retail clients* covered in this chapter will be expected to identify in the statement of *custody assets* sent to the *client* in accordance with COBS 16.4 (Statements of client designated investments or client money), article 63 of the MiFID Org Regulation (see COBS 16A.5) or CASS 9.5 (Reporting to clients on request) details of the assets which form the basis of the arrangements. Where the *firm* utilises global netting arrangements, a statement of the assets held on this basis will suffice.

...

## **6 Custody rules**

### **6.1 Application**

6.1.1 R This chapter (the *custody rules*) applies to a *firm*:

...

(1E) in respect of any arrangement for a *client* to transfer full ownership of a *safe custody asset* (or an asset which would be a safe custody asset but for the arrangement) to the *firm* which is:

- (a) in the course of, or in connection with, the *firm's designated investment business*; and
- (b) for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations,

~~but~~ and the application of the *custody rules* to a *firm* under this paragraph is ~~limited to~~ set out in the *rules and guidance* in CASS 6.1.6R to CASS 6.1.9G; and

...

...

Business in the name of the firm

6.1.4 R ...

[**Note:** recital ~~26~~ 51 to *MiFID*]

...

Title transfer collateral arrangements

6.1.6 R (1) ~~The *custody rules* do not apply where a *client* transfers full ownership of a *safe custody asset* to a *firm* for the purpose of securing or otherwise covering present or future, actual, contingent or prospective obligations. [deleted]~~

~~[**Note:** recital 27 to *MiFID*]~~

(2) ~~Excepted from (1) is a transfer of the full ownership of a *safe custody asset*: [deleted]~~

~~(a) belonging to a *retail client*;~~

~~(b) whose purpose is to secure or otherwise cover that *client's* present or future, actual, contingent or prospective obligations under a *contract for differences* or a *rolling spot forex contract* that is a *future*, and in either case where that contract is entered into with a *firm* acting as *market maker*; and~~

~~(c) which is made to that *firm* or to any other *person* arranging on its behalf.~~

(3) (a) A *firm* must not enter into a *TTCA* in respect of an asset belonging to a *retail client*.

(b) Where a *firm* entered into a *TTCA* in respect of an asset belonging to a *retail client* (or one which would belong to a *retail client* but for the arrangement) before 3 January 2018, the *firm* must terminate that *TTCA*.

~~[**Note:** article 16(10) of *MiFID* and article 5(5) of the *MiFID Delegated Directive*]~~

(4) Except for CASS 6.1.6BR to CASS 6.1.9G and provided that the *TTCA* is not with a *retail client*, the *custody rules* do not apply to a

firm in respect of an asset which is subject to a *TTCA* and which would otherwise be a *safe custody asset*.

[**Note:** recital 52 to *MiFID*]

- 6.1.6A R (1) ~~Subject to (2), where a *firm* makes arrangements for the purpose of securing or otherwise covering present or future, actual, contingent or prospective obligations of a *retail client* those arrangements must not provide for the taking of a transfer of full ownership of any of that *client's safe custody assets*. [deleted]~~
- (2) The application of (1) is confined to the taking of a transfer of full ownership:
- (a) ~~whose purpose is to secure or otherwise cover that *retail client's* obligations under a *contract for differences* or a *rolling spot forex contract* that is a *future*, and in either case where that contract is entered into with a *firm* acting as *market maker*; and~~
- (b) ~~which is made to that *firm* or to any other *person arranging* on its behalf.~~
- 6.1.6B R (1) A *firm* must ensure that any arrangement relating to the transfer of full ownership of a *client's safe custody asset* to the *firm* for the purposes set out in CASS 6.1.6R(1) and CASS 6.1.6AR(1) *TTCA* is the subject of a written agreement made on a *durable medium* between the *firm* and the *client*.
- ...
- ...
- 6.1.6D R (1) A *firm* must properly consider and document the use of *TTCAs* in the context of:
- (a) the relationship between the *client's* obligation to the *firm*;  
and
- (b) the *safe custody assets* subjected to *TTCAs* by the *firm*.
- (2) A *firm* must be able to demonstrate that it has complied with the requirement under (1).
- (3) When considering, and documenting, the appropriateness of the use of *TTCAs*, a *firm* must take into account the following factors:
- (a) whether there is only a very weak connection between the *client's* obligation to the *firm* and the use of *TTCAs*, including whether the likelihood of a *client's* liability to the *firm* is low or negligible;

- (b) the extent by which the amount of *safe custody assets* subject to a *TTCA* is in excess of the *client's* obligations (including where the *TTCA* applies to all *safe custody assets* from the point of receipt by the *firm*) and whether the *client* might have no obligations at all to the *firm*; and
- (c) whether all the *client's safe custody assets* are made subject to *TTCA*s, without consideration of what obligation the *client* has to the *firm*.
- (4) Where a *firm* uses a *TTCA*, it must highlight to the *client* the risks involved and the effect of any *TTCA* on the *client's safe custody assets*.

[Note: article 6 of the *MiFID Delegated Directive*]

6.1.6E G A *firm* may choose to combine its *client* communication under CASS 6.1.6DR(4) with any communication made in order to comply with article 15.1(a)(ii) of the *SFTR* or CASS 9.3.1R(2)(d).

6.1.7 G ~~A title transfer financial collateral arrangement under the *Financial Collateral Directive* is a type of transfer of instruments to cover obligations where the *financial instrument* will not be regarded as belonging to the *client*. [deleted]~~

...

Termination of title transfer collateral arrangements

6.1.8A R (1) ~~If a *client* communicates to a *firm* that it wishes (whether pursuant to a contractual right or otherwise) to terminate an arrangement relating to the transfer of full ownership of its *safe custody asset* to a *firm* for the purposes set out in CASS 6.1.6R(1) and CASS 6.1.6AR(1) a *TTCA* and the *client's* communication is not in writing, the *firm* must make a written record of the *client's* communication which also records the date the communication was received.~~

...

- (3) (a) ~~If a *firm* agrees to the termination of an arrangement relating to the transfer of full ownership of its *safe custody asset* to a *firm* a *TTCA*, it must notify the *client* of its agreement in writing. The notification must state when the termination is to take effect and whether or not the *client's safe custody asset* will be held under the *custody rules* by the *firm* thereafter.~~
- (b) ~~If a *firm* does not agree to terminate an arrangement relating to the transfer of full ownership of a *client's safe custody asset* to the *firm* a *TTCA*, it must notify the *client* of its disagreement in writing.~~

...

6.1.8B G ~~CASS 6.1.8AR(3)(a) refers only to a *firm's* agreement to terminate an existing arrangement relating to the transfer of full ownership of a *client's* safe custody asset to the *firm* TTCA. Such agreement by a *firm* does not necessarily need to amount to the termination of its entire agreement with the *client*.~~

6.1.8C G When a *firm* notifies a *client* under CASS 6.1.8AR(3)(a) of when the termination of an arrangement relating to the transfer of full ownership of the ~~safe custody asset to a *firm*~~ a *TTCA* is to take effect, it should take into account:

...

6.1.8D R ~~If an arrangement relating to the transfer of full ownership of safe custody assets to a *firm* for the purposes set out in CASS 6.1.6R(1) and CASS 6.1.6AR(1) a *TTCA* is terminated, then the exemption at CASS 6.1.6R(4) (4) no longer applies.~~

6.1.8E G (1) ~~Following the termination of an arrangement relating to the transfer of full ownership of safe custody assets to a *firm* for the purposes set out in CASS 6.1.6R(1) and CASS 6.1.6AR(1) a *TTCA*, where a *firm* does not immediately return the safe custody assets to the *client* the *firm* should consider whether the custody rules apply in respect of the safe custody assets pursuant to CASS 6.1.1R(1A) to CASS 6.1.1R(1C).~~

(2) Where the custody rules apply to a *firm* for safe custody assets in these circumstances then the *firm* is required to comply with those rules and should, for example, update the registration under CASS 6.2 (Holding of client assets), update its records under CASS 6.6 (Records, accounts and reconciliations) and treat any *shortfall* in accordance with CASS 6.6.54R (in each case as appropriate).

6.1.9 G *Firms* are reminded that, in certain cases, the collateral rules apply where a *firm* receives collateral from a *client* in order to secure the obligations of the *client*.

...

## 6.2 Holding of client assets

### Requirement to protect clients' safe custody assets

6.2.1 R A *firm* must, when holding safe custody assets belonging to *clients*, make adequate arrangements so as to safeguard *clients'* ownership rights, especially in the event of the *firm's* insolvency, and to prevent the use of safe custody assets belonging to a *client* on the *firm's* own account except with the *client's* express consent.



[**Note:** article ~~13(7)~~ 16(8) of *MiFID*]

#### Requirement to have adequate organisational arrangements

- 6.2.2 R A *firm* must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of *clients' safe custody assets*, or the rights in connection with those *safe custody assets*, as a result of the misuse of the *safe custody assets*, fraud, poor administration, inadequate record-keeping or negligence.

[**Note:** article ~~16(1)(f)~~ 2(1)(f) of the *MiFID implementing Delegated Directive*]

...

### 6.3 Depositing assets and arranging for assets to be deposited with third parties

#### Depositing safe custody assets with third parties

- 6.3.1 R ...
- (3) When a *firm* makes the selection, appointment and conducts the periodic review referred to under this *rule*, it must take into account:
- ...
- (b) any legal requirements ~~or market practices~~ related to the holding of those *safe custody assets* that could adversely affect *clients' rights*.

...

[**Note:** article ~~17~~ 3(1) of the *MiFID implementing Delegated Directive*]

- 6.3.2 G In discharging its obligations under CASS 6.3.1R, a *firm* should also consider, as appropriate, together with any other relevant matters:
- ...
- (2) ...
- (2A) market practices related to the holding of the *safe custody asset* that could adversely affect *clients' rights*.

...

...

- 6.3.4 R (1) Subject to (2), a *firm* must only deposit *safe custody assets* with a third party in a jurisdiction which specifically regulates and supervises the safekeeping of *safe custody assets* for the account of another ~~person~~ person with a third party who is subject to such

regulation.

- (2) A *firm* must not deposit *safe custody assets* held on behalf of a *client* with a third party in a ~~country that is not an EEA State (third country)~~ ~~and~~ *third country* which does not regulate the holding and safekeeping of *safe custody assets* for the account of another ~~person~~ *person* unless:
- (a) the nature of the *safe custody assets* or of the *investment services* connected with those *safe custody assets* requires them to be deposited with a third party in that ~~third country~~ *third country*; or
  - (b) the *safe custody assets* are held on behalf of a *professional client* and the *client* requests the *firm* in writing to deposit them with a third party in that ~~third country~~ *third country*.

...

- (4) The requirements under paragraphs (1) and (2) of this rule also apply when the third party has delegated any of its functions concerning the holding and safekeeping of *safe custody assets* to another third party.

[**Note:** article ~~17(2) and (3)~~ 3(2)-(4) of the *MiFID implementing Delegated Directive*]

6.3.4A-2 G CASS 6.3.4R(4) applies to a *firm* which deposits a *safe custody asset* into an account opened with a third party under CASS 6.3.1R(1). It is therefore possible for more than one *firm* in a chain of custody to be subject to CASS 6.3.4R(4) in respect of the same *safe custody asset*.

6.3.4A-1 R A *firm* must take the necessary steps to ensure that any *client's safe custody assets* deposited with a third party are identifiable separately from the *applicable assets* belonging to the *firm* and from the *applicable assets* belonging to that third party, by means of differently titled accounts on the books of the third party or other equivalent measures that achieve the same level of protection.

[**Note:** article ~~16(1)(d)~~ 2(1)(d) of the *MiFID implementing Delegated Directive*]

...

6.3.5 R ~~Subject to CASS 6.3.6R, in relation to a third party with which a *firm* deposits *safe custody assets* belonging to a *client*, a *firm* must ensure that any agreement with that third party relating to the custody of those assets does not include the grant to that party, or to any other *person*, of a lien or a right of retention or sale over the *safe custody assets*, or a right of set-off over any *client money* derived from those *safe custody assets*. [deleted]~~

6.3.6 R ~~A *firm* may conclude an agreement with a third party relating to the custody of *safe custody assets* which confers on that party, or on another *person*~~

~~instructed by that party to provide custody services for those assets, a lien, right of retention or sale, or right of set-off in favour of that party or that other *person* only if that lien or right: [deleted]~~

- ~~(1) is confined to those *safe custody assets* held in an account with that third party or that other person and extends only to properly incurred charges and liabilities arising from the provision of custody services in respect of *safe custody assets* held in that account; or~~
- ~~(2) arises under the operating terms of a securities depository, securities settlement system or central counterparty in whose account *safe custody assets* are recorded or held, and provided that it does so for the purpose only of facilitating the settlement of trades involving the assets held in that account; or~~
- ~~(3) arises in relation to those *safe custody assets* held in a jurisdiction, outside the *United Kingdom* provided that:
 
  - ~~(a) it does so as a result of local applicable law in that jurisdiction or is necessary for that *firm* to gain access to the local market in that jurisdiction; and~~
  - ~~(b) in respect of each *client* to which those assets belong, either:
 
    - ~~(i) the *firm* has taken reasonable steps to determine that holding those assets subject to that, lien or right is in the best interests of that *client*; or~~
    - ~~(ii) where a *client* is a *professional client*, the *firm* is instructed by that *client* to hold those assets in that jurisdiction notwithstanding the existence of that lien or right.~~~~~~

- 6.3.6A R (1) A *firm* must not grant any security interest, lien or right of set-off to another *person* over *clients' safe custody assets* that enable that other *person* to dispose of the *safe custody assets* in order to recover debts unless condition (a) or (b) is satisfied:
- (a) those debts relate to:
    - (i) one or more of the *firm's clients*; or
    - (ii) the provision of services by that other *person* to one or more of the *firm's clients*; or
  - (b) to the extent those debts relate to anything else then:
    - (i) the security interest, lien or right of set-off is required by applicable law in a *third country* jurisdiction in which the *safe custody assets* are held;

- (ii) the firm discloses information to the client so that the client is informed of the risks associated with these arrangements; and
- (iii) the firm has taken reasonable steps to determine that holding safe custody assets subject to that security interest, lien or right of set-off is in the best interests of the firm's clients.

(2) Where security interests, liens or rights of set-off are granted by a firm over safe custody assets, or where the firm has been informed that they are granted, these must be recorded in client contracts and the firm's own books and records to make the ownership status of safe custody assets clear, such as in the event of an insolvency.

[**Note:** article 2(4) of the *MiFID Delegated Directive*]

6.3.6B    G    Under CASS 6.3.6AR(1)(a), a security interest, lien or right of set-off to facilitate the clearing or settlement of transactions referring to clients of the firm may be regarded as being granted in order to recover debts that relate to the provision of services to one or more clients.

6.3.6C    G    (1)    Under CASS 6.3.6AR(1)(b)(i) a security interest, lien or right of set-off may be regarded as being required by applicable law in a third country for example where:

(a)    because of applicable law it is mandatory for such a security interest, lien or right of set-off to be given in order for the safe custody assets to be held in that third country; or

(b)    (i)    in the context of the service being provided for the firm's client the applicable law of that third country requires the use of a central securities depository, securities settlement system or central counterparty;

(ii)    the rules of that central securities depository, securities settlement system or central counterparty are subject to the oversight of a regulator that performs that function under the applicable law; and

(iii)    those rules require such a security interest, lien or right of set-off to be given.

(2)    But a firm should not grant a security interest, lien or right of set-off under CASS 6.3.6AR(1)(b)(i) that is wider than that under CASS 6.3.6AR(1)(a) where another person in a third country simply requests or demands this as a condition of business.

6.3.6D    G    To comply with CASS 6.3.6AR(2) and in relation to any security interests, liens or rights of set-off over safe custody assets, a firm should ensure that:

- (1) the written terms of its *client* contracts include the *client's* agreement to another *person* having such a security interest, lien or right of set-off over the *client's* assets; and
- (2) its books and records are able to show the *safe custody assets* in respect of which the *firm* is aware that such security interests, liens, or rights of set-off exist.

6.3.7 G ~~A firm will be considered to be acting on the instructions of its professional client under CASS 6.3.6R (3)(b)(ii) where: [deleted]~~

- (1) ~~the *firm* has received an individual instruction or has a standing instruction in its terms of business which results in it holding *safe custody assets* in the relevant jurisdiction; and~~
- (2) ~~prior to acting on the instruction, the *firm* has expressly informed the *client* that holding that *client's safe custody assets* in the relevant jurisdiction will involve the granting of a lien or right over those assets. The *firm* may do this by discussing the lien or right individually with the *client* or by including reference to it in terms of business (which may themselves cross refer to a separate list of relevant jurisdictions to which CASS 6.3.6R(3)(a) applies maintained on the *firm's* website in a form accessible to *clients*) or by a similar method.~~

6.3.8 R ~~For the purpose of CASS 6.3.6R, references to a *safe custody asset* include any *client money* derived from that *safe custody asset*. *Client money* derived from a *safe custody asset* may be regarded as held in the same account as that *safe custody asset* even though that money and those assets may be recorded separately. [deleted]~~

...

## 6.4 Use of safe custody assets

- 6.4.1 R
- (1) A *firm* must not enter into arrangements for *securities financing transactions* in respect of *safe custody assets* held by it on behalf of a *client* or otherwise use such *safe custody assets* for its own account or the account of any other *person* or ~~another~~ *client* of the *firm*, unless:
    - (a) the *client* has given express prior consent to the use of the *safe custody assets* on specified terms; and
    - (b) the use of that *client's safe custody assets* is restricted to the specified terms to which the *client* consents.
  - (2) A *firm* must not enter into arrangements for *securities financing transactions* in respect of *safe custody assets* held by it on behalf of a *client* in an omnibus account ~~held~~ maintained by a third party, or

otherwise use *safe custody assets* held in such an account for its own account or for the account of ~~another client~~ any other person unless, in addition to the conditions set out in (1):

- (a) each *client* whose *safe custody assets* are held together in an omnibus account has given express prior consent in accordance with (1)(a); or
  - (b) the *firm* has in place systems and controls which ensure that only *safe custody assets* belonging to *clients* who have given express prior consent in accordance with ~~the requirements of~~ (1)(a) are so used.
- (3) For the purposes of obtaining the express prior consent of a ~~retail client~~ retail client under this rule, the consent must be clearly evidenced in writing and the signature of the retail client or an equivalent alternative mechanism means of affirmative execution is required.

[**Note:** article ~~19~~ 5(1) and (2) of the MiFID ~~implementing~~ Delegated Directive]

6.4.1A G The FCA expects *firms* which enter into arrangements under CASS 6.4.1R with *retail clients* to only enter into *securities financing transactions* and not otherwise use *retail client's clients' safe custody assets*.

6.4.1B G (1) Prior express consent by clients should be given and recorded by firms in order to allow the firm to demonstrate clearly what the client agreed to and to help clarify the status of safe custody assets.

(2) Clients' consent may be given once at the start of the commercial relationship, as long as it is sufficiently clear that the client has consented to the use of their safe custody assets.

(3) Where a firm is acting on a client instruction to lend safe custody assets and where this constitutes consent to entering into the transaction, the firm should hold evidence to demonstrate this.

[**Note:** recital 10 to the MiFID Delegated Directive]

6.4.1C R A firm must take appropriate measures to prevent the unauthorised use of safe custody assets for its own account or the account of any other person, such as:

- (1) the conclusion of agreements with clients on measures to be taken by the firm in case the client does not have enough provision on its account on the settlement date, such as borrowing of the corresponding securities on behalf of the client or unwinding the position;
- (2) the close monitoring by the firm of its projected ability to deliver on the settlement date;

(3) the putting in place of remedial measures if the *firm* cannot deliver on the settlement date; and

(4) the close monitoring and prompt requesting of undelivered securities outstanding on the settlement day and beyond.

[Note: article 5(3) of the *MiFID Delegated Directive*]

6.4.1D G Examples of remedial measures in CASS 6.4.1.CR(2) can be found in CASS 6.6.54R.

...

6.4.2A R A *firm* must adopt specific arrangements for all *clients* to ensure that the borrower of *client safe custody assets* provides the appropriate collateral and that the *firm* monitors the continued appropriateness of such collateral and takes the necessary steps to maintain the balance with the value of the *client safe custody assets*.

[Note: article 5(4) of the *MiFID Delegated Directive*]

6.4.2B G The requirement to monitor collateral under CASS 6.4.2AR applies to a *firm* where it is party to a *securities financing transaction*, including when acting as an agent for the conclusion of a *securities financing transaction* or in the case of a tripartite transaction between a borrower, a *client* and the *firm*.

[Note: recital 9 to the *MiFID Delegated Directive*]

6.4.3 R Where a *firm* uses *safe custody assets* as permitted in this section, the records of the *firm* must include details of the *client* on whose instructions the use of the *safe custody assets* has been effected, as well as the number of *safe custody assets* used belonging to each *client* who has given consent, so as to enable the correct allocation of any loss.

[Note: article ~~19(2)~~ 5(2), second sub-paragraph of the *MiFID implementing Delegated Directive*]

...

## 6.6 Records, accounts and reconciliations

...

6.6.2 R A *firm* must keep such records and accounts as necessary to enable it at any time and without delay to distinguish *safe custody assets* held for one *client* from *safe custody assets* held for any other *client*, and from the *firm's* own *applicable assets*.

[Note: article ~~16(1)(a)~~ 2(1)(a) of the *MiFID implementing Delegated Directive*]

- 6.6.3 R A *firm* must maintain its records and accounts in a way that ensures their accuracy, and in particular their correspondence to the *safe custody assets* held for *clients* and that they may be used as an audit trail.

[**Note:** article ~~16(1)(b)~~ 2(1)(b) of the *MiFID implementing Delegated Directive*]

- 6.6.4 R A *firm* must maintain a *client-specific safe custody asset record*.

- 6.6.5 G (1) The requirements in CASS 6.6.2R to CASS 6.6.4R are for a *firm* to keep internal records and accounts of *clients' safe custody assets*. Therefore any records falling under those requirements should be maintained by the *firm*, and should be separate to any records the *firm* may have obtained from any third parties, such as those with whom it may have deposited, or through whom it may have registered legal title to, *clients' safe custody assets*.

(2) The FCA expects that compliance by a *firm* with CASS 6.6 as a whole (to the extent applicable to that *firm*) will be sufficient to comply with the requirement under CASS 6.6.3R to maintain its records and accounts in a way that ensures they may be used as an audit trail.

...

External custody reconciliations

...

- 6.6.34 R A *firm* must conduct, on a regular basis, reconciliations between its internal records and accounts of *safe custody assets* held by the *firm* for *clients* and those of any third parties by whom those *safe custody assets* are held.

[**Note:** article ~~16(1)(e)~~ 2(1)(c) of the *MiFID implementing Delegated Directive*]

...

## **7 Client money rules**

...

### **7.10 Application and purpose**

...

Credit institutions and approved banks

- 7.10.16 R In relation to the application of the *client money rules* (and any other *rule* in so far as it relates to matters covered by the *client money rules*) to the firms referred to in (1) and (2), the following is not *client money*:



- (1) any deposits within the meaning of the *CRD* held by a *CRD credit institution*; and

[**Note:** article 43(8) 16(9) of *MiFID* and article 48(4) 4(1) of the *MiFID implementing Delegated Directive*]

...

- 7.10.23 G *Firms* carrying on *MiFID business* are reminded of their obligation to supply investor compensation scheme information to *clients* under *COBS 6.1.16 R* or *COBS 6.1ZA.2.18R* (Compensation Information).

...

## 7.11 Treatment of client money

### Title transfer collateral arrangements

- 7.11.1 R (1) ~~Where a *client* transfers full ownership of *money* to a *firm* for the purpose of securing or otherwise covering present or future, actual or contingent or prospective obligations, such *money* should no longer be regarded as *client money*. [deleted]~~

[**Note:** recital 27 to *MiFID*]

- (2) Excepted from (1) is a transfer of the full ownership of *money*:
- (a) ~~belonging to a *retail client*;~~
  - (b) ~~whose purpose is to secure or otherwise cover that *client's* present or future, actual, contingent or prospective obligations under a *contract for differences* or a *rolling spot forex contract* that is a *future*, and in either case where that contract is entered into with a *firm* acting as *market maker*; and~~
  - (c) ~~which is made to that *firm* or to any other *person* arranging on its behalf. [deleted]~~
- (3) (a) A *firm* must not enter into a *TTCA* in respect of *money* belonging to a *retail client*.
- (b) Where a *firm* entered into a *TTCA* in respect of *money* belonging to a *retail client* (or *money* which would belong to a *retail client* but for the arrangement) before 3 January 2018, the *firm* must terminate that *TTCA*.
- [**Note:** article 16(10) of *MiFID* and article 5(5) of the *MiFID Delegated Directive*]
- (4) *Money* that is subject to a *TTCA* does not amount to *client money*, provided that the *TTCA* is not with a *retail client*.

[Note: recital 52 to MiFID]

- 7.11.2 R (1) ~~Subject to (2), where a *firm* makes arrangements for the purpose of securing or otherwise covering present or future, actual, contingent or prospective obligations of a *retail client* those arrangements must not provide for the taking of a transfer of full ownership of any of that *client's money*. [deleted]~~
- (2) ~~The application of (1) is confined to the taking of a transfer of full ownership:~~
- (a) ~~whose purpose is to secure or otherwise cover that *retail client's* obligations under a *contract for differences* or a *rolling spot forex contract* that is a *future*, and in either case where that contract is entered into with a *firm* acting as *market maker*; and~~
- (b) ~~which is made to that *firm* or to any other *person* arranging on its behalf.~~
- 7.11.3 R (1) A *firm* must ensure that any arrangement relating to the transfer of full ownership of a *client's money* to the *firm* for the purposes set out in CASS 7.11.1R(1) and CASS 7.11.2 R(1) TTCA is the subject of a written agreement made on a *durable medium* between the *firm* and the *client*.
- ...
- ...
- 7.11.4A R (1) A *firm* must properly consider and document the use of *TTCAs* in the context of the relationship between the *client's* obligation to the *firm* and the *money* subjected to *TTCAs* by the *firm*.
- (2) A *firm* must be able to demonstrate that it has complied with the requirement under (1).
- (3) When considering, and documenting, the appropriateness of the use of *TTCAs*, a *firm* must take into account the following factors:
- (a) whether there is only a very weak connection between the *client's* obligation to the *firm* and the use of *TTCAs*, including whether the likelihood of a liability arising is low or negligible;
- (b) the extent by which the amount of *money* subject to a *TTCA* is in excess of the *client's* obligations (including where the *TTCA* applies to all *money* from the point of receipt by the *firm*) and whether the *client* might have no obligations at all to the *firm*; and

(c) whether all the *client's money* is made subject to *TTCAs*, without consideration of what obligation the *client* has to the *firm*.

(4) Where a *firm* uses a *TTCA*, it must highlight to the *client* the risks involved and the effect of any *TTCA* on the *client's money*.

**[Note: article 6 of the *MiFID Delegated Directive*]**

7.11.5 G ~~A title transfer financial collateral arrangement under the Financial Collateral Directive is an example of a type of transfer of *money* to cover obligations where that *money* will not be regarded as *client money*. [deleted]~~

...

7.11.8 G ~~Pursuant to the *client's best interests rule*, a *firm* should ensure that where a *retail client* transfers full ownership of *money* to a *firm*: [deleted]~~

(1) ~~the *client* is notified that full ownership of the *money* has been transferred to the *firm* and, as such, the *client* no longer has a proprietary claim over this *money* and the *firm* can deal with it on its own right;~~

(2) ~~the transfer is for the purposes of securing or covering the *client's* obligations;~~

(3) ~~an equivalent transfer is made back to the *client* if the provision of collateral by the *client* is no longer necessary; and~~

(4) ~~there is a reasonable link between the timing and the amount of the collateral transfer and the obligation that the *client* owes, or is likely to owe, to the *firm*.~~

Termination of title transfer collateral arrangements

7.11.9 R (1) ~~If a *client* communicates to a *firm* that it wishes (whether pursuant to a contractual right or otherwise) to terminate an arrangement relating to the transfer of full ownership of its *money* to the *firm* for the purposes set out in CASS 7.11.1.R(1) and CASS 7.11.2R(1) a *TTCA*, and the *client's* communication is not in writing, the *firm* must make a written record of the *client's* communication, which also records the date the communication was received.~~

...

(3) (a) ~~If a *firm* agrees to the termination of an arrangement relating to the transfer of full ownership of a *client's money* to the *firm* a *TTCA*, it must notify the *client* of its agreement in writing. The notification must state when the termination is to take effect and whether or not the *client's money* will be treated as *client money* by the *firm* thereafter.~~

- (b) If a *firm* does not agree to terminate ~~an arrangement to the transfer of full ownership of a *client's* money to the *firm* a TTCA~~, it must notify the *client* of its disagreement in writing.

...

- 7.11.10 G CASS 7.11.9 R(3)(a) refers only to a *firm's* agreement to terminate an existing ~~arrangement relating to the transfer of full ownership of a *client's* money to the *firm* TTCA~~. Such agreement by a *firm* does not necessarily need to amount to the termination of its entire agreement with the *client*.

- 7.11.11 G When a *firm* notifies a *client* under CASS 7.11.9R(3)(a) of when the termination of ~~an arrangement relating to the transfer of full ownership of the *client's* money to the *firm* a TTCA~~ is to take effect, it should take into account:

...

- 7.11.12 R (1) ~~If an arrangement relating to the transfer of full ownership of a *client's* money to a *firm* for the purposes set out in CASS 7.11.1R(1) and CASS 7.11.2R(1) a TTCA is terminated then, unless otherwise permitted under the *client money rules* and notified to the *client* under CASS 7.11.9R(3)(a), the *firm* must treat that *money* as *client money* from the start of the next business day following the date of termination as set out in the *firm's* notification under CASS 7.11.9R(3)(a).~~

- (2) Where the *firm's* notification under CASS 7.11.9R(3)(a) does not state when the termination of the arrangement will take effect, the *firm* must treat that *money* as *client money* from the start of the next *business day* following the date on which the *firm's* notification is made.

...

- 7.11.15 G The exclusion from the *client money rules* for delivery versus payment transactions under CASS 7.11.14R is an example of an exclusion from the *client money rules* which is permissible by virtue of recital ~~26~~ of 51 to *MiFID*.

...

## 7.12 Organisational requirements: client money

### Requirement to protect client money

- 7.12.1 R A *firm* must, when holding *client money*, make adequate arrangements to safeguard the *client's* rights and prevent the use of *client money* for its own account.

[~~Note~~: article ~~13(8)~~ 16(9) of *MiFID*]

Requirement to have adequate organisational arrangements

- 7.12.2 R A *firm* must introduce adequate organisational arrangements to minimise the risk of the loss or diminution of *client money*, or of rights in connection with *client money*, as a result of misuse of *client money*, fraud, poor administration, inadequate record-keeping or negligence.

[~~Note~~: article ~~16(1)(f)~~ 2(1)(f) of the *MiFID implementing Delegated Directive*]

...

### 7.13 Segregation of client money

...

Depositing client money

- 7.13.3 R A *firm*, on receiving any *client money*, must promptly place this *money* into one or more accounts opened with any of the following:

- (1) a central bank;
- (2) a *CRD credit institution*;
- (3) a bank authorised in a ~~third country~~ *third country*;
- (4) a *qualifying money market fund*.

[~~Note~~: article ~~18(1)~~ 4(1) of the *MiFID implementing Delegated Directive*]

...

Selection, appointment and review of third parties

- 7.13.8 R (1) A *firm* that does not deposit *client money* with a central bank must exercise all due skill, care and diligence in the selection, appointment and periodic review of the *CRD credit institution*, bank or *qualifying money market fund* where the *money* is deposited and the arrangements for the holding of this *money*.

- (2) The *firm* must consider the need for diversification as part of its due diligence under (1).

[~~Note~~: article ~~18(3)~~ 4(2) first sub-paragraph of the *MiFID implementing Delegated Directive*]

...

- 7.13.10 R When a *firm* makes the selection, appointment and conducts the periodic

review of a *CRD credit institution*, a bank or a *qualifying money market fund*, it must take into account:

- (1) the expertise and market reputation of the third party with a view to ensuring the protection of clients' rights; and
- (2) any legal or regulatory requirements or market practices related to the holding of *client money* that could adversely affect *clients' rights*.

[**Note:** article ~~18(3)~~ 4(2) second sub-paragraph of the *MiFID implementing Delegated Directive*]

...

#### Client bank accounts

- 7.13.12 R A *firm* must take the necessary steps to ensure that *client money* deposited, in accordance with CASS 7.13.3R, in a central bank, a *credit institution*, a bank authorised in a ~~third country~~ *third country* or a *qualifying money market fund* is held in an account or accounts identified separately from any accounts used to hold *money* belonging to the *firm*.

[**Note:** article ~~16(1)(e)~~ 2(1)(e) of the *MiFID implementing Delegated Directive*]

...

#### Diversification of client money

- 7.13.20-  
A G (1) In CASS 7.13.20R to CASS 7.13.25R *client money* means *money* deposited under CASS 7.13.3R and therefore includes *money* deposited under CASS 7.13.3R:
- (a) in an account opened with a *qualifying money market fund*; or
  - (b) invested in units or shares of a *qualifying money market fund*.
- (2) But *client money* held under CASS 7.14.2R does not fall within the scope of the diversification provisions at CASS 7.13.20R to CASS 7.13.25R.
- 7.13.20 R Notwithstanding the requirement at CASS 7.13.22R a *firm* must limit the funds that it deposits or holds with a relevant group entity or combination of such entities so that the value of those funds do not at any point in time exceed 20 per cent of the total of all the *client money* held by the *firm* ~~in its client bank accounts~~ under CASS 7.13.3R.

[**Note:** article 4(3) first sub-paragraph of the *MiFID Delegated Directive*]

- 7.13.21 R For the purpose of CASS 7.13.20R an entity is a relevant group entity if it is:
- (1) (a) a *CRD credit institution*; or

- (b) a bank authorised in a ~~third country~~ third country; or
- (c) a qualifying money market fund; or
- (d) the entity operating or managing the qualifying money market fund; and

(2) a member of the same *group* as that *firm*.

**[Note: article 4(3) first sub-paragraph of the *MiFID Delegated Directive*]**

7.13.21 R (1) A firm need not comply with CASS 7.13.20R if, following an assessment, it is able to demonstrate that the requirement under that rule is not proportionate, in view of:

- (a) the small balance of client money that it holds;
- (b) the nature, scale and complexity of its business; and
- (c) the safety offered by the relevant third parties referred to under CASS 7.13.20R.

(2) A firm must review any assessment it makes under (1) periodically.

(3) A firm must notify its assessment under (1) and its reviewed assessments under (2) to the FCA in accordance with CASS 7.13.21CR.

**[Note: article 4(3) second sub-paragraph of the *MiFID Delegated Directive*]**

7.13.21 G (1) In relation to the requirement to take account of a firm's "small balance" of client money at CASS 7.13.21AR(1)(a):

- (a) the FCA expects a firm that would not qualify to be a CASS small firm under the rules in CASS 1A.2, ignoring any safe custody assets that it holds, to have difficulty in justifying using the approach in CASS 7.13.21AR(1);
- (b) a firm should calculate its client money balance for these purposes in the same way required under CASS 1A.2.3R, and base its assessment under CASS 7.13.21AR(1)(a) on either:
  - (i) the highest total amount of client money that it held during the year ending on the date of the assessment; or
  - (ii) if it did not hold client money in the previous calendar year, the highest total amount of client money that the firm projects it will hold during the year starting on the date of the assessment;

- (c) this means that it may be possible for a CASS medium firm or a CASS large firm to justify using the approach in CASS 7.13.21AR(1) on the basis of small client money balances; and
- (d) in any case, a firm seeking to take that approach should also consider the points at CASS 7.13.21AR(1)(b) and (c) as part of its assessment.
- (2) In relation to the requirement under CASS 7.13.21AR(2) to review the assessment under CASS 7.13.21AR(1):
- (a) a firm should undertake a review and, where appropriate, consider whether to cease to use the approach in CASS 7.13.21AR(1) when it becomes aware of a change in the circumstances that might have led the firm to a different conclusion on its previous assessment; and
- (b) in any case a firm should undertake a review at least one year after its previous assessment until it ceases to use the approach in CASS 7.13.21AR(1).
- (3) A firm may, subject to paragraph (2)(a), wish to perform the assessment and any periodic reviews under CASS 7.13.21AR when the obligations under CASS 1A.2.9R arise.
- (4) Firms are reminded that, independent of CASS 7.13.21AR, each firm is required by CASS 1A.2.2R to determine once every year whether it is a CASS large firm, CASS medium firm or CASS small firm.
- 7.13.21 C R (1) Where a firm decides following an assessment under CASS 7.13.21AR(1) that it intends to use the approach under that rule, the firm must give the FCA notice of this upon reaching that decision and before it starts to use that approach.
- (2) Where, following a review under CASS 7.13.21AR(2) a firm decides that it will either cease to use the approach under CASS 7.13.21AR(1) or continue to use it, it must give the FCA notice of this upon reaching that decision.
- 7.13.22 R Subject to the requirement at CASS 7.13.20R, and in accordance with Principle 10 and CASS 7.12.1R, a firm must:
- (1) periodically assess review whether it is appropriate to diversify (or further diversify) the third parties with which it deposits some or all of the *client money* that the firm holds; and
- (2) whenever it concludes that it is appropriate to do so, it must make adjustments accordingly to the third parties it uses and to the amounts of *client money* deposited with them.



[Note: article 4(2) first sub-paragraph of the *MiFID Delegated Directive*]

- 7.13.23 G In complying with the requirement in CASS 7.13.22R to periodically assess review whether diversification (or further diversification) is appropriate, a *firm* should have regard to:

...

...

#### Qualifying money market funds

- 7.13.26 R Where a *firm* deposits *client money* with a *qualifying money market fund*, the *firm's* holding of those units or shares in that fund will be subject to any applicable requirements of the *custody rules*.

[Note: recital 23 4 to the *MiFID implementing Delegated Directive*]

...

- 7.13.28 R (1) A *firm* must inform a *client* that *money* placed with a *qualifying money market fund* will not be held in accordance with the requirements for holding *client money*.
- (2) A *firm* must give a *client* the right to oppose the placement of his *money* in a *qualifying money market fund* ensure that, having provided the information to the *client* under (1), the *client* gives its explicit consent to the placement of their *money* in a *qualifying money market fund*.

[Note: article 18(3) 4(2) third sub-paragraph to the *MiFID implementing Delegated Directive*]

- 7.13.29 G ~~If a *firm* that intends to place *client money* in a *qualifying money market fund* is subject to the requirement to disclose information before providing services, it should, in compliance with that obligation, notify the *client* that:~~  
[deleted]
- (1) ~~*money* held for that *client* will be held in a *qualifying money market fund*; and~~
- (2) ~~as a result, the *money* will not be held in accordance with the *client money rules*; and~~
- (3) ~~if it is the case, that the *units* will be held as the *client's safe custody assets* in accordance with the *custody rules*.~~

- 7.13.29 G A *firm* may comply with CASS 7.13.28 R(1) by informing the *client* that the units or shares in the *qualifying money market fund* will be held as *safe custody assets*.

A

...

**7.15 Records, accounts and reconciliations**

...

- 7.15.2 R A *firm* must keep such records and accounts as are necessary to enable it, at any time and without delay, to distinguish *client money* held for one *client* from *client money* held for any other *client*, and from its own money.

[**Note:** article ~~16(1)(a)~~ 2(1)(a) of the *MiFID implementing Delegated Directive*]

- 7.15.3 R A *firm* must maintain its records and accounts in a way that ensures their accuracy, and in particular their correspondence to the *client money* held for *clients* and that they may be used as an audit trail.

[**Note:** article ~~16(1)(b)~~ 2(1)(b) of the *MiFID implementing Delegated Directive*]

- 7.15.4 G (1) The requirements in CASS 7.15.2R to CASS 7.15.3R are for a *firm* to keep internal records and accounts of *client money*. Therefore, any records falling under those requirements should be maintained by the *firm* and should be separate to any records the *firm* may have obtained from any third parties, such as those with or through whom it may have deposited, or otherwise allowed to hold, *client money*.

(2) Where a *firm* complies with CASS 7.15 as a whole (to the extent applicable to that *firm*) this will be sufficient to comply with the specific duty in CASS 7.15.3R to maintain its records and accounts in a way that ensures that they can be used as an audit trail.

...

## External client money reconciliations

- 7.15.20 R A *firm* must conduct, on a regular basis, reconciliations between its internal records and accounts and those of any third parties which hold *client money*.

[**Note:** article ~~16(1)(e)~~ 2(1)(c) of the *MiFID implementing Delegated Directive*]

...

**9 Information to clients**

...

**9.3 Prime brokerage agreement disclosure annex**

...

- 9.3.2 G ...
- (2) ...
- (c) ...
- (i) ...
- (ii) the record-keeping obligations in ~~CASS 6.3.6R(3)(b)(i)~~ 6.3.6AR.
- ...

...

#### 9.4 Information to clients concerning custody assets and client money

- 9.4.1 G (1) Firms to which COBS 6.1 applies are reminded that, under *COBS 6.1.7R*, a *firm* that holds *client designated investments* or *client money* must provide its *clients* with specific information about how the *firm* holds those *client designated investments* and *client money* and how certain arrangements might give rise to specific consequences or risks for those *client designated investments* and *client money*.
- (2) COBS 6.1 (Information about the firm and compensation information (non-MiFID provisions)) applies to a firm in relation to its designated investment business, other than MiFID, equivalent third country or optional exemption business, for a retail client.
- 9.4.2 R A firm to which COBS 6.1 applies that holds custody assets or client money must, in relation to its business for which COBS 6.1 applies:
- ...
- 9.4.2A G (1) Firms to which COBS 6.1ZA applies are reminded of the requirements under article 49 of the *MiFID Org Regulation* (which are directly applicable to some *firms* and which are also applied to *firms* in other circumstances under *COBS 6.1ZA.1.3R*) to provide certain information to a *client* when the *firm* is holding the *client's financial instruments* or funds (see *COBS 6.1ZA.2.5EU*).
- (2) COBS 6.1ZA (Information about the firm and compensation information (MiFID provisions)) applies to a firm in relation to its MiFID, equivalent third country or optional exemption business for a client.
- 9.4.2B R A firm to which COBS 6.1ZA applies that holds custody assets or client money must, in relation to its business for which COBS 6.1ZA applies:
- (1) provide the information referred to in paragraphs 2 to 7 of article 49 of the MiFID Org Regulation for any custody asset that the firm may

hold for a client, including:

(a) any custody asset which is a designated investment but not a financial instrument; and

(b) any custody asset which is neither a designated investment nor a financial instrument; and

(2) provide the information in (1) to each of its clients.

9.4.3 G A firm should provide the information required in CASS 9.4.2R or CASS 9.4.2BR (as applicable) to any client for whom it holds custody assets or client money, including a retail client, a professional client and an eligible counterparty.

9.4.4 G (1) ...

(2) Firms are also reminded of the requirements in respect of communications made to retail clients under COBS 4.5 and clients under article 44 of the MiFID Org Regulation and COBS 4.5A (as applicable).

## 9.5 Reporting to clients on request

9.5.1 G (1) Firms to which COBS 16.4 applies are reminded that, under COBS 16.4, they are required to send to each of their clients at least once a year a statement in a durable medium of those designated investments and/or client money they hold for that client. A firm which manages investments may provide this statement in its periodic statement, as required under COBS 16.3.

(2) COBS 16.4 (Statements of client designated investments or client money) applies, in accordance with COBS 16.1.2R, to a firm carrying on designated investment business other than MiFID, equivalent third country or optional exemption business.

9.5.2 G Firms are reminded that the requirements in COBS 16.4, article 63 of the MiFID Org Regulation and COBS 16A.4 only set out the minimum frequency at which firms must report to their clients on their holdings of designated investments and/or client money. Firms may choose to report to their clients more frequently.

9.5.3 G Subject to CASS 9.5.5AR and CASS 9.5.6R, CASS 9.5.4R, CASS 9.5.4BR and CASS 9.5.5R require firms to comply with a client's request for information on the custody assets and/or client money the firm holds for a client under CASS 6 and/or CASS 7, and such request may be made by a client at any time.

9.5.4 R When a firm to which COBS 16.4 applies receives a request, made by a client, or on a client's behalf, for a statement of the custody assets and/or client money that the firm holds for that client, the firm must provide the

*client* with the statement requested in a *durable medium*.

- 9.5.4A G (1) Firms to which COBS 16A applies are reminded of the requirements under article 63 of the MiFID Org Regulation (which are directly applicable to some firms and which are also applied to firms in other circumstances under COBS 16A.1.2R) in relation to quarterly statements when the firm is holding a client's financial instruments or funds (see COBS 16A.4.1EU and COBS 16A.5.1EU).
- (2) COBS 16A (Reporting information to clients (MiFID provisions) applies to a firm in relation to its MiFID, equivalent third country or optional exemption business.
- 9.5.4B R When a firm to which COBS 16A applies receives a request, made by a client, or on a client's behalf, for a statement of the custody assets that the firm holds for that client, it must provide the client with a statement in a durable medium in relation to any custody assets that are not financial instruments.
- 9.5.4C G A firm to which COBS 16A applies may combine the statement required under CASS 9.5.4BR with a statement issued in response to a request made under the last sentence of the first sub-paragraph of article 63(1) of the MiFID Org Regulation.
- ...
- 9.5.5A R A firm is not required to provide a client with a statement under CASS 9.5.4R or CASS 9.5.4BR, or a copy of a statement under CASS 9.5.5R (as applicable) where the following conditions are met:
- (1) the firm provides the client with access to an online system, which qualifies as a durable medium;
- (2) up-to-date statements of the client's custody assets and/or client money can be easily accessed by the client via the system under (1); and
- (3) the firm has evidence that the client has accessed this statement at least once during the relevant quarter.
- 9.5.6 R Any charge agreed between the *firm* and the *client* for providing the statements in CASS 9.5.4R and, CASS 9.5.4BR or CASS 9.5.5R (as applicable) must reasonably correspond to the firm's actual costs be at a commercial cost.
- 9.5.7 G Any statement provided to a *client* under CASS 9.5.4R or CASS 9.5.5R (as applicable) may, although it is not required to, be in the same form as the statement a *firm* is required to provide to a *client* under *COBS 16.4* or, if appropriate, *COBS 16.3*.
- ...

- 9.5.9 G *Firms* are reminded that under CASS 3.2.4G *firms* that enter into arrangements with ~~retail clients~~ retail clients covered by CASS 3 (Collateral) should, when appropriate, identify in any statement of *custody assets* sent to the *client* under COBS 16.4 (Statements of client designated investments or client money), article 63 of the MiFID Org Regulation or COBS 16A.4 (as applicable) or this section, the details of the assets which form the basis of that collateral arrangement.

...

## 10 CASS resolution pack

### 10.1 Application, purpose and general provisions

...

#### Purpose

- 10.1.2 G The purpose of the *CASS resolution pack* is to ensure that a *firm* maintains and is able to retrieve information that would:
- (1) in the event of its insolvency, assist an insolvency practitioner in achieving a timely return of *client money* and *safe custody assets* held by the *firm* to that *firm's clients*; and
  - (2) in the event of its or another *firm's* resolution, assist the Bank of England in its capacity as resolution authority under the RRD; and
  - (3) in either case, assist the FCA.

...

- 10.1.7 R In relation to each document in a *firm's CASS resolution pack* a *firm* must:
- (1) put in place adequate arrangements to ensure that an administrator, receiver, trustee, liquidator or analogous officer appointed in respect of it or any material part of its property is able to retrieve each document as soon as practicable and in any event within 48 hours of that officer's appointment; and
  - (2) ensure that it is able to retrieve each document as soon as practicable, and in any event within 48 hours, where it has taken a decision to do so or as a result of an *FCA or Bank of England* request.

[Note: article 2(5) of the MiFID Delegated Directive]

...

### 10.3 Existing records forming part of the CASS resolution pack

- 10.3.1 R A *firm* must include, as applicable, within its *CASS resolution pack* the

records required under:

- (1) ...
- (1A) CASS 6.3.6AR (third party rights over client assets);
- (2) ...
- ...
- (11) COBS 8.1.4R or COBS 8A.1.9R (retail and professional client agreements).

...

**12 Commodity Futures Trading Commission Part 30 exemption order**

...

**12.2 Treatment of client money**

...

12.2.2 G The FCA understands that in complying with condition 2(g) of the *Part 30 exemption order*, a *firm* is representing that it will not:

...

- (3) enter into any ~~arrangement relating to the transfer of full ownership of the client's money to the firm for the purposes set out in CASS 7.11.1R(1) TTCA under CASS 7.11;~~

in relation to business conducted pursuant to the *Part 30 exemption order*.

...

[*Editor's note:* Please re-order rows in their correct numerical sequence to correspond with the order of the Handbook.]

**Sch 1 Record keeping requirements**

...

1.3G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period

...				
<del>CASS 1.4.12R and, where applicable, CASS 1.4.13R</del>	<del>For a firm which carries on <i>auction regulation bidding</i>, election (under CASS 1.4.9R) to comply with CASS in respect of this activity and, where applicable, decision to discontinue use of that opt in</del>	<del>Record of this election or, where applicable, the decision to discontinue use of the opt in, including the date on which either is to be effective</del>	<del>Upon making the election or, where applicable, upon taking the decision to discontinue use of the opt in</del>	<del>5 years from the date on which the opt in ceases to be used  [deleted]</del>
...				
CASS 6.1.6BR(3)	Written agreement regarding any arrangement relating to the transfer of full ownership of a <i>client's safe custody asset</i> to the firm for the purposes set out in CASS 6.1.6R(1) and CASS 6.1.6AR(1) a <u>TTCA</u>	...	...	<u>Five years from date agreement terminated</u> <u>From the date the agreement is entered into and until five years after the agreement is terminated</u>
CASS 6.1.8AR(1) and (2)	<del>Client's</del> <i>Client's</i> communication to firm of wish to terminate <del>TTCA</del> <u>TTCA</u>	<del>Client's</del> <i>Client's</i> communication of wish to terminate <del>TTCA</del> <u>TTCA</u>	...	...
CASS 6.1.8AR(4)	<i>Firm's</i> response to <i>client's</i> wish to terminate <del>TTCA</del> <u>TTCA</u>	<i>Firm's</i> response to <i>client's</i> wish to terminate <del>TTCA</del> <u>TTCA</u>	...	...
<del>CASS</del> <u>CASS</u> 6.1.12R(4)	...	...	...	Not specified (see default)



<u>6.1.12R(5)</u>				provision CASS <del>6.5.3R</del> <u>6.6.7R)</u>
...				
<u>CASS</u> <u>6.3.6AR(2)</u>	<u>Granting of</u> <u>security interests,</u> <u>liens or rights of</u> <u>set-off</u>	<u>Recording of</u> <u>the granting of</u> <u>security</u> <u>interests, liens</u> <u>or rights of set-</u> <u>off in the firm's</u> <u>books and</u> <u>records</u>	<u>On the</u> <u>firm's</u> <u>granting,</u> <u>or where</u> <u>the firm</u> <u>has been</u> <u>informed</u> <u>of the</u> <u>granting</u>	<u>Not</u> <u>specified</u> <u>(see default</u> <u>provision</u> <u>CASS</u> <u>6.6.7R)</u>
CASS 6.4.3R	...	...	...	<del>5 years</del> <del>(from the</del> <del>date the</del> <del>record was</del> <del>made)</del> <u>Not</u> <u>specified</u> <u>(see default</u> <u>provision</u> <u>CASS</u> <u>6.6.7R)</u>
CASS 6.6.2R	...	...	...	<del>5 years</del> <del>(from the</del> <del>date the</del> <del>record was</del> <del>made)</del> <u>Not</u> <u>specified</u> <u>(see default</u> <u>provision</u> <u>CASS</u> <u>6.6.7R)</u>
CASS 6.6.3R	...	...	...	<del>5 years</del> <del>(from the</del> <del>date the</del> <del>record was</del> <del>made)</del> <u>Not</u> <u>specified</u> <u>(see default</u> <u>provision</u> <u>CASS</u> <u>6.6.7R)</u>

CASS 6.5.2AR	<i>Client</i> agreements that include a <i>firm's</i> right to use <i>safe custody assets</i> for its own account	A copy of every executed <i>client</i> agreement that includes a <i>firm's</i> right to use <i>safe custody assets</i> for its own account	Maintain up-to-date records	5 years (from the date the record was made) <u>[deleted]</u>
CASS 6.5.3R	Default record keeping provisions for CASS 6	Refer to the rule concerned	Refer to the rule concerned	Five years from the later of: (1) the date it was created; and (2) if it has been modified since the date in (1), the date it was most recently modified <u>[deleted]</u>
CASS 6.6.4R	...	...	...	Five years (from the date the record was made) <u>Not specified (see default provision CASS 6.6.7R)</u>
<u>CASS 6.6.6R</u>	<u>Client</u> agreements that include a <u>firm's</u> right to use <u>safe custody assets</u> for its own account	A copy of every executed <u>client</u> agreement that includes a <u>firm's</u> right to use <u>safe custody assets</u> for its own account	<u>Not specified</u>	<u>Not specified (see default provision CASS 6.6.7R)</u>

<u>CASS 6.6.7R</u>	<u>Default record keeping provisions for CASS 6</u>	<u>Refer to the rule concerned</u>	<u>Refer to the rule concerned</u>	<u>Five years from the later of:</u> <u>(1) the date it was created; and</u> <u>(2) if it has been modified since the date in (1), the date it was most recently modified</u>
CASS 6.6.8R	...	...	...	Not specified (see default provision CASS 6.6.7R )
CASS 6.6.16R	...	...	...	Not specified (see default provision CASS 6.6.7R )
...				
CASS 6.6.46R(2)	...	...	...	Not specified (see default provision CASS 6.6.7R )
CASS 6.6.54R(2)(a)	...	...	...	Not specified (see default provision CASS 6.6.7R )
CASS 6.6.54R(2)(b)	...	...	...	Not specified (see default

				provision CASS 6.6.7R )
<del>CASS</del> 7.11.3R(3)  <u>CASS</u> 7.10.3R(3)	Record of election to comply with the <i>client money chapter</i>	Record of election to comply with the <i>client money chapter</i> , including the date from which the election is to be effective	Date of the election	5 years (from the date the <i>firm</i> ceases to use the election)
CASS 7.10.31R	Record of election in relation to <del>CASS 7.1.15CR</del> <u>7.10.30R</u>	Record of election in relation to <del>CASS 7.1.15CR</del> <u>7.10.30R</u>	Date of the election	Not specified (see default provision <del>CASS 7.6.4R</del> <u>7.15.5R(3)</u> )
...				
<u>CASS</u> 7.11.3R(3)	<u>Written agreement regarding any arrangement relating to a TTCA</u>	<u>The agreement</u>	<u>When agreement made</u>	<u>From the date the agreement is entered into and until five years after the agreement is terminated</u>
<del>CASS 7.2.8AER</del> <u>7.11.20R</u>	<i>Client's</i> agreement to <i>firm's</i> use of the delivery versus payment exemption in <del>CASS 7.2.8R</del> <u>7.11.14R</u>	...	...	During the time the <i>firm</i> makes use or intends to make use of the exemption in <del>CASS 7.2.8R</del> <u>7.11.14R</u> in respect of that <i>client's</i>

				monies
<u>CASS 7.11.24R</u>	<u>Client's agreement to firm's use of the delivery versus payment exemption in CASS 7.11.21R</u>	<u>Client's written agreement</u>	<u>At the time of client's agreement</u>	<u>During the time the firm makes use, or intends to make use, of the exemption in CASS 7.11.21R in respect of that client's monies</u>
CASS 7.11.55R	Client money paid to charity by the firm under CASS <del>7.2.19R</del> 7.11.50R(4)	...	...	...
CASS 7.11.57R(4)	Client money paid to charity by the firm under CASS <del>7.2.25R</del> <u>this rule</u>	<del>Indefinite</del> <u>Records of all balances released from client bank accounts, including the information in CASS 7.11.55R(1)(a) and CASS 7.11.55R(1)(b)</u>	...	Not specified (see default provision CASS <del>7.6.4R</del> 7.15.5R(3))
<del>CASS</del> <u>CASS</u> 7.13.25R(1)	...	...	...	...
<u>CASS 7.13.32R(3)</u>	<u>Physical receipts</u>	<u>Physical receipt of money</u>	<u>When the firm receives client money in the form of cash, a cheque or other payable order</u>	<u>Not specified (see default provision CASS 7.15.5R(3))</u>

<u>CASS 7.13.33R(3)</u>	<u>Future dated cheque</u>	<u>Receipt of money</u>	<u>When the firm receives client money in the form of a cheque that is dated with a future date</u>	<u>Not specified (see default provision CASS 7.15.5R(3))</u>
<u>CASS 7.4.17BR 7.13.55R</u>	...	...	...	...
CASS 7.4.19AR to CASS 7.4.19CR	<i>Alternative approach alternative approach mandatory prudent segregation record</i>	<i>Details of money segregated under CASS 7.4.18BR required by these rules</i>	<i>Maintain up-to-date</i>	<i>Five years (after the firm ceases to retain money as client money under CASS 7.4.18BR) [deleted]</i>
...				
<u>CASS 7.6.4R 7.15.5R(3)</u>	...	...	...	...
<u>CASS 7.6.7R 7.15.18R</u>	...	<i>Explanation of method of internal reconciliation of client money balances used by the firm, and if different from the standard method of internal client money reconciliation, an explanation as to how the method used affords equivalent</i>	<i>Date the firm starts using the method</i> <i>Before the firm uses a non-standard method of internal client money reconciliation on or materially changes its method</i>	<i>5 years (from the date the firm ceases to use the method)</i> <i>Not specified (see default provision CASS 7.15.5R(3))</i>

		<p>degree of protection to <i>clients</i>, and how it enables the <i>firm</i> to comply with the <i>client money distribution rules</i></p> <p><u>The <i>firm's</i> reasons for concluding that the method of <i>internal client money reconciliation</i> it proposes to use meets the criteria at CASS 7.15.18R(1)(a)</u></p>		
<u>CASS 7.8.9R(1)</u> <u>7.18.10R(1)</u>	...	...	...	...
<u>CASS 7.8.9R(2)</u> <u>7.18.10R(2)</u>	...	...	...	...
<u>CASS 7.8.10R</u> <u>7.18.11R</u>	...	...	...	...
...				
CASS 7.11.20R	<i>Client's</i> agreement to <i>firm's</i> use of the delivery versus payment exemption under CASS 7.11.14R	Written evidence of <i>client's</i> agreement	Immediate	Until the <i>firm</i> ceases to use this exemption [deleted]
CASS 7.11.24R	<i>Client's</i> agreement to <i>firm's</i> use of the delivery versus payment exemption under CASS 7.11.21R	Written evidence of <i>client's</i> agreement	Immediate	Until the <i>firm</i> ceases to use this exemption [deleted]

...				
CASS 7.13.50R; CASS 7.13.51R	...	...	...	Five years (after the <del>firm</del> <i>firm</i> ceases to retain <i>money</i> as <i>client</i> <i>money</i> under CASS 7.13.41R)
CASS 7.13.66R; CASS 7.13.67R	...	...	...	Five years (after the <del>firm</del> <i>firm</i> ceases to retain <i>money</i> as <i>client</i> <i>money</i> under CASS 7.13.65R)
CASS 7.13.74R; CASS 7.13.75R	...	...	...	Five years (after the <del>firm</del> <i>firm</i> ceases to retain <i>money</i> as <i>client</i> <i>money</i> under CASS 7.13.73R(3) (a) )
CASS 7.15.9R	...	...	...	Not specified (see default provision CASS CASS 7.15.5R(3))
...				

## Sch 2 Notification requirements



2.1G

Handbook reference	Matter to be notified	Contents of notification	Trigger event	Time allowed
...				
<del>CASS</del> <u>CASS</u> 6.6.57R(1)	...	...	...	...
...				
<del>CASS</del> <u>CASS</u> 6.6.57R(6)	Inability or material failure to conduct an <del>external custody record check</del> <u>external custody reconciliation</u> in compliance with CASS 6.6.34R to CASS 6.6.37R	...	...	...
...				
<u>CASS</u> 7.13.21CR(1)	<u>Commencement of approach under CASS 7.13.21AR(1)</u>	<u>Notice that the firm will start to use the approach under CASS 7.13.21AR(1)</u>	<u>Whenever a decision to use the approach under CASS 7.13.21AR(1) is taken</u>	<u>Upon reaching the decision and before the firm starts to use that approach</u>
<u>CASS</u> 7.13.21CR(2)	<u>Cessation or continuation of approach under CASS 7.13.21AR(1)</u>	<u>Notice that the firm will cease to use the approach under CASS 7.13.21AR(1)</u>	<u>Whenever a decision to cease the approach under CASS 7.13.21AR(1) is taken</u>	<u>Upon reaching the decision</u>
<del>CASS</del> 7.4.17DR <u>CASS</u> 7.13.57R	...	...	...	...
<del>CASS</del> <u>CASS</u> 7.15.18R(1)(b)	...	...	...	...
<u>CASS</u> 7.6.16R(2)	<del>Non-compliance or inability, in any material respect, to comply with the</del>	<del>The fact that the firm has not complied or is unable,</del>	<del>Non-compliance or inability, in any</del>	<del>Without delay</del> [deleted]

	requirements in CASS 7.6.13R to CASS 7.6.15R (Reconciliation discrepancies)	in any material respect, to comply with the requirements and the reasons for that	material respect, to comply with the requirements	
CASS 7.15.33R(6)	...	...	<u>On becoming aware</u>	...
...				

## Annex I

### Amendments to the Market Conduct sourcebook (MAR)

In this Annex, underlining indicates new text.

After MAR 5A (Organised trading facilities) insert the following new chapter. All the text is new and is not underlined.

#### 5AA Multilateral systems

##### 5AA.1 Operation of a multilateral system as an MTF or OTF

5AA.1.1 R Where a *firm* operates a *multilateral system* from an establishment in the *United Kingdom* it must operate it as a *multilateral trading facility* or an *organised trading facility*.

[**Note:** article 1(7) of *MiFID*]

5AA.1.2 G In our view, any system that merely receives, pools, aggregates and broadcasts indications of interest, bids and offers or prices should not be considered a *multilateral system*. This means that a bulletin board should not be considered a *multilateral system*. The reason is that there is no reaction of one trading interest to another other within these types of facilities. However, operating such a facility may amount to performing the activity of *making arrangements with a view to transactions in investments* (see *PERG 2.7.7BG*).

Insert the new section MAR 5.10 after MAR 5.9 (Post-trade transparency requirements for shares). All the text is new and is not underlined.

#### 5.10 Operation of an SME growth market

Registering an MTF as an SME growth market

5.10.1 R A *firm* may apply to the *FCA* to have an *MTF* registered as an *SME growth market*.

[**Note:** article 33(1) of *MiFID*]

5.10.2 R For an *MTF* to be eligible for registration as an *SME growth market*, the *firm* must have effective rules, systems and procedures which ensure that:

(1) at least 50% of the *issuers* whose *financial instruments* are admitted to trading on the *MTF* are *small and medium-sized enterprises* at the

time when the *MTF* is registered as an *SME growth market*, and in any calendar year thereafter;

- (2) appropriate criteria are set for initial and ongoing admission to trading of *financial instruments* of *issuers* on the market;
- (3) on initial admission to trading of *financial instruments* on the market, there is sufficient information to enable investors to make an informed judgement about whether or not to invest in the *financial instruments* published in either:
  - (a) an appropriate admission document; or
  - (b) a prospectus, if the *Prospectus Directive* is applicable in respect of a public offer being made in conjunction with the initial admission to trading of the *financial instrument* on the *MTF*;
- (4) there is appropriate ongoing periodic financial reporting by, or on behalf of, an *issuer* on the market, for example through audited annual reports;
- (5) the following comply with the *Market Abuse Regulation* as applicable to each of them:
  - (a) *issuers* on the market as defined in point (21) of article 3(1) of the *Market Abuse Regulation*;
  - (b) *persons* discharging managerial responsibilities as defined in point (25) of article 3(1); and
  - (c) *persons* closely associated with them as defined in point (26) of article 3(1);
- (6) regulatory information concerning the *issuers* on the market is stored and disseminated to the public; and
- (7) there are effective systems and controls aiming to prevent and detect *market abuse* on that market as required under the *Market Abuse Regulation*.

[**Note:** articles 33(2) and 33(3) of *MiFID*]

The contents of an application for registration as an *SME growth market*

- 5.10.3 G The requirements specified in *MAR* 5.10.2R:
- (1) are subject to the provisions of the *MiFID Org Regulation*, further specifying the requirements laid down in article 33(3) of *MiFID*; and
  - (2) do not detract from other obligations relevant to an *MTF* under this chapter, but a *firm* may impose additional requirements to those

specified in MAR 5.10.2R.

[**Note:** articles 33(4) and 33(8) of *MiFID*, and articles 78 and 79 of the *MiFID Org Regulation*]

- 5.10.4 G (1) The *FCA* expects an application for registration as an *SME growth market* to be accompanied by:
- (a) a copy of the rules, systems and procedures supporting the applicant's compliance with the requirements specified in MAR 5.10.2R; and
  - (b) such other information as the *FCA* may reasonably require to determine the application in accordance with MAR 5.10.2R and MAR 5.10.3R.
- (2) A *firm* intending to apply for registration as an *SME growth market* may wish to contact the Infrastructure and Trading Firms Department at the *FCA* for further advice on the preparation, timing and practical aspects of an application to register.
- 5.10.5 R (1) Where a *financial instrument* of an *issuer* is admitted to trading on one *SME growth market*, the *financial instrument* must not be traded on another *SME growth market* unless the *issuer* has been informed and has not objected.
- (2) In the case of (1), the *issuer* shall not be subject to any obligation relating to corporate governance or initial, ongoing or ad hoc disclosure with regard to the latter *SME growth market*.

[**Note:** article 33(7) of *MiFID*]

- 5.10.6 G The *issuer* of the *financial instrument* referred to in MAR 5.10.5R should be informed by notice in writing that another *SME growth market* wishes to admit the instrument to trading, and should generally be given no less than 28 *days* to object.

#### Deregistering an MTF as an SME growth market

- 5.10.7 R An *MTF* registered as an *SME growth market* may be deregistered by the *FCA* in the following cases:
- (1) the *firm* operating the market applies for its deregistration; or
  - (2) the requirements in MAR 5.10.2R are (subject to MAR 5.10.3G(1)) no longer complied with.

[**Note:** article 33(5) of *MiFID* and article 79 of the *MiFID Org Regulation*]

## 10 Commodity derivative position limits and controls, and position reporting

...

**10.4 Position reporting**

## Application

10.4.1 G The application of this section is set out in the following table:

<b>Type of firm</b>	<b>Applicable provisions</b>
<i>UK regulated market</i>	<i>MAR 10.4.2G</i>
<i>UK firm operating a multilateral trading facility or an OTF and a UK branch of a third country investment firm operating a multilateral trading facility or an OTF</i>	<i>MAR 10.4.3R to MAR 10.4.6G</i>
<i>UK MiFID investment firm</i>	<i>MAR 10.4.7D to MAR 10.4.9D <u>and</u> <u>MAR 10.4.11G</u></i>
<i>UK branch of a third country investment firm when not operating a multilateral trading facility or an OTF</i>	<i>MAR 10.4.7D to MAR 10.4.9D <u>and</u> <u>MAR 10.4.11G</u></i>
<i>Member, participant or a client of a UK trading venue</i>	<i>MAR 10.4.7D</i>
<i>EEA MiFID investment firm who is a member, participant or a client of a UK trading venue</i>	<i>MAR 10.4.10D <u>to</u> <u>MAR 10.4.11G</u></i>

...

- 10.4.11 G (1) This guidance applies to persons subject to MAR 10.4.8D(2) or MAR 10.4.10D(3).
- (2) A firm subject to MAR 10.4.8D(2) or MAR 10.4.10D(3) may use a third party technology provider to submit to the FCA the report referred to in MAR 10.4.8 D(2) provided that it does so in a manner consistent with MiFID. It will retain responsibility for the completeness, accuracy and timely submission of the report and should populate field 5 of MiFID ITS 4 Annex II with its own reporting entity identification. It should be the applicant for, and should complete and sign, the FCA MDP on-boarding application form.
- (3) MAR 10.4.11.G(2) applies to a trading venue subject to MAR 10.4.

- (4) A firm subject to MAR 10.4.8D(2) or MAR 10.4.10D(3) may arrange for the trading venue where that commodity derivative or emission allowance is traded to provide the FCA with the report provided that it does so in a manner consistent with MiFID. The firm will retain responsibility for the completeness, accuracy and timely submission of the report, submitted on its behalf. The firm should populate field 5 of MiFID ITS 4 Annex II with its own reporting entity identification.

## Annex J

## Amendments to the Supervision manual (SUP)

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

### 3 Auditors

#### 3.1 Application

...

##### 3.1.2 R Applicable sections (see SUP 3.1.1R)

...

(1) Category of firm		(2) Sections applicable to the firm	(3) Sections applicable to its auditor
...			
(7AA)	<del>A firm that has exercised an opt in to CASS in accordance with CASS 1.4.9R</del>	<del>SUP 3.1 to SUP 3.7, SUP 3.11</del>	<del>SUP 3.1, SUP 3.2, SUP 3.8, SUP 3.10.</del>
...			

...

#### 3.10 Duties of auditors: notification and report on client assets

...

Client assets report: timing of submission

##### 3.10.7 R An auditor must deliver a client assets report under SUP 3.10.4R to the FCA within four months from the end of each period covered, unless it is the auditor of a firm falling within category (10) of SUP 3.1.2R.

[Note: article 8 of the MiFID Delegated Directive]

...

### 6 Applications to vary and cancel Part 4A permission and to impose, vary or cancel requirements



...

**6.4 Applications for cancellation of permission**

...

When will the relevant regulator grant an application for cancellation of permission?

...

6.4.22 G In deciding whether to cancel a *firm's Part 4A permission*, the relevant regulator will take into account all relevant factors in relation to business carried on under that *permission*, including whether:

...

- (3) the *firm* has ceased to hold or control *custody assets* in accordance with instructions received from *clients* and COBS 6.1.7R or article 49 of the *MiFID Org Regulation* (see COBS 6.1ZA.2.5EU) (Information concerning safeguarding of designated investments belonging to clients and client money);

...

...

**6 Annex Additional guidance for a firm winding down (running off) its business**  
**4G**

...

4.2AG	1	A <i>firm</i> must comply with CASS 5.5.80R and CASS 7.11.34R (Client money: discharge of fiduciary duty) and CASS 7.11.50R (Allocated but unclaimed <del><i>client money</i></del> <u>client money</u> ) if it is ceasing to hold <i>client money</i> . A <i>firm</i> must also cease to hold or control <i>custody assets</i> in accordance with instructions received from <i>clients</i> and <u>COBS 6.1.7R or article 49 of the <i>MiFID Org Regulation</i> (see <u>COBS 6.1ZA.2.5EU</u>) (Information concerning safeguarding of designated investments belonging to clients and client money). These <i>rules</i> apply to both repayment and transfer to a third party.</u>
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...

**10A FCA Approved Persons**

**10A.1 Application**

...

Bidders in emissions auctions

10A.1.2 G For a *firm* that is exempt from *MiFID* under article 2(1)(i)(j) and whose only  
1 permission is *bidding in emissions auctions*, the only *FCA controlled functions* that apply to it are:

...

(2) the *money laundering reporting function*; and

(3) the *customer function*; ~~and~~.

(4) ~~(where it has exercised an opt-in to CASS in accordance with CASS 1.4.9R and is a CASS medium firm or a CASS large firm) the CASS operational oversight function. [deleted]~~

...

...

## 10A.8 Systems and controls functions

...

10A.8.2 R The *systems and controls function* does not apply in relation to *bidding in emissions auctions* carried on by a *firm* that is exempt from *MiFID* under article 2(1)(i)(j).

...

## 12 Appointed representatives

### 12.1 Application and purpose

~~Application~~ General application

12.1.1 R ...

Territorial application: compatibility with EU law

12.1.1A R (1) The territorial scope of SUP 12 is modified to the extent necessary to be compatible with EU law (see SUP 12.1.1BG and 12.1.1CG for guidance on this).

(2) This rule overrides every other rule in this chapter.

12.1.1B G For a UK MiFID investment firm, in our view, rules in this chapter that are within the scope of MiFID apply to its MiFID business carried on from an establishment in the United Kingdom or another EEA State.

[Note: articles 34(1) and 35(1) and (8) of MiFID]

12.1.1C G For an EEA MiFID investment firm, in our view, rules in this chapter that are within the scope of MiFID apply only to its MiFID business to the extent

they relate to the knowledge and competence of one or more of its UK tied agents. An EEA MiFID investment firm should complete the Appointed representative appointment form in SUP 12 Annex 3R when appointing a UK tied agent to carry on MiFID business on its behalf.

[Note: article 29(3) of MiFID]

### Interaction of SUP 12 and other modules in relation to MiFID business

- 12.1.1D G In addition to those rules in SUP 12 relating to the MiFID business of appointed representatives and tied agents, there are other MiFID obligations in the Handbook relevant to the knowledge and competence of tied agents and related compliance obligations (see SYSC 5.1, TC and FIT (in respect of appointed representatives that are approved persons)). These provisions are subject to the territorial application requirements in their respective chapters.

Purpose

...

- 12.1.4 G ~~The FCA has produced a leaflet entitled “Becoming an appointed representative” which provides a comprehensive summary of some of the main features of the appointed representative regime. You may download a copy of this leaflet from our website at <http://www.fca.org.uk/your-fca/documents/factsheet-becoming-an-appointed-representative> FCA’s website includes information about becoming and appointing an appointed representative. This information can be found at <https://www.fca.org.uk/firms/appointed-representatives-principals>.~~

- 12.1.5 G This chapter also sets out:
- (1) guidance about section 39A of the Act, which is relevant to a UK MiFID investment firm that is considering appointing an FCA registered tied agent ; and
  - (2) ~~It also sets out the FCA’s rules, and guidance on those rules, in relation to the appointment of:~~
    - (a) an EEA tied agent by a UK MiFID investment firm;
    - (b) a MiFID optional exemption appointed representative; and
    - (c) a structured deposit appointed representative.

## 12.2 Introduction

What is an appointed representative?

- 12.2.1 G ...

(3) If an *appointed representative* is also a  *tied agent* or a *MiFID optional exemption appointed representative* he must also satisfy the condition in section 39(1A) of the *Act* in order to be an *exempt person*. See *SUP 12.4.12G* and *SUP 12.4.13G* for *guidance* on that condition ~~and~~, *SUP 12.2.16G* for more general *guidance* about *tied agents* and *SUP 12.2.17G* for *guidance* about *MiFID optional exemption appointed representatives*.

(3A) If an *appointed representative* is also a *structured deposit appointed representative* he must also satisfy the condition in section 39(1AA) of the *Act* in order to be an *exempt person*. See *SUP 12.4.12G* and *SUP 12.4.13G* for *guidance* on that condition and *SUP 12.2.18G* for *guidance* about *structured deposit appointed representatives*.

...

...

#### Business for which an appointed representative is exempt

- 12.2.7 G (1) The *Appointed Representatives Regulations* are made by the Treasury under sections 39(1), (1C) and (1E) of the *Act*. These regulations describe, among other things, the business for which an *appointed representative* may be exempt or to which sections 20(1) and (1A) and 23(1A) of the *Act* may not apply, which is business which comprises any of:
- ...
- (b) *arranging (bringing about) deals in investments* (article 25(1) of the *Regulated Activities Order*) (that is in summary, deals in a *designated investment* (other than a *P2P agreement*), *structured deposit*, *funeral plan contract*, *pure protection contract*, *general insurance contract* or right to or interest in a funeral plan);
- (c) *making arrangements with a view to transactions in investments* (article 25(2) of the *Regulated Activities Order*) (that is in summary, transactions in a *designated investment* (other than a *P2P agreement*), *structured deposit*, *funeral plan contract*, *pure protection contract*, *general insurance contract* or right to or interest in a funeral plan);
- ...
- (i) *advising on investments (except P2P agreements)* (article 53(1) of the *Regulated Activities Order*) (that is in summary, on any *designated investment* (other than a *P2P agreement*), *structured deposit*, *funeral plan contract*, *pure protection contract*, *general insurance contract* or right to or interest in a funeral plan);

...

- (2) If the *appointed representative* is also a tied agent of an EEA firm, the business for which the *appointed representative* may be exempt includes the following additional activities:

...

...

What is a tied agent?

12.2.16 G ...

- (7) Under *MiFID*, ~~an EEA State may prohibit the appointment of tied agents by MiFID investment firms for which it is the Home State a tied agent must be registered with the competent authority of the EEA State in which it is established. If a UK MiFID investment firm appoints may appoint a tied agent established in such an EEA State, the UK but that does not, and is not likely to, conduct any business as a tied agent in the UK. That tied agent must be registered with the FCA. Such an EEA tied agent is referred to in the Handbook as an FCA registered tied agent.~~
- (8) If a UK *MiFID investment firm* appoints a *tied agent* established in an *EEA State* ~~that allows MiFID investment firms for which it is the Home State to appoint tied agents other than the UK~~, the *tied agent* must be registered with the *competent authority* of the *EEA State* in which it is established. Such an *EEA tied agent* is referred to in the *Handbook* as an *EEA registered tied agent*.

What is a MiFID optional exemption appointed representative?

- 12.2.17 G (1) A MiFID optional exemption appointed representative is a person who acts for and under the responsibility of a MiFID optional exemption firm. Such appointed representatives are not also tied agents since they do not act on behalf of a MiFID investment firm in respect of MiFID business.
- (2) Unless otherwise provided, this chapter applies to a firm that appoints a MiFID optional exemption appointed representative in the same way as it applies to the appointment of any other appointed representative.
- (3) The rules in this chapter which apply with respect to UK tied agents appointed by UK firms also apply to a firm that appoints a MiFID optional exemption appointed representative.

What is a structured deposit appointed representative?

- 12.2.18 G (1) If a MiFID investment firm or a third country investment firm

appoints a *person* to act under its full and unconditional responsibility but only for the purpose of selling, or advising *clients* in relation to, *structured deposits* (and not any of the activities within article 4(1)(29) of *MiFID*), that *person* will not be a *tier agent* in respect of that activity.

- (2) Unless otherwise provided, this chapter applies to a *firm* that appoints a *structured deposit appointed representative* in the same way as it applies to the appointment of any other *appointed representative*.
- (3) The *rules* in this chapter which apply with respect to *UK tier agents* appointed by *UK firms* also apply to a *firm* that appoints a *structured deposit appointed representative*.

### 12.3 What responsibility does a firm have for its appointed representatives or EEA tier agent agents?

...

Responsibility for EEA tier agents

- 12.3.5 R A *UK MiFID investment firm* must not appoint an *EEA registered tier agent* or allow such an agent to continue to act for it unless it accepts or has accepted responsibility in writing for the agent's activities in acting as its *EEA registered tier agent*.

[Note: paragraph 1 of article ~~23(2)~~ 29(2) of *MiFID*]

...

### 12.4 What must a firm do when it appoints an appointed representative or an EEA tier agent?

...

Appointment of an appointed representative (other than an introducer appointed representative)

...

- 12.4.2A R (1) A *firm* must ensure that:
- (a) a *tier agent* that is an *appointed representative*; or
  - (b) a *MiFID optional exemption appointed representative*; or
  - (c) a *structured deposit appointed representative*,
- is of sufficiently good repute and that it possesses appropriate

general, commercial and professional knowledge and competence so as to be able to communicate accurately all relevant information regarding the proposed service to the *client* or potential *client*. This does not limit a *firm's* obligations under SUP 12.4.2R.

- (2) A firm must ensure that its tied agent or MiFID optional exemption appointed representative also possesses appropriate general, commercial and professional knowledge and competence so as to be able to deliver the investment service or ancillary service for which the firm has accepted responsibility.

[Note: paragraphs 3 2 and 4 3 of article 23(3) 29(3) of MiFID]

- 12.4.2B G (1) A firm to which SUP 12.4.2AR applies should also have regard to SYSC 5.1 (Skills, knowledge and expertise). The requirements of the Training and Competence sourcebook (TC) and guidance in the Fit and Proper Test for Approved Persons and specified significant-harm functions (FIT) may also be relevant.

- (2) ESMA has issued guidelines for MiFID investment firms specifying the criteria for the assessment of knowledge and competence. These guidelines are relevant to tied agents (see SYSC 5.1.5ADG).

...

Appointment of an FCA registered tied agent

- 12.4.11 R If a UK MiFID investment firm appoints an FCA registered tied agent, SUP 12.4.2R and SUP 12.4.2AR apply to that firm as though the FCA registered tied agent were an appointed representative.

[Note: paragraphs 3 2 and 4 3 of article 23(3) 29(3) of MiFID]

Tied agents

- 12.4.12 G (1) A tied agent that is an appointed representative may not start to act as a tied agent until it is included on the applicable register (section 39(1A) of the Act). If the tied agent is established in the UK, the register maintained by the FCA is the applicable register for these purposes. If the tied agent is established in another EEA State, it should consult section 39(1B) of the Act to determine the applicable register is that maintained by the competent authority in the EEA State in which the tied agent is established.

...

- (4) If the tied agent is not established in the UK and is appointed by an EEA MiFID investment firm, it cannot commence acting as a tied agent until it is included on the public register of tied agents in the EEA State in which it is established (or in certain cases, of the Home State of the firm).

...

MiFID optional exemption appointed representatives and structured deposit appointed representatives

- 12.4.13 G (1) A MiFID optional exemption appointed representative or a structured deposit appointed representative may not start to act as such until it is included on the Financial Services Register (sections 39(1A) and 39(1AA) of the Act).
- (2) A firm must notify the FCA of the appointment of a MiFID optional exemption appointed representative or a structured deposit appointed representative before such appointed representative starts acting in that capacity (SUP 12.7.1R).

## 12.5 Contracts: required terms

Required contract terms for all appointed representatives

...

- 12.5.2 G ...
- (2) Under the *Appointed Representatives Regulations*, an *appointed representative* is treated as representing other counterparties if, broadly, it:
- ...
- where an “investment transaction” means a transaction to *buy, sell, subscribe for or underwrite a security or a relevant investment* (that is, a *designated investment* (other than a *P2P agreement*), *structured deposit (where applicable)*, *funeral plan contract, pure protection contract, general insurance contract* or right to or interest in a funeral plan; or
- ...
- ...
- 12.5.2A G If:
- (1) a *UK MiFID investment firm* or a *third country investment firm* appoints an *appointed representative* that is a *tied agent* or a *MiFID optional exemption appointed representative*, regulation 3(6) of the *Appointed Representatives Regulations* requires the contract between the *firm* and the *appointed representative* to contain a provision that the representative is only permitted to provide the services and carry on the activities referred to in ~~Article 4(1)(25)~~ article 4(1)(29) of



*MiFID* while entered on the Register.

- (2) a firm appoints an appointed representative that is a structured deposit appointed representative, regulation 3(6) of the Appointed Representatives Regulations requires the contract between the firm and the appointed representative to contain a provision that the representative is only permitted to sell, or advise clients on, structured deposits while entered on the Register.

...

- 12.5.6 G (1) If the *appointed representative* is appointed to give *advice on investments to retail clients* concerning *packaged products*, the *firm* should also satisfy itself that the contract requires compliance with the *rules in COBS 6 or COBS 6.1ZA* (Information about the firm and compensation information).

...

Prohibition of multiple principals for certain activities

- 12.5.6A R ...

[**Note:** articles ~~4(1)(25)~~ 4(1)(29) and ~~23(1)~~ 29(1) of *MiFID*]

...

Required contract terms for EEA tied agents

- 12.5.8 R If a *UK MiFID investment firm* appoints an *EEA tied agent*, *SUP 12.5.6AR(1A)* applies to that *firm* as though the *EEA tied agent* were an *appointed representative*.

[**Note:** articles ~~4(1)(25)~~ 4(1)(29) and ~~23(1)~~ 29(1) of *MiFID*]

...

## 12.6 Continuing obligations of firms with appointed representatives or EEA tied agents

Suitability etc. of appointed representatives

...

- 12.6.1A R A *firm* that is a ~~principal~~ *principal* of a *tied agent* that is an *appointed representative* must monitor the activities of that *tied agent* so as to ensure the *firm* complies with obligations imposed under *MiFID* (or equivalent obligations relating to the *equivalent business of a third country investment firm*) when acting through that *tied agent*.

[**Note:** paragraph 3 of ~~Article 23(2)~~ article 29(2) of *MiFID*]

...

## Obligations of firms under the training and competence rules

12.6.10 G ...

12.6.10 G A firm that is a principal of a tied agent should also refer to the guidelines for MiFID investment firms issued by ESMA specifying criteria for the assessment of knowledge and competence (see SYSC 5.1.5ADG).

A

...

## Continuing obligations of firms with tied agents

12.6.13 R A firm must ensure that its *tied agent* discloses the capacity in which he is acting and the *firm* he is representing when contacting a *client* or potential *client* or before dealing with a *client* or potential *client*.

[Note: paragraph 1 of article ~~23(2)~~ 29(2) of MiFID]

12.6.14 R A firm must take adequate measures in order to avoid any negative impact of the activities of its *tied agent* not covered by the scope of MiFID (or relating to the *equivalent business of a third country investment firm*) could have on the activities carried out by the *tied agent* on behalf of the *firm*.

[Note: paragraph 1 of article ~~23(4)~~ 29(4) of MiFID]

12.6.15 R ...

Continuing obligations of firms with MiFID optional exemption appointed representatives or structured deposit appointed representatives

12.6.15 R If a firm appoints a MiFID optional exemption appointed representative or a structured deposit appointed representative, that firm must:

A

(1) monitor the activities of the appointed representative to ensure that the firm complies with those obligations which implement provisions of MiFID and to which it is subject when acting through its appointed representative;

(2) ensure that its appointed representative discloses the capacity in which it is acting and the firm it is representing when contacting a client or potential client or before dealing with a client or potential client; and

(3) take adequate measures to avoid any negative impact that the activities of its appointed representative not covered by the scope of MiFID could have on the activities carried out by the appointed representative on behalf of the firm.

12.6.15B G In SUP 12.6.15AR(1), the obligations which implement relevant provisions

of MiFID to which a firm is subject include:

- (1) in the case of a MiFID optional exemption firm appointing a MiFID optional exemption appointed representative, those conduct requirements which are imposed pursuant to article 3(2) of MiFID; and
- (2) in the case of a firm appointing a structured deposit appointed representative, those requirements which are imposed pursuant to article 1(4) of MiFID.

...

## 12.7 Notification requirements

Notification of appointment of an appointed representative

- 12.7.1 R (1) This rule applies to a firm which intends to appoint:
- (a) an appointed representative to carry on insurance mediation activities; or
  - (b) a tied agent; or
  - (c) an appointed representative to carry on MCD credit intermediation activity; or
  - (d) a MiFID optional exemption appointed representative; or
  - (e) a structured deposit appointed representative.

...

...

- 12.7.5 G To contact the ~~Individuals, Mutuals and Policy Department~~ FCA's Contact Centre with appointed representatives enquiries:
- (1) telephone ~~on 020 7066 0019~~ 0300 500 0597; fax ~~on 020 7066 4099 0017~~; or
  - (2) write to: ~~Individuals, Mutuals and Policy Department~~ Customer Contact Centre, The Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS; or
  - (3) email ~~iva@fca.org.uk~~ firm.queries@fca.org.uk.

...

Notification of changes in information given to the FCA

- 12.7.7 R ...

(1A) If:

(a)

- (i) the scope of appointment changes such that the *appointed representative* acts as a *tiered agent*, *MiFID optional exemption appointed representative* or *structured deposit appointed representative* for the first time; and
- (ii) the *appointed representative* is not included on the ~~Financial Services Register~~ *Financial Services Register*; or

(b) the *appointed representative* ceases to act as a *tiered agent*, *MiFID optional exemption appointed representative* or *structured deposit appointed representative*;

the *appointed representative's* ~~principal~~ *principal* must give written notice to the *FCA* of that change before the *appointed representative* begins to act as a *tiered agent*, *MiFID optional exemption appointed representative* or *structured deposit appointed representative* (see *SUP* 12.4) or as soon as the *appointed representative* ceases to act as a *tiered agent*, *MiFID optional exemption appointed representative* or *structured deposit appointed representative*.

...

...

Submission in the event of failure of FCA information technology systems

- 12.7.10 G If the *FCA's* information technology systems fail and online submission is unavailable for 24 hours or more, the *FCA* will endeavour to publish a notice on its website confirming that online submission is unavailable and that *firms*, other than *credit unions*, should use the alternative methods of submission set out in *SUP* 12.7.1AR(3) and *SUP* 12.7.8AR(3) (as appropriate), and *SUP* 15.7.4R to *SUP* 15.7.9G, addressing applications for the attention of the ~~Individuals~~ Approved Persons, Passporting and Mutuals Team.

...

**12**            **Appointed representative appointment form**  
**Annex**  
**3R**

...

...

Yes No

**15** Will the appointed representative undertake structured- deposit related regulated activities? † §

...

**13A Qualifying for authorisation under the Act**

...

**13A Annex 1G Application of the Handbook to Incoming EEA Firms**

...		
5. An EEA firm that exercises an EEA right under MiFID to carry on MiFID business bidding is subject to the applicable provisions relating to its carrying on of MiFID business and any applicable EU regulations.		
<b>(1) Module of Handbook</b>	<b>(2) Potential application to an incoming EEA firm with respect to activities carried on from an establishment of the firm (or its appointed representative) in the United Kingdom</b>	<b>(3) Potential application to an incoming EEA firm with respect to activities carried on other than from an establishment of the firm (or its appointed representative) in the United Kingdom</b>
...		
SYSC	<p>...</p> <p>The common platform requirements in SYSC 4 - 10 apply as set out in Part 2 of SYSC 1 Annex 1 (Application of the common platform requirement).</p> <p>...</p> <p><u>SYSC 10A applies to an incoming EEA AIFM and an EEA MiFID investment firm.</u></p> <p>...</p> <p>SYSC 19A, 19B, 19C and 19D do not apply.</p> <p><u>SYSC 19F applies to a MiFID</u></p>	<p>...</p> <p>The common platform requirements in SYSC 4 - SYSC 10 apply as set out in SYSC 1 Annex 1.2.2R.</p> <p><del>SYSC 4</del> <u>10A</u> - SYSC 17 do not apply.</p> <p>SYSC 18 applies.</p> <p>SYSC 19A, <u>19B</u>, 19C and <u>19D</u>, <u>19E</u> and <u>19F</u> do not apply.</p>

	<i>investment firm</i> unless it is a <u>UCITS investment firm</u> or an <u>AIFM investment firm</u> .	
...		
<i>GEN</i>	<p><i>GEN</i> applies (<i>GEN</i> 1.1, <u><i>GEN</i> 1.2</u>, <i>GEN</i> 2.1, <i>GEN</i> 4.1, <i>GEN</i> 5.1 and <i>GEN</i> 6.1). However,</p> <p>(a) <i>GEN</i> 4 does not apply to the extent that the <i>firm</i> is subject to equivalent <i>rules</i> imposed by its <i>Home State</i> (<i>GEN</i> 4.1.1R(3)), and</p> <p>(b) <i>GEN</i> 6 only applies to business that can be regulated under sections 137A and 137G of the <i>Act</i> (The FCA's General rules) and (The PRA's General rules), respectively. It does not therefore apply if, or to the extent that, responsibility has been reserved to an <i>incoming firm's Home State regulator</i> by an <i>EU instrument</i>. Only <del>GEN</del> <u><i>GEN</i> 4.5</u> applies in relation to <i>MiFID</i> or equivalent <i>third country business</i> (see <i>GEN</i> 4.1.1R). <u>The FCA has supervisory responsibility in respect of a <i>branch of a MiFID investment firm</i> under article 44(8) of the <i>MiFID Org Regulation</i> relating to the prohibition on using the name of a <i>competent authority</i> to suggest its endorsement of the <i>firm's</i> products or services.</u></p>	<p><i>GEN</i> 4 does not apply if the <i>firm</i> has <i>permission</i> only for <i>cross-border services</i> and does not carry on <i>regulated activities</i> in the <i>United Kingdom</i> (see <i>GEN</i> 4.1.1R).</p> <p>Otherwise, as column (2) <u>except in relation to article 44(8) of the <i>MiFID Org Regulation</i></u>.</p>
<i>FEES</i>	<p>Applies to the extent a <i>firm</i> is required to pay a fee in regards to carrying out any <i>regulated activity</i> in the <i>UK</i>, <del>normally this would be the case when the <i>firm</i> holds a <i>top-up permission</i></del>. <u><i>FEES</i> 3.2.7R applies in relation to <i>incoming data reporting services providers</i></u>.</p>	<p><del>As column (2)</del></p> <p><u>Does not apply in relation to <i>regulated activity</i> in the <i>UK</i></u> <u><i>FEES</i> 3.2.7R applies in relation to <i>incoming data reporting services providers</i></u></p>

...		
MAR	...	...
...	<p><b><u>MAR 10 (Commodity derivative position limits and controls, and position reporting)</u></b></p> <p><u>Position limits apply in relation to position limits set by the FCA in accordance with MAR 10.2.2D. Position reporting applies to a member, participant or a client of a UK trading venue in accordance with MAR 10.4.10D.</u></p>	<u>As column (1)</u>
SUP	...	...
...		
	<p><b>SUP 16 (Reporting requirements)</b></p> <p>Parts of this chapter may apply if the <i>firm</i> has a <i>top-up permission</i> or if the <i>firm</i> is:</p> <p>(a) a <i>bank</i>; or</p> <p>(c) an <i>OPS firm</i>; or</p> <p>(e) an <i>insurer</i> with <i>permission</i> to effect or carry out <i>life policies</i>; or</p> <p>(f) a <i>firm</i> with <i>permission</i> to <i>establish, operate or wind up a personal pension scheme</i> or a <i>stakeholder pension scheme</i>; or</p> <p>(g) a <i>firm</i> with <i>permission</i> to <u>carry on MiFID business</u>, <i>advise on investments, arrange (bring about) deals in investments, make arrangements with a view to transactions in investments, or arrange safeguarding and administration of assets.</i></p> <p>(SUP 16.1)</p>	<p><b>SUP 16 (Reporting requirements)</b></p> <p>Parts of this chapter may apply if the <i>firm</i> has a <i>top-up permission</i> or if the <i>firm</i> is:</p> <p>(b) an <i>OPS firm</i>; or</p> <p>(d) an <i>insurer</i> with <i>permission</i> to effect or carry out <i>life policies</i>; or</p> <p>(e) a <i>firm</i> with <i>permission</i> to <i>establish, operate or wind up a personal pension scheme</i> or a <i>stakeholder pension scheme</i>; or</p> <p>(f) a <i>firm</i> with <i>permission</i> to <i>advise on investments, arrange (bring about) deals in investments, make arrangements with a view to transactions in investments, or arrange safeguarding and administration of assets.</i></p> <p>(SUP 16.1)</p>

	<p><b>SUP 17 (Transaction reporting)</b></p> <p>Applies to <del>UK</del> branches of <del>incoming EEA firms</del> which are <del>MiFID investment firms</del> in respect of reportable <del>transactions</del> executed in the course of services provided, whether within in the <del>United Kingdom</del> and outside. (<del>SUP 17.1.2G and SUP 17.1.3AG</del>)</p> <p><u>A MiFID investment firm (other than a collective portfolio management investment firm) reports transactions executed wholly or partly through its branch to the competent authority of its Home State unless otherwise agreed by that competent authority and the FCA, in which case it will report to the FCA.</u></p>	<p><b>SUP 17 (Transaction reporting)</b></p> <p>Applies as appropriate to <del>incoming EEA firms</del> which are <del>MiFID investment firms</del> in respect of reportable <del>transactions</del>. (<del>SUP 17.1.1R and SUP 17.1.4R</del>)</p> <p><u>Does not apply.</u></p>
...		
<u>PROD</u>	<p>Applies in respect of the <u>rules which implement article 24(2) MiFID and articles 9 and 10 of the MiFID Delegated Directive in relation to the activities of a branch within the territory of the UK.</u></p>	<u>Does not apply.</u>
<u>DEPP</u>	...	...
<u>DISP</u>	<p>Generally applies (<u>DISP 1.1.1G</u>) but in a <del>limited way</del> in relation to <del>MiFID business</del>.</p> <p><u>In relation to MiFID business carried on from the branch of an EEA firm, the provisions in DISP relating to MiFID complaints generally apply (subject to some limitations, see DISP 1.1A.7R), as do the directly applicable provisions of the MiFID Org Regulation relating to complaints</u></p>	<p>Generally does not apply (<u>DISP 1.1.1G</u>).</p> <p>However, <u>DISP</u> applies (subject to some limitations, see <u>DISP 1.1.3R</u> and <u>DISP 1.1.5R</u>) to:</p> <p>(a) an <u>incoming EEA firm</u> which is a <u>UCITS management company</u> managing a <u>UCITS scheme</u>; or</p> <p>(b) an <u>AIFM</u> managing an</p>



	handling. ...	<i>authorised AIF or a UK ELTIF other than a body corporate that is not a collective investment scheme.</i>
...		
<b>Notes to Annex 1</b>		
<p>Note 1: The following modules or chapters are relevant to <i>firms</i> in both the <i>PRA Handbook</i> and the <i>FCA Handbook</i>: <i>PRIN, SYSC, COCON, APER, FIT, GEN, FEES, GENPRU, BIPRU, MIPRU, IPRU(INV), SUP 2 to 6, 8, 11, 13 to 16, 18 &amp; Appendix 2 and COMP</i></p> <p><i>PRA-authorized persons</i> should also refer to the relevant parts of the <i>PRA Rulebook</i>.</p>		
<p>Note 2: The following modules or chapters are relevant in the <i>FCA Handbook</i> only: <i>COND, INSPRU, COBS, ICOBS, MCOB, CASS, MAR, TC, SUP 1A, 7, 9, 10A, 12 &amp; 17, DEPP, DISP, COLL, FUND, PROF, LR, PR, DTR, and EG</i> The effect of article 35(1) and 35(8) of <i>MiFID</i> (when read with article 1(3) of <i>MiFID</i>) is that if an <i>EEA MiFID investment firm</i> establishes a <i>branch</i> in the <i>UK</i> exercising an <i>EEA right</i> under <i>MiFID</i> or <i>CRD</i>, the <i>FCA</i> has supervisory responsibility for the services and activities provided or performed by the <i>branch</i> within the <i>UK</i> in relation to the <i>rules</i> implementing articles 24, 25, 27 and 28 of <i>MiFID</i>.</p>		

13A  
Annex  
2G

**Matters reserved to a Home State regulator**

Introduction	
1. {FCA/PRA}	...
Requirements in the interest of the general good	
2. {FCA/PRA}	<p>The <i>Single Market Directives</i> , and the <i>Treaty</i> (as interpreted by the European Court of Justice) adopt broadly similar approaches to reserving responsibility to the <i>Home State regulator</i>. To summarise, the <i>FCA</i> or <i>PRA</i>, as <i>Host State regulator</i>, is entitled to impose requirements with respect to activities carried on within the <i>United Kingdom</i> if these can be justified in the interests of the “general good” and are imposed in a non-discriminatory way. This general proposition is subject to the following in relation to activities passported under the <i>Single Market Directives</i>:</p>

	(1)	the <i>Single Market Directives</i> expressly reserve responsibility for the prudential supervision of a <i>MiFID investment firm</i> , <i>CRD credit institution</i> , <i>UCITS management company</i> , <i>AIFM</i> or passporting <i>Solvency II firm</i> to the <i>Firm's Home State regulator</i> in respect of <u>prudential matters within the scope of the respective <i>Single Market Directives</i></u> . The <i>Insurance Mediation Directive</i> and the <i>MCD</i> reach the same position without expressly referring to the concept of prudential supervision. Accordingly, the <i>FCA</i> , as <i>Host State regulator</i> , is entitled to regulate only the conduct of the firm's business within the <i>United Kingdom</i> ;
	...	
	(3)	<del>for a <i>CRD credit institution</i>, the <i>PRA</i> or <i>FCA</i>, as <i>Host State regulator</i>, is jointly responsible with the <i>Home State regulator</i> under article 156 of the <i>CRD</i> for supervision of the liquidity of a <i>branch in the United Kingdom</i>; [deleted]</del>
	(4)	for a <i>MiFID investment firm</i> including a <i>CRD credit institutions institution</i> which is a <i>MiFID investment firm</i> ), the protection of <i>clients' money</i> and <i>clients' assets</i> is reserved to the <i>Home State regulator</i> under <i>MiFID</i> ; and
	(5)	...
3. {FCA/PR A}		It is necessary to refer to the case law of the European Court of Justice to interpret the concept of the "general good". To summarise, to satisfy the general good test, <i>Host State</i> rules must come within a field which has not been harmonised at <i>EU</i> level, satisfy the general requirements that they pursue an objective of the general good, be non-discriminatory, be objectively necessary, be proportionate to the objective pursued and not already be safeguarded by rules to which the <i>firm</i> is subject in its <i>Home State</i> .
Application of <i>SYSC 2</i> and <i>SYSC 3</i>		
4. {FCA/PR A}		...
5. {FCA/PR A}		...
6. {FCA/PR A}		This Annex represents the <i>FCA's</i> and <del><i>PRA's</i></del> views, but a firm is also advised to consult the relevant <i>EU</i> instrument and, where necessary, seek legal advice.

	...
...	...
Application of the common platform requirements in SYSC to EEA MiFID investment firms	
8. {FCA/PR A}	Whilst the <i>common platform requirements</i> (located in SYSC 4 - SYSC 10) do not generally apply to <i>incoming EEA firms</i> (but for <i>EEA UCITS management companies</i> , see 8A below), <i>EEA MiFID investment firms</i> must comply with the <i>common platform record-keeping requirements</i> in relation to a branch in the <i>United Kingdom</i> and SYSC 10A ( <u>Recording telephone communications and electronic communications</u> ).
Application of SYSC to EEA UCITS management companies	
8A. {FCA}	...
Requirements under MiFID	
9. {FCA/PR A}	<del>Article 31(1)</del> <u>Article 34(1)</u> of <i>MiFID</i> prohibits Member States from imposing additional requirements on a <i>MiFID investment firm</i> in relation to matters covered by <i>MiFID</i> if the <i>firm</i> is providing services on a cross-border basis. Such firms will be supervised by their Home State regulator.
10. {FCA/PR A}	<del>Article 32</del> <u>Article 35(8)</u> of <i>MiFID</i> requires the <del>FSA</del> <u>FCA</u> as the <i>Host State regulator</i> to apply certain obligations to an <i>incoming EEA firm</i> with an establishment in the <i>UK</i> . In summary, these are <del>Articles</del> <u>articles</u> :
	(1) <del>19 (conduct of business obligations);</del> <u>24 of MiFID (General principles and information to clients);</u>
	(1A) <u>25 of MiFID (Assessment of suitability and appropriateness and reporting to clients);</u>
	(2) <del>21</del> <u>27 of MiFID</u> (execution of orders on terms most favourable to the client);
	(3) <del>22 (client order handling)</del> <u>28 of MiFID (client order handling rules);</u>
	(4) <del>25 (upholding the integrity of markets, reporting transactions and maintaining records);</del>
	(5) <del>27 (making public firm quotes);</del> and
	(6) <del>28 (post-trade disclosure).</del>

	<p><u>In addition, the FCA assumes responsibility for supervision of articles 14 to 26 of MiFIR although article 14 of RTS 22 permits a firm to report transactions executed wholly or partly through its branch to the competent authority of its Home State unless otherwise agreed by that competent authority and the FCA. The remaining obligations under MiFID and MiFIR are reserved to the Home State regulator other than requirements in MAR 10.2 in relation to commodity derivative position limits.</u></p>	
11.	<p><i>MiFID</i> is more highly harmonising than other <i>Single Market Directives</i>. Article 4 of <del>the <i>MiFID implementing Directive</i></del> <i>Directive 2006/73</i> <del>permits</del> <u>permitted</u> Member States to impose additional requirements only where certain tests <del>are</del> <u>were</u> met. The <del>FSA has</del> made certain requirements that <del>fall</del> <u>fell</u> within the scope of Article 4, some of which have been retained by the <i>FCA</i>, for example in <i>COBS</i>. <i>MiFID</i> retains an ability for Member States to <u>impose additional requirements in the areas of client assets and investor protection</u>. The <i>FCA</i> has made some further requirements <u>which fall within the scope of these provisions</u>. These requirements apply to an <i>EEA MiFID investment firm</i> with an establishment in the <i>United Kingdom</i> as they apply to a <i>UK MiFID investment firm</i>, in the circumstances contemplated by article <del>32(7)</del> <u>35(8)</u> <i>MiFID</i>.</p>	
...		
12. [FCA/PR A]	<p><del>Further guidance on the territorial application of the <i>Handbook</i> can be found at <i>PERG</i> 13.6 and <i>PERG</i> 13.7. [deleted]</del></p>	
13. [FCA/PR A]	<p>Examples of how <i>SYSC</i> 3 and/or the common platform provisions apply in practice.</p>	
	...	
	(2)	<p>The Conduct of Business sourcebook (<i>COBS</i>) applies to an <i>incoming EEA firm</i>. Similarly, <i>SYSC</i> 3 and <i>SYSC</i> 4-10 do require such a <i>firm</i>, <u>to the extent provided by <i>SYSC</i> 1 Annex 1:</u></p>
	(a)	<p>to establish systems and controls in relation to those aspects of the conduct of its business covered by applicable sections of <i>COBS</i> (<i>SYSC</i> 3.1.1R and <i>SYSC</i> 4.1.1R);</p>
	(b)	<p>to establish systems and controls for compliance with the applicable sections of <i>COBS</i> (<i>SYSC</i> 3.2.6R and <i>SYSC</i> 6.1.1R); and</p>

		(c)	to make and retain records in relation to those aspects of the conduct of its business ( <i>SYSC</i> 3.2.20R and <i>SYSC</i> 9.1.1R to 9.1.4G).
See also Question 12 in <i>SYSC</i> 2.1.6G for guidance on the application of <i>SYSC</i> 2.1.3R(2).			

...

## 16.12 Integrated Regulatory Reporting

...

Regulated Activity Group 3

...

- 16.12.11 R The applicable *data items* referred to in *SUP* 16.12.4R are set out according to *firm* type in the table below:

Description of <i>data item</i>	<i>Firms' prudential category and applicable data items</i> (note 1)					
	<i>IFPRU investment firms and BIPRU firms</i>		<i>Firms other than BIPRU firms or IFPRU investment firms</i>			
	<i>IFPRU</i>	<i>BIPRU</i>	<i>IPRU(INV)</i> Chapter 3	<i>IPRU(INV)</i> Chapter 5	<i>IPRU(INV)</i> Chapter 9	<i>IPRU(INV)</i> Chapter 13
...						
Note 18	Except if the <i>firm</i> is an <i>adviser</i> , <del><i>local or traded options market maker</i></del> (as referred to in <i>IPRU(INV)</i> 3-60(4)R).					
...						
Note 20	Only required in the case of an <i>adviser</i> , <del><i>local or traded options market maker</i></del> (as referred to in <i>IPRU(INV)</i> 3-60(4)R) that is a <i>sole trader</i> .					
...						

...

## 17A Transaction reporting and supply of reference data

...

### 17A.2 Connectivity with FCA systems

- 17A.2.1 R ...

17A.2.1A G The FCA expects a systematic internaliser that will be supplying the FCA with financial instrument reference data in respect of a financial instrument traded on its system that is not admitted to trading on a regulated market or traded on an MTF or OTF to establish a technology connection with the FCA for the supply of that reference data.

17A.2.1B G A firm in SUP 17A.1.1.R(4) may use a third party technology provider to submit to the FCA financial instrument reference data in respect of a financial instrument traded on its system provided that it does so in a manner consistent with MiFID and MiFIR. Firms will retain responsibility for the completeness, accuracy and timely submission of the data. A firm should be the applicant for, and should complete and sign, the FCA MDP on-boarding application form.

...

### App 3 Guidance on passporting issues

...

#### App 3.3 Background

...

Interpretative communications

...

3.3.6 G (1) The European Commission has not produced an interpretative communication on *MiFID*. It is arguable, however, that the principles in the communication on the Second Banking Directive can be applied to *investment services and activities*. This is because ~~Chapter~~ Chapter II of Title II of *MiFID* (containing provisions relating to operating conditions for investment firms) also applies to the *investment services and activities* of firms operating under the *Banking Consolidation Directive*, which is repealed and replaced by the *CRD*.

...

...

#### App 3.6 Freedom to provide services

...

Place of supply

...

App 3.6.7 G In respect of banking services, the European Commission believes that "...to determine where the activity was carried on, the place of provision

of what may be termed the ‘characteristic performance’ of the service i.e. the essential supply for which payment is due, must be determined” (Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C/209/04)). In the view of the *FCA and PRA*, this requires consideration of where the service is carried out in practice.

- App 3.6.8 G The *FCA and PRA* are is of the opinion that *UK firms* that are *credit institutions* and *MiFID investment firms* should apply the ‘characteristic performance’ test (as referred to in *SUP App 3.6.7G*) when considering whether prior notification is required for services business. *Firms* should note that other *EEA States* may take a different view. Some *EEA States* may apply a solicitation test. This is a test as to whether it is the consumer or the provider that initiates the business relationship.

...

#### Monitoring procedures

- App 3.6.15 G The *FCA and PRA* ~~consider~~ considers that, in order to comply with *Principle 3: Management and control* (see *PRIN 2.1.1R*), a *firm* should have appropriate procedures to monitor the nature of the services provided to its *customers*. Where a *UK firm* has non-resident *customers* but has not notified the *EEA State* in which the *customers* are resident that it wishes to exercise its freedom to provide services, the *FCA and PRA* would expect the *firm’s* systems to include appropriate controls. Such controls would include procedures to prevent the supply of services covered by the *Single Market Directives* in the *EEA State* in which the *customers* are resident if a notification has not been made and it is proposed to provide services otherwise than by remote communication. In respect of *insurance business*, the *insurer’s* records should identify the location of the risk at the time the policy is taken out or last renewed. That will, in most cases, remain the location of the risk thereafter, even if, for example, the *policyholder* changes his habitual residence after that time.

...

#### Membership of ~~regulated markets~~ trading venues

- App 3.6.25 G (1) The *FCA and PRA* are is of the opinion that where a *UK firm* becomes a member of:
- (a) a *regulated market* that has its registered office or, if it has no registered office, its head office, in another *EEA State*; or
  - (b) an *MTF* or *OTF* operated by a *MiFID investment firm* or a *market operator* in another *EEA State*,
- the same principles as in the ‘characteristic performance’ test should apply. Under this test, the fact that a *UK firm* has a screen

displaying the *regulated market's* or the *MTF's* or the *OTF's* prices in its ~~UK~~ UK office does not mean that it is *dealing* within the territory of the *Home State* of the *regulated market* or of the *MTF* or *OTF*.

- (2) In such a case, the *FCA* and ~~*PRA*~~ would consider that:
- (a) the *market operator* operating the *regulated market* or the *MTF* or the *OTF* is providing a *cross-border service* into the *UK* and so, provided it has given notice to its *Home State regulator* in accordance with articles 42 ~~53~~(6) or 34~~(5)~~ 34(6) of *MiFID*, it will be exempt from the *general prohibition* in respect of any *regulated activity* carried on as part of the business of the *regulated market* ~~or of operating an MTF~~, of *operating a multilateral trading facility* or of *operating an organised trading facility* (see section 312A of the Act);
  - (b) the *MiFID investment firm* operating the *MTF* or *OTF* is providing a *cross-border service* into the *UK* and so needs to comply with *SUP 13A*.

App 3.6.26 G *Firms* are reminded of their rights, under article 33 ~~36~~ of *MiFID*, to become members of, or have access to, the *regulated markets* in other Member States.

App 3.6.27 G *Firms* should note that, in circumstances where the *FCA* ~~or PRA~~ take the view that a notification would not be required, other *EEA States* may take a different view.

...

### App 3.9 Mapping of MiFID, CRD, AIFMD, UCITS Directive and Insurance Mediation Directive to the Regulated Activities Order

App 3.9.1 G The following Tables 1, 2, 2ZA, 2A and 2B provide an outline of the *regulated activities* and *specified investments* that may be of relevance to *firms* considering undertaking *passport activities* under the *CRD*, *MiFID*, *AIFMD*, the *UCITS Directive*, the *MCD* and the *Insurance Mediation Directive*. The tables may be of assistance to *UK firms* that are thinking of offering financial services in another *EEA State* and to *EEA firms* that may offer those services in the *United Kingdom*.

...

App 3.9.3 G In considering the issues raised in the tables, *firms* should note that:

- (1) article 64 of the *Regulated Activities Order* (Agreeing to carry on specific kinds of activity) ~~applies~~ may apply in respect of agreeing to undertake the specified activity (see *PERG 2.7.21G*); and



- (2) article 89 of the *Regulated Activities Order* (Rights to or interests in investments) applies in respect of rights to and interests in the types of *investments* to which the category applies.

...

App 3.9.5 G Services set out in Annex 1 to MiFID

Table 2: <i>MiFID investment services and activities</i>		Part II RAO Investments	Part III RAO Investments
	<i>A MiFID investment services and activities</i>		
1.	Reception and transmission of orders in relation to one or more financial instruments	Article 25	Article 76-81, <u>82B</u> , 83-85, 89
2.	Execution of orders on behalf of clients	Article 14, 21	Article 76-81, <u>82B</u> , 83-85, 89
3	Dealing on own account	Article 14	Article 76-81, <u>82B</u> , 83-85, 89
4	Portfolio management	Article 37 (14, 21, 25 - see Note 1)	Article 76-81, <u>82B</u> , 83-85, 89
5	Investment advice	Article 53(1)	Article 76-81, <u>82B</u> , 83-85, 89
6	Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	Article 14, 21	Article 76-81, <u>82B</u> , 83-85, 89
7	Placing of financial instruments without a firm commitment basis	Article 21, 25	Article 76-81, <u>82B</u> , 83-85, 89
8	Operation of Multilateral Trading Facilities	Article 25D (see Note 2)	Article 76-81, <u>82B</u> , 83-85, 89

9	<u>Operation of an OTF</u>	<u>Article 25DA</u> (see Note 3)	<u>Article 77, 77A, 78, 79, 80, 81, 82B, 83-85, 89</u>
	Ancillary services	Part II RAO Activities	Part III RAO Investments
1.	Safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management	Article 40, 45, 64	Article 76-81, <u>82B</u> , 83-85, 89
2.	Granting credits or loans to an investor to allow him to carry out a transaction in one or more of the relevant instruments where the firm granting the credit or loan is involved		
3.	Advice to undertakings on capital structure, industrial strategy and related matters and advice and services relating to mergers and the purchase of undertakings	Article 14, 21, 25, 53(1), 64	Article 76-80, <u>82B</u> , 83-85, 89
4.	Foreign exchange services where these are connected with the provision of investment services	Article 14, 21, 25, 53(1), 64	Article 83-85, 89
5	Investment research and financial analysis or other forms of general recommendation relating to transactions in	Article 53(1), 64	Article 76-81, <u>82B</u> , 83-85, 89

	financial instruments		
6.	Services related to underwriting	Article 25, 53(1), 64	Article 76-81, <u>82B</u> , 83-85, 89
7.	Investment services and activities as well as ancillary services of the type included under Section A or B of Annex I related to the underlying of the derivatives included under Section C 5, 6, 7 and 10-where these are connected to the provision of investment or ancillary services.	Article 14, 21, 25, 25D, 37, 53(1), 64	Article 83 and 84
Note 1. A <i>firm</i> may also carry on these other activities when it is <i>managing investments</i> .			
Note 2. A <i>firm</i> operating an <i>MTF</i> under article 25D does not need to have a <i>permission</i> covering other <i>regulated activities</i> , unless it performs other <i>regulated activities</i> in addition to <i>operating an MTF</i> .			
Note 3. A <i>firm</i> operating an <i>OTF</i> under article 25DA does not need to <u>have a <i>permission</i> covering other <i>regulated activities</i>, unless it performs other <i>regulated activities</i> in addition to <i>operating an OTF</i>.</u>			

Activities set out in article 6(2) to (4) of the AIFMD

App  
3.9.5A

G

<b>Table 2ZA: AIFMD activities</b>		<b>Part II RAO Activities</b>	<b>Part III RAO Investments</b>
...			
2.	Management of portfolios of investments, including those owned by pension funds and institutions for occupational retirement in accordance with article 19(1) of Directive 2003/41/EC, in accordance with mandates given by investors on a discretionary client-by-client	Articles 14, 21, 25, 37, 40 (arranging only), 64	Articles 76 to 81, <u>82B</u> , 83 to 85, 89

	basis (Note 2).		
3.	Investment advice (Note 2).	Articles 53(1), 64	Articles 76 to 81, <u>82B</u> , 83 to 85, 89
4.	Safe-keeping and administration in relation to <i>shares</i> or <i>units</i> of collective investment undertakings.	Articles 40, 45, 64	Articles 76 to 81, <u>82B</u> , 83 to 85, 89
5.	Reception and transmission or orders in relation to <i>financial instruments</i> .	Articles 25(1), 64	Articles 76 to 81, <u>82B</u> , 83 to 85, 89
...			

Activities set out in Article 6(2) and (3) of the UCITS Directive

App 3.9.6 G

<b>Table 2A: UCITS Directive activities</b>		<b>Part II RAO Activities</b>	<b>Part III RAO Investments</b>
...			
2.	Managing portfolios of investments, including those owned by pension funds, in accordance with mandates given by investors on a discretionary, client-by-client basis, where such portfolios include one or more of the instruments listed in Section C of Annex I to <i>MiFID</i> .	Articles 14, 21, 25, 37, 40 (arranging only), 64	Articles 76- 81, <u>82B</u> , 83- 85, 89
3.	Investment advice concerning one or more of the instruments listed in Section C of Annex I to <i>MiFID</i> .	Articles 53(1), 64	Articles 76- 81, <u>82B</u> , 83- 85, 89
4.	Safekeeping and administration services in relation to units of collective investment undertakings.	Articles 40, 45, 64	Articles 76- 81, <u>82B</u> , 83- 85, 89
...			

## Annex K

## Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

## 2 Annex 1G Warning notices and decision notices under the Act and certain other enactments

...

The Small and Medium Sized Business (Finance Platforms) Regulations 2015	Description	Handbook reference	Decision maker
...			

<u>Data Reporting Services Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 10(8)(a)</u>	<u>when the FCA is proposing to impose a restriction on the applicant for authorisation as a data reporting services provider</u>		<u>Executive procedures</u>
<u>Regulation 10(9)(b)</u>	<u>when the FCA is deciding to impose a restriction on the applicant for authorisation as a data reporting services provider</u>		<u>RDC or executive procedures</u> (see Note 1)
<u>Regulations 8(5) and 10(8)(b)</u>	<u>when the FCA is proposing to refuse an application for verification or authorisation as a data reporting services provider</u>		<u>Executive procedures</u>
<u>Regulations 8(6)(b) and 10(9)(c)</u>	<u>when the FCA is deciding to refuse an application for verification or authorisation as a data reporting services</u>		<u>RDC or executive procedures</u>

	<u>provider</u>		<u>(see Note 2)</u>
<u>Regulations 8(9), 11(4)(a) and 11(5)(b)(i)</u>	<u>when the FCA is proposing or deciding to cancel a verification or the authorisation of a data reporting services provider otherwise than at its request</u>		<u>RDC</u>
<u>Regulations 8(9) and 11(4)(b)</u>	<u>when the FCA is proposing to refuse a request to cancel a verification or authorisation of a data reporting services provider</u>		<u>Executive procedures</u>
<u>Regulations 8(9) and 11(5)(b)(ii)</u>	<u>when the FCA is deciding to refuse a request to cancel a verification authorisation of a data reporting services provider</u>		<u>RDC or executive procedures</u> <u>(see Note 2)</u>
<u>Regulations 8(10) and 12(3)</u>	<u>when the FCA is proposing to refuse a request to vary a verification or the authorisation of a data reporting services provider</u>		<u>Executive procedures</u>
<u>Regulations 8(10) and 12(4)</u>	<u>when the FCA is deciding to refuse a request to vary a verification or the authorisation of a data reporting services provider</u>		<u>RDC or executive procedures</u> <u>(see Note 1)</u>
<p><u>Notes:</u></p> <p>1) <u>If representations are made in response to a warning notice, then the RDC will take the decision to give a decision notice if the action proposed involves:</u></p> <p><u>(a) restricting a person from providing a data reporting service; or</u></p> <p><u>(b) refusing an application to include a type of activity in a verification or authorisation.</u></p> <p><u>In all other cases, the decision to give a decision notice will be taken by FCA staff under executive procedures.</u></p> <p>2) <u>If representations are made in response to a warning notice then the RDC will take the decision to give a decision notice. Otherwise the decision to give a decision notice will be taken by FCA staff under executive procedures.</u></p>			

#### Sch 4 Powers Exercised

...

4.2G

The following additional powers and related provisions have been exercised by the *FCA* to make the statements of policy in *DEPP*:

...

Regulation 29 (Application of Part 26 of the 2000 Act) of the *Immigration Regulations*

Regulation 20 (Guidance) of the *DRS Regulations*

Regulation 37 (Application of Part 26 of the Act) of the *DRS Regulations*

## Annex L

## Amendments to the Dispute Resolution: Complaints sourcebook (DISP)

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

## 1 Treating complainants fairly

### 1.1 Purpose and application

...

Application to firms

- 1.1.3 R (1) ...
- (2) ~~For complaints relating to the MiFID business of a firm, the complaints handling rules and the complaints record rule~~ For the MiFID complaints of a MiFID investment firm:
- (a) ~~apply to complaints from retail clients and do not apply to complaints from eligible complainants who are not retail clients; DISP 1.1A applies; and~~
- (b) ~~also apply in respect of activities carried on from a branch of a UK firm in another EEA State; and~~ the other provisions of this chapter apply only as set out in DISP 1.1A.
- (c) ~~do not apply in respect of activities carried on from a branch of an EEA firm in the United Kingdom. [deleted]~~
- (2A) For the MiFID complaints of a third country investment firm received from retail clients or elective professional clients:
- (a) DISP 1.1A applies; and
- (b) the other provisions of this chapter apply only as set out in DISP 1.1A.
- (3) ...
- ...

...

Exemptions for firms, payment service providers, electronic money issuers and



designated credit reference agencies

- 1.1.12 R (1) ...
- (2) Notwithstanding (1):
- (a) ~~the complaints handling rules and complaints record rule will continue to apply in respect of complaints concerning MiFID business~~ DISP 1.1A will continue to apply to MiFID complaints; and
- (b) ...
- ...

Insert the following new section after DISP 1.1 (Purpose and application). All the text is new and is not underlined.

## **1.1A Complaints handling requirements for MiFID complaints**

Application: Who? What?

- 1.1A.1 R This section:
- (1) applies to the *MiFID complaints* of a *MiFID investment firm* and does not apply to *complaints* that are not *MiFID complaints*;
- (2) also applies to the *MiFID complaints* of a *third country investment firm* received from a *retail client* or an *elective professional client* but does not apply to *complaints* that are not *MiFID complaints*; and
- (3) applies certain other provisions in *DISP 1* to such complaints.
- 1.1A.2 R For the *MiFID complaints* of a *third country investment firm*, the provisions marked “EU” shall apply as *rules*.
- 1.1A.3 G A *MiFID complaint* is, amongst other things, a complaint to which article 26 of the *MiFID Org Regulation* applies, being a complaint about:
- (1) the provision of *investment services* or *ancillary services* to a *client* by an *investment firm*;
- (2) the provision of one or more *investment services* to a *client* by a *CRD credit institution*;
- (3) selling *structured deposits* to *clients*, or advising *clients* on them, where the sale or advice is provided by an *investment firm* or a *CRD credit institution*;

- (4) the activities permitted by article 6(3) of the *UCITS Directive* when carried on by a *collective portfolio management investment firm*; and
- (5) the activities permitted by article 6(4) of the *AIFMD* when carried on by a *collective portfolio management investment firm*.

[**Note:** see article 1(1), 1(3) and 1(4) of *MiFID*, and article 1 of the *MiFID Org Regulation*]

1.1A.4 G A *MiFID complaint* is also a complaint about the *equivalent business of a third country investment firm*.

[**Note:** see articles 39 and 41 of *MiFID*]

1.1A.5 G In contrast to the other provisions in *DISP 1* which generally apply to *complaints from eligible complainants*, subject to *DISP 1.1A.6R*:

- (1) the obligations in this section that apply to the *MiFID complaints of MiFID investment firms*, apply to complaints from “clients” as defined in *MiFID* (which includes *retail clients*, *professional clients* and (in relation to *eligible counterparty business*) *eligible counterparties*); and
- (2) the obligations in this section that apply to the *MiFID complaints of third country investment firms*, apply to complaints from *retail clients* and *elective professional clients*.

[**Note:** see recital (103) and article 4(1)(9) of *MiFID* for the definition of “client”]

1.1A.6 R (1) Only the provisions in this section marked “EU” and *DISP 1.1A.39R* apply to a *MiFID complaint* received from a *retail client*, *professional client* or an *eligible counterparty* that is not an *eligible complainant*.

(2) But where the *retail client*, *professional client* or *eligible counterparty* is also an *eligible complainant*, all of the provisions in this section apply.

Application: Where?

1.1A.7 R The table below sets out how *DISP 1.1A* applies to *MiFID complaints* relating to:

- (1) the activities of a *MiFID investment firm* carried on from an establishment in the *United Kingdom*;
- (2) the *equivalent business of a third country investment firm* where the complaint is received from a *retail client* or an *elective professional client*;
- (3) activities carried on from a *branch* of a *UK firm* in another *EEA State*; and

- (4) activities carried on from a *branch* of an *EEA firm* in the *United Kingdom*.

Table: Application of DISP 1.1A to the MiFID business of firms in the UK, and the equivalent business of third country investment firms, branches of UK firms and UK branches of EEA firms

<b>(1) Provision</b>	<b>(2) Provision applies to the MiFID business of a firm carried on from an establishment in the UK?</b>	<b>(3) Provision applies to the equivalent third country business of a third country investment firm where the complaint is received from a retail client or an elective professional client?</b>	<b>(4) Provision applies to a branch of a UK firm in another EEA State?</b>	<b>(5) Provision applies to a branch of an EEA firm in the UK?</b>
1.1A.10EU	Yes	Yes	Yes	Yes
1.1A.11R	Yes	Yes	No	Yes
1.1A.12EU	Yes	Yes	Yes	Yes
1.1A.13EU	Yes	Yes	Yes	Yes
1.1A.14G	Yes	Yes	Yes	No
1.1A.15G	Yes	Yes	Yes	No
1.1A.16EU	Yes	Yes	Yes	Yes
1.1A.17EU	Yes	Yes	Yes	Yes
1.1A.18EU	Yes	Yes	Yes	Yes
1.1A.19G	Yes	Yes	Yes	No
1.1A.20R	Yes	Yes	No	Yes
1.1A.21G	Yes	Yes	No	Yes

1.1A.22R	Yes	Yes	No	Yes
1.1A.23R	Yes	Yes	No	Yes
1.1A.24EU	Yes	Yes	Yes	Yes
1.1A.25EU	Yes	Yes	Yes	Yes
1.1A.26R	Yes	Yes	No	Yes
1.1A.27G	Yes	Yes	No	Yes
1.1A.28R	Yes	Yes	No	Yes
1.1A.29EU	Yes	Yes	Yes	Yes
1.1A.30EU	Yes	Yes	Yes	Yes
1.1A.31R	Yes	Yes	No	Yes
1.1A.32G	Yes	Yes	No	Yes
1.1A.33G	Yes	Yes	No	Yes
1.1A.34G	Yes	Yes	No	Yes
1.1A.35R	Yes	Yes	No	Yes
1.1A.36R	Yes	Yes	No	Yes
1.1A.37EU	Yes	Yes	Yes	Yes
1.1A.38EU	Yes	Yes	Yes	Yes
1.1A.39R	Yes	Yes	No	Yes
1.1A.40R	Yes	Yes	No	No
1.1A.41G	Yes	Yes	No	No
1.1A.42R	No	No	Yes	No
Notes				
(1)	The provisions marked “EU” in the table are ‘directly applicable’ which means they apply to all <i>MiFID investment firms</i> in relation to <i>MiFID complaints</i> by virtue of the <i>MiFID Org Regulation</i> .			
(2)	This table should be read in conjunction with the <i>rules and guidance</i> in <i>DISP 1.1A.1R</i> to <i>DISP 1.1A.6R</i> .			

#### Interpretation of this section

- 1.1A.8 G This section contains a number of provisions marked with the status letters “EU”, which have been selectively reproduced from the *MiFID Org*

*Regulation.*

- 1.1A.9 G References in column (1) to a word or phrase used in those provisions marked “EU” have the meaning indicated in column (2) of the table below:

(1)	(2)
“complaint”	<i>MiFID complaint</i>
“investment firm” and “firm”	<i>MiFID investment firm</i>

[**Note:** for the definition of “client” see recital (103) and article 4(1)(9) of *MiFID*]

## Consumer awareness

- 1.1A.10 EU Investment firms shall publish the details of the process to be followed when handling a complaint. Such details shall include information about the complaints management policy and the contact details of the complaints management function. This information shall be provided to clients or potential clients, on request, or when acknowledging a complaint.

[**Note:** article 26(2) of the *MiFID Org Regulation*]

- 1.1A.11 R A *MiFID investment firm* must provide information to *eligible complainants*, in a clear, comprehensible and easily accessible way, about the *Financial Ombudsman Service* (including the *Financial Ombudsman Service’s* website address):

- (1) on its website, where one exists; and
- (2) if applicable, in the general conditions of its contracts with *eligible complainants*.

[**Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP* 1.2.1R(4)]

[**Note:** article 13(2) of the *ADR Directive*, article 14(1) of the *ODR Regulation*, and regulation 19 of the *ADR Regulations*]

## Complaints handling

- 1.1A.12 EU Investment firms shall establish, implement and maintain effective and transparent complaints management policies and procedures for the prompt handling of clients’ or potential clients’ complaints.

[**Note:** first paragraph, article 26(1) of the *MiFID Org Regulation*]

- 1.1A.13 EU The complaints management policy shall provide clear, accurate and up-to-date information about the complaints-handling process. This policy shall be endorsed by the firm’s management body.

[**Note:** second paragraph, article 26(1) of the *MiFID Org Regulation*]

- 1.1A.14 G The complaints management policy should be set out in a written document e.g. as part of a general fair treatment policy. It should be made available to all relevant staff of the *firm* through appropriate internal channels.

[**Note:** guideline 1(b) and (c) of the complaints handling guidelines for the securities (*ESMA*) and banking (*EBA*) sectors. See <https://www.eba.europa.eu/documents/10180/732334/JC+2014+43+-+Joint+Committee+-+Final+report+complaints-handling+guidelines.pdf/312b02a6-3346-4dff-a3c4-41c987484e75>]

- 1.1A.15 G The *firm's* senior management should be responsible for the implementation of the complaints management policy and for monitoring compliance with it.

[**Note:** guideline 1(b) and (c) of the complaints handling guidelines for the securities (*ESMA*) and banking (*EBA*) sectors. See <https://www.eba.europa.eu/documents/10180/732334/JC+2014+43+-+Joint+Committee+-+Final+report+complaints-handling+guidelines.pdf/312b02a6-3346-4dff-a3c4-41c987484e75>]

- 1.1A.16 EU Investment firms shall enable clients and potential clients to submit complaints free of charge.

[**Note:** article 26(2) of the *MiFID Org Regulation*]

- 1.1A.17 EU Investment firms shall establish a complaints management function responsible for the investigation of complaints. This function may be carried out by the compliance function.

[**Note:** article 26(3) of the *MiFID Org Regulation*]

- 1.1A.18 EU Investment firms' compliance function shall analyse complaints and complaints-handling data to ensure that they identify and address any risks or issues.

[**Note:** article 26(7) of the *MiFID Org Regulation*]

- 1.1A.19 G *MiFID complaints* should be handled effectively and in an independent manner.

[**Note:** recital (38) of the *MiFID Org Regulation*]

#### Complaints resolution

- 1.1A.20 R Once a *MiFID complaint* has been received by a *MiFID investment firm*, the *firm* must:

- (1) investigate the complaint competently, diligently and impartially, obtaining additional information as necessary;

- (2) assess fairly, consistently and promptly:
  - (a) the subject matter of the complaint;
  - (b) whether the complaint should be upheld;
  - (c) what remedial action or redress (or both) may be appropriate; and
  - (d) if appropriate, whether it has reasonable grounds to be satisfied that another respondent may be solely or jointly responsible for the matter alleged in the complaint; and
- (3) comply promptly with any offer of remedial action or redress accepted by the complainant.

**[Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP* 1.4.1R(1), (2) and (5).]

1.1A.21 G Factors that may be relevant in the assessment of a *MiFID complaint* under *DISP* 1.1A.20R(2) include the following:

- (1) all the evidence available and the particular circumstances of the complaint;
- (2) similarities with other complaints received by the respondent;
- (3) relevant guidance published by the *FCA*, other relevant regulators, the *Financial Ombudsman Service* or former schemes; and
- (4) appropriate analysis of decisions by the *Financial Ombudsman Service* concerning similar complaints received by the *MiFID investment firm*.

**[Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP* 1.4.2G.]

1.1A.22 R Where a *MiFID complaint* against a *MiFID investment firm* is referred to the *Financial Ombudsman Service*, the *MiFID investment firm* must cooperate fully with the *Financial Ombudsman Service* and comply promptly with any settlements or awards made by it.

**[Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP* 1.4.4R.]

Complaints resolved by close of the third business day

1.1A.23 R If a *MiFID investment firm* resolves a *MiFID complaint* by close of business on the third *business day* following the day on which it is received, it may choose to comply with *DISP* 1.1A.24EU to *DISP* 1.1A.27G rather than with *DISP* 1.1A.28R to *DISP* 1.1A.34G.

- 1.1A.24 EU When handling a complaint, investment firms shall communicate with clients or potential clients clearly, in plain language that is easy to understand and shall reply to the complaint without undue delay.

[**Note:** article 26(4) of the *MiFID Org Regulation*]

- 1.1A.25 EU Investment firms shall communicate the firm's position on the complaint to clients or potential clients and inform the clients or potential clients about their options, including that they may be able to refer the complaint to an alternative dispute resolution entity, as defined in Article 4(h) of Directive 2013/11/EU of the European Parliament and Council on consumer ADR or that the client may be able to take civil action.

[**Note:** article 26(5) of the *MiFID Org Regulation*. See the *ADR Directive* at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>]

- 1.1A.26 R The explanation given by *MiFID investment firms* to *clients* or potential *clients* in accordance with *DISP* 1.1A.25EU must also:

- (1) refer to the fact that the complainant has made a *MiFID complaint* and inform the complainant that the *MiFID investment firm* now considers the *MiFID complaint* to have been resolved;
- (2) inform the complainant that if, still dissatisfied with the resolution of the *MiFID complaint*, the complainant may be able to refer it to the *Financial Ombudsman Service*;
- (3) indicate whether or not the *respondent* consents to waiving the relevant time limits in *DISP* 2.8.2R or *DISP* 2.8.7R (Was the complaint referred to the Financial Ombudsman Service in time?) by including the appropriate wording set out in *DISP* 1 Annex 3R;
- (4) provide the website address of the *Financial Ombudsman Service*; and
- (5) refer to the availability of further information on the website of the *Financial Ombudsman Service*.

[**Note:** article 13 of the *ADR Directive*]

- 1.1A.27 G The information regarding the *Financial Ombudsman Service* required to be provided in a communication sent under *DISP* 1.1A.25EU and referred to in *DISP* 1.1A.26R should be set out clearly, comprehensibly, in an easily accessible way and prominently within the text of those responses.

[**Note:** article 13 of the *ADR Directive*]

#### Complaints time limits

- 1.1A.28 R On receipt of a *MiFID complaint*, a *MiFID investment firm* must:



- (1) send the complainant a prompt written acknowledgement providing early reassurance that it has received the *MiFID complaint* and is dealing with it; and
- (2) ensure the complainant is kept informed thereafter of the progress of the measures being taken for the *MiFID complaint's* resolution.

[**Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP* 1.6.1R.]

- 1.1A.29 EU When handling a complaint, investment firms shall communicate with clients or potential clients clearly, in plain language that is easy to understand and shall reply to the complaint without undue delay.

[**Note:** article 26(4) of the *MiFID Org Regulation*]

- 1.1A.30 EU Investment firms shall communicate the firm's position on the complaint to clients or potential clients and inform the clients or potential clients about their options, including that they may be able to refer the complaint to an alternative dispute resolution entity, as defined in Article 4(h) of Directive 2013/11/EU of the European Parliament and Council on consumer ADR or that the client may be able to take civil action.

[**Note:** article 26(5) of the *MiFID Org Regulation*. See the *ADR Directive* at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>]

- 1.1A.31 R The explanation given by *MiFID investment firms* to *clients* or potential *clients* in accordance with *DISP* 1.1A.30EU must also:

- (1) enclose a copy of the *Financial Ombudsman Service's* standard explanatory leaflet;
- (2) provide the website address of the *Financial Ombudsman Service*;
- (3) inform the complainant that if, still dissatisfied with the *respondent's* response, the *complaint* may now be referred to the *Financial Ombudsman Service*; and
- (4) indicate whether or not the *respondent* consents to waiving the relevant time limits in *DISP* 2.8.2R or *DISP* 2.8.7R (Was the complaint referred to the Financial Ombudsman Service in time?) by including the appropriate wording set out in *DISP* 1 Annex 3R.

[**Note:** article 13 of the *ADR Directive*]

- 1.1A.32 G The information regarding the *Financial Ombudsman Service* required to be provided in a *final response* sent under *DISP* 1.1A.30EU and referred to in *DISP* 1.1A.31R should be set out clearly, comprehensibly, in an easily accessible way and prominently within the text of those responses.

[**Note:** article 13 of the *ADR Directive*]

- 1.1A.33 G When assessing a *MiFID investment firm's* response to a *MiFID complaint*, the *FCA* may have regard to a number of factors, including, the quality of response, as against the above rules, as well as the speed with which it was made.

[**Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP 1.6.8G*]

- 1.1A.34 G *DISP 2.8.1R* sets out the circumstances in which the *Ombudsman* can consider a *complaint*, including where eight weeks have elapsed since its receipt by the *MiFID investment firm* and where the *MiFID investment firm* consents (subject to the other requirements of *DISP 2.8.1R(4)*).

#### Complaints forwarding

- 1.1A.35 R *DISP 1.7* also applies to a *MiFID complaint* received by a *MiFID investment firm*.

#### Complaints time barring

- 1.1A.36 R If a *MiFID investment firm* receives a *MiFID complaint* which is outside the time limits for referral to the *Financial Ombudsman Service* (see *DISP 2.8*) it may reject the *MiFID complaint* without considering the merits, but must explain this to the complainant in a *final response*.

[**Note:** subject to a few minor changes reflecting its amended application, this provision replicates *DISP 1.8*]

#### Complaints records

- 1.1A.37 EU Investment firms shall keep a record of the complaints received and the measures taken for their resolution.

[**Note:** article 26(1) of the *MiFID Org Regulation*; see also article 72 of the *MiFID Org Regulation* regarding the retention of records]

#### Complaints reporting

- 1.1A.38 EU Investment firms shall provide information on complaints and complaints-handling to the relevant competent authorities and, where applicable under national law, to an alternative dispute resolution (ADR) entity.

[**Note:** article 26(6) of the *MiFID Org Regulation*]

- 1.1A.39 R The *complaints reporting rules* also apply to the *MiFID complaints* of a *firm*, except that the relevant parts of the report which the *firm* must provide to the *FCA* under *DISP 1.10.1R* must, in relation to *MiFID complaints*, include information about such complaints received from *retail clients*, *professional clients*, and (where relevant) *eligible counterparties* rather than

*eligible complainants.*

#### Complaints data publication

- 1.1A.40 R The *complaints data publication rules* apply to the *MiFID complaints* of a *firm*.
- 1.1A.41 G The effect of the *complaints data publication rules* and *DISP 1.1A.37EU* is that, for the purposes of complying with those *rules*, a *firm's complaints data summary* should include relevant data about any *MiFID complaints* received by the *firm*.

#### ADR entities and branches of UK MiFID investment firms in other EEA States

- 1.1A.42 R A *branch* of a *UK MiFID investment firm* in another *EEA State* must adhere to one or more relevant *ADR entities* in that *EEA State* in respect of *consumer disputes concerning investment services and ancillary services*.

[**Note:** article 75 of *MiFID*]

Amend the following as shown.

### 1.3 Complaints handling rules

#### Complaints handling procedures for respondents

- 1.3.1 R ...

[**Note:** ~~article 10 of the *MiFID implementing Directive* and article 6(1) of the *UCITS implementing Directive*~~]

...

#### Further requirements for all respondents

- 1.3.3 R ~~In respect of *complaints* that do not relate to *MiFID business*, a Δ respondent must put in place appropriate management controls and take reasonable steps to ensure that in handling *complaints* it identifies and remedies any recurring or systemic problems, for example, by:~~

...

...

- 1.3.4 G ~~In respect of *complaints* that relate to *MiFID business*, a *firm* should put in place appropriate management controls and take reasonable steps, in the same way as for *complaints* that do not relate to *MiFID business* (see *DISP 1.3.3R* and *DISP 1.3.3BG*), in order to detect and minimise any risk of compliance failures (*SYSC 6.1*) and to comply with *Principle 6* (*Customers' interests*).~~ [deleted]

...

## 1.9 Complaints record rule

1.9.1 R A firm, including, in the case of ~~MiFID business~~ or collective portfolio management services for a UCITS scheme or an EEA UCITS scheme, a branch of a UK firm in another EEA state, must keep a record of each complaint received and the measures taken for its resolution, and retain that record for:

- (1) at least five years where the complaint relates to ~~MiFID business~~ or collective portfolio management services for a UCITS scheme or an EEA UCITS scheme; and
- (2) three years for all other complaints;

from the date the complaint was received.

[~~Note: article 10 of the MiFID implementing Directive~~ and article 6(2) of the UCITS implementing Directive]

...

## 1 Annex 2G Application of DISP 1 to type of respondent / complaint

...

Type of respondent/ complaint	<u>DISP 1.1A Requirements for MiFID investment firms</u>	DISP 1.2 Consumer awareness rules	DISP 1.3 Complaints handling rules	DISP 1.4 - 1.8 Complaints resolution rules etc.	DISP 1.9 Complaints record rule	DISP 1.10 Complaints reporting rules	DISP 1.10A Complaints data publication rules
firm in relation to complaints concerning non-MiFID business (except as specifically provided below)	<u>Does not apply</u>	Applies for eligible complaints	Applies for eligible complaints (DISP 1.3.4G does not apply)	Applies for eligible complaints	Applies for eligible complaints	Applies for eligible complaints	Applies for eligible complaints
firm in relation to MiFID complaints concerning MiFID business carried on from an	<u>Applies for retail clients and professional clients, and (where relevant) eligible counterpart</u>	<u>Applies for eligible complaints</u> <u>Does not apply</u>	<u>(DISP 1.3.3R does not apply)</u> <u>Does not apply</u>	<u>Applies for eligible complaints</u> <u>DISP 1.7 applies as set out in DISP 1.1A</u>	<u>Applies for retail clients</u> <u>Does not apply (but see DISP 1.1A.37EU)</u>	<u>Applies for eligible complaints</u> <u>Applies as set out in DISP 1.1A</u>	<u>Applies for eligible complaints</u> <u>Applies as set out in DISP 1.1A</u>

<u>establishment in the UK</u>	<u>ies (see also DISP 1.1A.6R)</u>						
<i>UK UCITS management company in relation to complaints concerning collective portfolio management services in respect of a UCITS scheme or an EEA UCITS scheme provided under the freedom to provide cross border services</i>	<u>Does not apply</u>	Applies for unitholders	Applies for unitholders	Applies for eligible complainants	Applies for unitholders	Applies for eligible complainants	Applies for eligible complainants
<i>branch of a UK UCITS management company in another EEA State in relation to complaints concerning collective portfolio management services in respect of an EEA UCITS scheme</i>	<u>Does not apply</u>	Applies for unitholders	Applies for unitholders	Does not apply	Applies for unitholders	Does not apply	Does not apply
<i>branch of a UK firm (other than a UK UCITS management company when providing collective portfolio management</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply

<i>nt services in respect of an EEA UCITS scheme) in another EEA State in relation to complaints concerning non-MiFID business</i>							
<i>branch of a UK firm in another EEA State in relation to MiFID complaints concerning MiFID business</i>	<u>Applies for retail clients and professional clients, and (where relevant) eligible counterparties (see also DISP 1.1A.6R)</u>	Does not apply	<del>Applies for retail clients (DISP 1.3.3R does not apply)</del>	Does not apply	<del>Applies for retail clients</del> Does not apply (but see DISP 1.1A.37EU)	Does not apply	Does not apply
<i>incoming branch of an EEA firm (other than an EEA UCITS management company when providing collective portfolio management services in respect of an EEA UCITS scheme) in relation to complaints concerning non-MiFID business</i>	<u>Does not apply</u>	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants	Does not apply
<i>incoming branch of an EEA firm in relation to MiFID complaints concerning MiFID business</i>	<u>Applies for retail clients and professional clients, and (where relevant) eligible counterparties (see also DISP</u>	<del>Applies for eligible complainants</del> Does not apply	Does not apply	<del>Applies for eligible complainants</del> Applies as set out in DISP 1.1A	<u>Does not apply (but see DISP 1.1A.37EU)</u>	<del>Applies for eligible complainants</del> Applies as set out in DISP 1.1A	Does not apply

	<u>1.1A.6R)</u>						
<i>incoming branch of an EEA UCITS management company in relation to complaints concerning collective portfolio management services in respect of a UCITS scheme</i>	<u>Does not apply</u>	Applies for <i>unitholders</i>	Applies for <i>unitholders</i>	Applies for <i>eligible complainants</i>	Applies for <i>unitholders</i>	Applies for <i>eligible complainants</i>	Does not apply
<i>incoming EEA UCITS management company in relation to complaints concerning collective portfolio management services in respect of a UCITS scheme provided under the freedom to provide cross border services</i>	<u>Does not apply</u>	Does not apply	Does not apply	Applies for <i>eligible complainants</i>	Does not apply	Applies for <i>eligible complainants</i>	Does not apply
<i>incoming EEA firm providing <del>cross-border</del> services <u>cross border services</u> from outside the UK</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>equivalent business of a third country investment firm in relation to</i>	<u>Applies as set out in DISP 1.1A</u>	<u>Does not apply</u>	<u>Does not apply</u>	<u>Applies as set out in DISP 1.1A</u>	<u>Does not apply (but see DISP 1.1A.37EU)</u>	<u>Applies as set out in DISP 1.1A</u>	<u>Applies as set out in DISP 1.1A</u>

<i>MiFID complaints</i>							
<i>branch of an overseas firm (in relation to all other complaints)</i>	<u>Does not apply</u>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>
<i>payment service provider in relation to complaints concerning payment services</i>	<u>Does not apply</u>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Does not apply	Does not apply	Does not apply
<i>EEA branch of a UK payment service provider in relation to complaints concerning payment services</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>incoming branch of an EEA authorised payment institution in relation to complaints concerning payment services</i>	<u>Does not apply</u>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Does not apply	Does not apply	Does not apply
<i>incoming EEA authorised payment institution providing cross border payment services from outside the UK</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>electronic money issuer in relation to complaints concerning issuance of</i>	<u>Does not apply</u>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Applies for <i>eligible complaints</i>	Does not apply	Does not apply	Does not apply



<i>electronic money</i>							
<i>EEA branch of an authorised electronic money institution or an EEA branch of any other UK electronic money issuer in relation to complaints concerning issuance of electronic money</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>incoming branch of an EEA authorised electronic money institution in relation to complaints concerning issuance of electronic money</i>	<u>Does not apply</u>	Applies for <i>eligible complainants</i>	Applies for <i>eligible complainants</i>	Applies for <i>eligible complainants</i>	Does not apply	Does not apply	Does not apply
<i>incoming EEA authorised electronic money institution providing cross border electronic money issuance services from outside the UK</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>VJ participant</i>	<u>Does not apply</u>	Applies for <i>eligible complainants</i>	Applies for <i>eligible complainants (DISP 1.3.4G to DISP 1.3.5G do not apply)</i>	Applies for <i>eligible complainants (DISP 1.6.8G does not apply)</i>	Does not apply	Does not apply	Does not apply

<i>complaints relating to auction regulation bidding</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>a full-scope UK AIFM, small authorised UK AIFM or an incoming EEA AIFM, for complaints concerning AIFM management functions carried on for an AIF that is a body corporate (unless it is a collective investment scheme)</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
<i>a depositary, for complaints concerning activities carried on for an authorised AIF</i>	<u>Does not apply</u>	Applies for eligible complainants	Applies for eligible complainants (DISP 1.3.4G does not apply)	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants
<i>a depositary, for complaints concerning activities carried on for an unauthorised AIF that is a charity AIF (other than a body corporate that is not a collective investment scheme)</i>	<u>Does not apply</u>	Applies for eligible complainants	Applies for eligible complainants (DISP 1.3.4G does not apply)	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants
<i>a depositary, for complaints</i>	<u>Does not apply</u>	Applies for eligible complainants	Applies for eligible complainants (DISP	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants	Applies for eligible complainants

concerning activities carried on for an <i>unauthorised AIF</i> that is a <i>UK ELTIF</i> (other than a <i>body corporate</i> that is not a <i>collective investment scheme</i> )			1.3.4G does not apply)				
a <i>depository</i> , for <i>complaints</i> concerning activities carried on for an <i>unauthorised AIF</i> that is not a <i>charity AIF</i> or a <i>UK ELTIF</i>	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
a <i>depository</i> , for <i>complaints</i> concerning activities carried on for an <i>unauthorised AIF</i> that is a <i>body corporate</i> (other than a <i>collective investment scheme</i> ).	<u>Does not apply</u>	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply	Does not apply
an <i>incoming EEA AIFM</i> , for <i>complaints</i> concerning <i>AIFM management functions</i> carried on for an <i>authorised AIF</i> or a <i>UK ELTIF</i> under the	<u>Does not apply</u>	Applies for <i>eligible complainants</i>	Applies for <i>eligible complainants</i> ( <i>DISP</i> 1.3.4G does not apply)	Applies for <i>eligible complainants</i>	Applies for <i>eligible complainants</i>	Applies for <i>eligible complainants</i>	Does not apply

freedom to provide cross-border services							
a CBTL firm in relation to <u>complaints concerning CBTL business</u>	<u>Does not apply</u>	Applies for eligible complaints	Applies for eligible complaints	Applies for eligible complaints	Does not apply	Does not apply	Does not apply
a designated credit reference agency in relation to complaints about providing credit information	<u>Does not apply</u>	Applies for eligible complaints	Applies for eligible complaints	Applies for eligible complaints	Does not apply	Does not apply	Does not apply

## 2 Jurisdiction of the Financial Ombudsman Service

...

### 2.3 To which activities does the Compulsory Jurisdiction apply?

Activities by firms

2.3.1 R ...

2.3.1A R The Ombudsman can also consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by:

- (1) an investment firm authorised under MiFID when providing investment services or ancillary services;
- (2) a CRD credit institution when providing one or more investment services;
- (3) an investment firm authorised under MiFID or a CRD credit institution when selling structured deposits to clients, or advising clients on them;
- (4) a collective portfolio management investment firm when providing the activities permitted by article 6(3) of the UCITS Directive; and
- (5) a collective portfolio management investment firm when providing the activities permitted by article 6(4) of the AIFMD.

[Note: see article 1(1), 1(3) and 1(4) and article 75 of *MiFID*, and articles 1 and 26(5) of the *MiFID Org Regulation*]

2.3.1B     G     For the purposes of *DISP* 2.3.1AR, the *Ombudsman* can consider a *complaint* about an act carried out by a *MiFID investment firm* that is preparatory to the provision of an *investment service* or *ancillary service* which is an integral part of such a service. This includes, for example, generic advice given by a *MiFID investment firm* to a *client* prior to, or in the course of, the provision of investment advice or another *investment service* or *ancillary service*.

[Note: recitals 15 and 16 of the *MiFID Org Regulation*]

...

## Sch 1     Record keeping requirements

...

Sch  
1.2G

Handbook reference	Subject of record	Contents of record	When record must be made	Retention period
<u><i>DISP</i> 1.1A.37EU</u>	<u><i>MiFID complaints</i> subject to <i>DISP</i> 1.1A.</u>	Each <u><i>MiFID complaint</i> received and the <i>complaint handling measures</i> taken to address the <i>MiFID complaint</i> and for its resolution</u>  <u>[Note: see article 26(1), article 72, and Annex 1 of the <i>MiFID Org Regulation</i>]</u>	Not specified (see article 26(1), article 72 and Annex 1 of the <i>MiFID Org Regulation</i> )	Not specified (see article 72 of the <i>MiFID Org Regulation</i> )
<i>DISP</i> 1.9.1R	<i>Complaints</i> subject to <i>DISP</i> 1.3 - <i>DISP</i> 1.8.	Each <i>complaint</i> received and the measures taken for its resolution	<del>On</del> From receipt	5 years for <i>complaints</i> relating to <del><i>MiFID business</i></del> or <i>collective portfolio management services</i> and 3 years for all other <i>complaints</i>

## Sch 2 Notification requirements

...

## Sch 2.1G

Handbook reference	Matter to be notified	Contents of notification	Trigger event	Time allowed
...				
<i>DISP</i> 1.10A.4R and (where relevant) <i>DISP</i> 1.1A.40R	Publication of <i>complaints</i> data summary/total number of <i>complaints</i> (as appropriate), including <i>MiFID complaints</i> where relevant	Email confirmation of publication, containing also a statement that the data summary or total number of <i>complaints</i> (as appropriate) accurately reflects the report submitted to the <i>FCA</i> and stating where the summary/total number of <i>complaints</i> has been published	Upon publication of <i>complaints</i> data summary/total number of <i>complaints</i> (as appropriate)	Immediately
...				

## Annex M

## Amendments to the Collective Investment Schemes sourcebook (COLL)

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

## 6 Operating duties and responsibilities

...

### 6.6B UCITS depositaries

...

Depositary functions: cash monitoring

6.6B.17 R The *depositary* must ensure that the cash flows of each *UCITS scheme* are properly monitored and that:

...

(2) all cash of the *scheme* has been booked in cash accounts which are:

...

(c) maintained in accordance with the principles in article ~~46~~ 2 (safeguarding of client financial instruments and funds) of the ~~MiFID implementing directive~~ MiFID Delegated Directive; and

...

...

## TP 1 Transitional Provisions

### TP 1.1

(1)	(2) Material to which the transitional provision applies	(3)	(4) Transitional provision	(5) Transitional provision: dates in force	(6) Handbook provision: coming into force
...					
47	<u>COLL 4.3.4R(2); COLL 4.3.6R(2); COLL 8.3.6R(1)</u>	<u>R</u>	<u>A new type of payment out of scheme property,</u>	<u>From 3 January 2018 until 3 January 2020</u>	<u>3 January 2018</u>

	<u>and (2)</u>		<u>which is introduced by a firm to facilitate the operation of a research payment account under COBS 2.3B.3R(2), does not constitute a fundamental change under COLL 4.3.4R(2) or COLL 8.3.6R(1) requiring prior approval by meeting. Such a change will however constitute a significant change under COLL 4.3.6R(2) and COLL 8.3.6R(2) requiring pre-event notification.</u>	
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## Annex N

## Amendments to the Investment Funds sourcebook (FUND)

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

### 3 Requirements for alternative investment fund managers

...

#### 3.11 Depositaries

...

Depositary functions: cash monitoring

3.11.20 R A *depositary* must ensure that the *AIF*'s cash flows are properly monitored and that:

...

(2) all cash of the *AIF* has been booked in cash accounts opened:

...

(b) at:

...

(iv) another entity of the same nature, in the relevant market where cash accounts are required, provided such an entity is subject to effective prudential regulation and supervision which have the same effect as *EU* law and are effectively enforced and in accordance with the principles set out in article ~~16~~ 2 (safeguarding of client financial instruments and funds) of the ~~*MiFID*~~ *MiFID Delegated Directive*; and

...

## Annex O

### Amendments to the Professional Firms sourcebook (PROF)

In this Annex, underlining indicates new text.

## 2 Status of exempt professional firm

### 2.1 Designated professional bodies and exempt regulated activities

...

Exempt regulated activities

...

- 2.1.16     G     (1)     An exempt professional firm providing a service which is an investment service is required to do so in accordance with article 4 of the MiFID Org Regulation.
- (2)     In the FCA's view, PROF 2.1.14G is also relevant for these purposes as well as the approach to disclosure described in PROF 4.1.4G, noting that article 4(c) of the MiFID Org Regulation imposes a disclosure obligation when an exempt professional firm markets or otherwise promotes its ability to provide investment services.

## Annex P

## Amendments to the Recognised Investment Exchanges sourcebook (REC)

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

## 2 Recognition requirements

...

### 2.16A Operation of a multilateral trading facility (MTF) or an organised trading facility (OTF)

2.16A.1 UK Schedule to the Recognition Requirements Regulations, Paragraph 9A-9H

...
<b>Paragraph 9E – SME growth markets</b>
A [ <i>UK RIE</i> ] operating a multilateral trading facility which has registered that facility as an SME growth market in accordance with Article 33 of the markets in financial instruments directive must comply with rules made by the FCA for the purposes of this paragraph.
<b>[Note: <i>REC 2.16A.1D</i>]</b>
...

...

2.16A.1D R For the purposes of complying with the requirement set out in paragraph 9E of the Schedule to the *Recognition Requirement Regulations* (SME Growth Markets), the *rules set out by the FCA in MAR 5.10 (Operation of an SME growth market)* apply to a *UK RIE* operating a *multilateral trading facility* as an *SME growth market*, as though it was an *investment firm*.

**[Note: article 33 of *MiFID*]**

...

## Annex Q

## Amendments to the Listing Rules sourcebook (LR)

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

## App 1.1 Relevant definitions

App 1.1.1 **Note:** The following definitions relevant to the *listing rules* are extracted from the *Glossary*.

...	
<i>regulated market</i>	<p>a multilateral system operated and/or managed by a <i>market operator</i>, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in <i>financial instruments</i> - in the system and in accordance with its non-discretionary rules - in a way that results in a contract, in respect of the <i>financial instruments</i> admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with <del>the provisions of</del> Title III of <i>MiFID</i>.</p> <p>[Note: article <del>4(1)(14)</del> <u>4(1)(21)</u> of <i>MiFID</i>]</p>
...	

## Annex R

## Amendments to the Prospectus Rules sourcebook (PR)

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

## App 1.1 Relevant definitions

App 1.1.1 **Note:** The following definitions relevant to the *prospectus rules* are extracted from the *Glossary*.

...	
<i>MiFID</i>	<p><del>The European Parliament and Council Directive on markets in financial instruments (No. 2004/39/EC).</del></p> <p>See also <del>MiFID Regulation</del> and <del>MiFID implementing Directive</del>.</p> <p><u>Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending the <i>insurance mediation directive</i> and <i>AIFMD</i>.</u></p>
...	
<i>regulated market</i>	<p>a multilateral system operated and/or managed by a <i>market operator</i>, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in <i>financial instruments</i> – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the <i>financial instruments</i> admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with <del>the provisions of Title III of <i>MiFID</i>.</del></p> <p>[Note: article 4(1)(21) of <i>MiFID</i>]</p>
...	

## Annex S

### Amendments to the Disclosure Guidance and Transparency Rules sourcebook (DTR)

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

#### 5 Vote Holder and Issuer Notification Rules

...

#### 5.4 Aggregation of managed holdings

...

5.4.2 R (1) The *parent undertaking* of an *investment firm* authorised under *MiFID* shall not be required to aggregate its holdings with the holdings which such *investment firm* manages on a client-by-client basis within the meaning of Article 4(1), ~~point 9~~ point 8, of *MiFID*, provided that:

...

...

...

## Annex T

### Product Intervention and Product Governance Sourcebook (PROD)

All the text in this Annex is new and is not underlined.

#### 1 Application and purpose

##### 1.1 Purpose

- 1.1.1 G The purpose of *PROD* is to improve *firms'* product oversight and governance processes and to set out the *FCA's* statement of policy on making *temporary product intervention rules*.
- 1.1.2 G Product oversight and governance refers to the systems and controls *firms* have in place to design, approve, market and manage products throughout the products' lifecycle to ensure they meet legal and regulatory requirements.
- 1.1.3 G Good product governance should result in products that:
- (1) meet the needs of one or more identifiable target markets;
  - (2) are sold to *clients* in the target markets by appropriate *distribution channels*; and
  - (3) deliver appropriate *client* outcomes.

##### 1.2 Application of PROD 2

- 1.2.1 R *PROD 2* sets out the *FCA's* approach to issuing *temporary product intervention rules*. It is of relevance to all *firms*.

##### 1.3 Application of PROD 3

General: Who? What?

- 1.3.1 R *PROD 3* applies to:
- (1) a *MiFID investment firm*;
  - (2) a *CRD credit institution*;
  - (3) a *MiFID optional exemption firm*; and
  - (4) *branches of third country investment firms*;

with respect to:

- (5) *manufacturing financial instruments and structured deposits*; and
- (6) *distributing financial instruments, structured deposits and investment services*.

[**Note:** articles 1(3), 1(4), 16(3), 24(2) and 41(2) of *MiFID*]

Other firms manufacturing or distributing financial instruments or structured deposits

- 1.3.2 R Other *firms* which *manufacture* or *distribute financial instruments or structured deposits* should take account of *PROD 3* as if it were *guidance* on the *Principles* and other relevant *rules* and as if “should” appeared in *PROD 3* rules instead of “must”.

Eligible counterparty business

- 1.3.3 R *PROD 3.3.1R* does not apply to *eligible counterparty business*.

[**Note:** article 30(1) of *MiFID*]

Where?

- 1.3.4 R *PROD 3* applies to a *firm* with respect to activities carried on from an establishment maintained by it, or its *appointed representative*, in the *United Kingdom*.

- 1.3.5 R (1) *PROD 3* also applies to a *firm* with respect to activities from an establishment *overseas* with a *client* in the *United Kingdom*.
- (2) But *PROD 3* does not apply to those activities if the office from which the activity is carried on were a separate *person* and the activity:
- (a) would fall within the *overseas persons* exclusions in article 72 of the *Regulated Activities Order*; or
  - (b) would not be regarded as being carried on in the *United Kingdom*.

EEA territorial scope rule: compatibility with European law

- 1.3.6 R (1) The territorial scope of this sourcebook is modified to the extent necessary to be compatible with European law (see *PROD 1.3.7G* to *PROD 1.3.10G* for guidance on this).
- (2) This *rule* overrides every other *rule* in this sourcebook.

Effects of the EEA territorial scope rule



- 1.3.7 G One of the effects of *PROD* 1.3.6R is to override the application of this sourcebook to the *overseas* establishments of *EEA firms* in circumstances covered by *MiFID*.
- 1.3.8 G The *guidance* in this chapter provides a general overview only and is not comprehensive.
- 1.3.9 G When considering the impact of a directive on the territorial application of a *rule*, a *firm* will first need to consider whether the relevant situation involves a non-UK element. *PROD* 1.3.6R is unlikely to apply if a *UK firm* is doing business in a *UK establishment* for a *client* located in the *United Kingdom* in relation to a *UK product*, in other words *PROD* 3 will apply to the *UK firm*. However, if there is a non-UK element, the *firm* should consider whether:
- (1) it is subject to the directive (in general, directives only apply to *UK firms* and *EEA firms*, but the implementing provisions may not treat non-*EEA firms* more favourably than *EEA firms*);
  - (2) the business it is performing is subject to the directive; and
  - (3) the particular *rule* is within the scope of the directive.
- If the answer to all three questions is ‘yes’, *PROD* 1.3.6R may change the application of the *rules* in this sourcebook.
- 1.3.10 G When considering a particular situation, a *firm* should also consider whether two or more directives apply.
- MiFID: effect on territorial scope
- 1.3.11 G *PERG* 13 contains general *guidance* on the *persons* and businesses to which *MiFID* applies.
- 1.3.12 G For a *UK MiFID investment firm*, *rules* in this sourcebook that are within the scope of *MiFID* generally apply to its *MiFID business* carried on from an establishment in the *United Kingdom*. They also generally apply to its *MiFID business* carried on from an establishment in another *EEA State*, although in the case of *rules* that implement article 24(2) *MiFID* only where that business is not carried on within the territory of that *EEA State*. Where a *MiFID investment firm* carries on *MiFID business* from a *branch* in another *EEA State*, organisational requirements, including *rules* implementing product manufacture obligations under article 16 *MiFID* are home state requirements and therefore *FCA* responsibility (see *SUP* 13A Annex 1G).
- [**Note:** see articles 34(1) and 35(1) and (8) of *MiFID*]
- 1.3.13 G For an *EEA MiFID investment firm*, *rules* in this sourcebook that are within the scope of *MiFID* generally apply only to its *MiFID business* if that business is carried on from an establishment in, and within the territory of, the *United Kingdom* and only to the extent that the *rules* implement article 24(2) of *MiFID*.

[**Note:** see articles 35(1) and (8) of *MiFID*]

Electronic Commerce Directive: effect on territorial scope

- 1.3.14 G The guidance on the *Electronic Commerce Directive* in *COBS 1 Annex 1*, Part 3, paragraph 7 applies equally in relation to the *rules* in *PROD 3*.

Interaction of *PROD 3* and the *RPPD Guide*

- 1.3.15 G A *firm* to which *PROD 3* applies need not apply the *guidance* in *RPPD* for matters covered by *PROD 3* if the *firm* has complied with *PROD 3*.

## 2 Statement of policy with respect to the making of temporary product intervention rules

[*Editor's note:* This chapter does not take account of any changes that may be required as a result of *MiFIR* or Regulation (EU) 1286/2014 (*PRIIPs*)]

### 2.1 Purpose

- 2.1.1 G This chapter explains the *FCA's* policy with respect to the making of *temporary product intervention rules* under sections 137D and 138M of the *Act*. This statement of policy replaces the "Statement of Policy for making temporary product intervention rules" published in Policy Statement PS13/03 (see <https://www.fca.org.uk/publication/policy/fsa-ps13-03.pdf>).

[**Note:** see section 138N of the *Act*]

- 2.1.2 G Product intervention *rules* are *rules* made under section 137D of the *Act* which apply to specific products (or types of products), product features or marketing practices relating to specific products.
- 2.1.3 G Product intervention *rules* may be made without consultation under section 138M of the *Act* but are limited to a maximum duration of 12 *months* and are referred to as "*temporary product intervention rules*".

### 2.2 General rule making and product intervention rules

- 2.2.1 G The *Act* empowers the *FCA* to make general *rules* as appear necessary or expedient for the purpose of advancing one or more of its *operational objectives*.

[**Note:** see section 137A of the *Act*]

- 2.2.2 G The *Act* also provides that the *FCA* may use its general *rule-making* power to make product intervention rules prohibiting *authorised persons* from, among other things, entering into specified agreements (section 137D of the

*Act*). These *rules* may be made to advance:

- (1) the consumer protection objective; or
- (2) the competition objective; or
- (3) the market integrity objective.

- 2.2.3 G Section 137D(2) of the *Act* sets out that the *FCA* may prohibit *authorised persons* from:
- (1) entering into specified agreements with any *person* or specified person (specified person means a person who meets the description specified by *FCA rules*);
  - (2) entering into specified agreements with any *person* or specified person unless requirements specified in the *rules* have been satisfied;
  - (3) doing anything that would or might result in the entering into of specified agreements by *persons* or specified persons, or the holding by them of a beneficial or other kind of economic interest in specified agreements; and
  - (4) doing anything within paragraph (3) unless requirements specified in the *rules* have been satisfied.
- 2.2.4 G Section 137D of the *Act* makes it clear that a range of options would be available to us in making *rules* prohibiting *authorised persons* from entering into specified agreements.
- 2.2.5 G The extent of the *rules* which are made will generally depend on the type of intervention deemed necessary to address the issues identified, having regard to whether the intervention would be a proportionate response to the perceived risk to *consumers*, competition issues or market integrity issues.
- 2.2.6 G *Rules* may include:
- (1) requiring certain product features to be included, excluded or changed; or
  - (2) requiring amendments to promotional materials; or
  - (3) the imposition of restrictions on sales or marketing of the product; or
  - (4) in more serious cases, a ban on sales or marketing of a product in relation to all or some types of *client*.
- 2.2.7 G Where the product is provided by a business outside of the *UK*, *rules* may be made targeting *regulated activities* by *authorised persons* in the *UK* that would lead to a specified agreement being formed.

[**Note:** see sections 137D(2)(c) and (d) of the *Act*]

## 2.3 Agreements made in breach of product intervention rules

- 2.3.1 G In relation to agreements entered into in breach of product intervention *rules*, section 137D(7) sets out that the *rules* may:
- (1) provide for a relevant agreement or obligation to be unenforceable against any *person* or specified person;
  - (2) provide for the recovery of any money or other property paid or transferred under a relevant agreement or obligation by any *person* or specified person; and
  - (3) provide for the payment of compensation for any loss sustained by any *person* or specified person as a result of paying or transferring any money or other property under a relevant agreement or obligation.
- 2.3.2 G Where a *rule* provides for a relevant agreement or obligation to be unenforceable, the relevant agreement or obligation would only be unenforceable if the sale of the product was made after the introduction of the *rules* and there was a contravention of those *rules*. *Clients* with products bought after the introduction of *rules* incorporating unenforceability provisions would generally need to seek redress through the usual channels of complaints to the *firm* and to the *Financial Ombudsman Service*, or legal action against the *firm*.
- 2.3.3 G Arrangements made before the introduction of the *rules* would not be affected by the unenforceability and compensation provisions. *Clients* holding contracts made before these *rules* were in place would still be able to seek redress through the usual channels of complaints to the *firm* and to the *Financial Ombudsman Service* or legal action against the relevant *firm*. These *clients* would need to establish their claim to redress in the usual way, for example by demonstrating that the advice they received was unsuitable, or that they bought the product after receiving a misleading *financial promotion*.

## 2.4 Temporary product intervention rules

- 2.4.1 G Normally the *FCA* must consult the public before making any *rules*. However, the *Act* allows a general exemption in section 138L where the *FCA* considers that the delay involved in complying with the requirement to consult would be prejudicial to the interests of *consumers*.
- 2.4.2 G There is also a specific exemption to the consultation requirement in relation to making *temporary product intervention rules* (section 138M of the *Act*). The *FCA* may make *temporary product intervention rules* without consultation if it considers that it is necessary or expedient not to comply with such a requirement to advance:

- (1) the consumer protection objective, or
- (2) the competition objective, or
- (3) the market integrity objective.

- 2.4.3 G The *FCA*'s discretion to act under section 138M is therefore wider than under section 138L.
- 2.4.4 G Decisions to make any *rules*, including *temporary product intervention rules*, will be taken by the *FCA* Board. In doing so, the *FCA* Board will have regard to all the available, relevant evidence, as well as the impact of the measure to be introduced by the *rule*.
- 2.4.5 G The *FCA* Board will consider whether the evidence is sufficient to support the proposed measure and whether the measure is a proportionate response to the issue identified.
- 2.4.6 G In publishing *temporary product intervention rules* the *FCA* will also publish the rationale for these *rules*.

## **2.5 Factors the FCA will consider when making temporary product intervention rules**

- 2.5.1 G In general terms the *FCA* will consider a product intervention *rule* where we identify a risk of *consumer* detriment, a threat to market integrity or ineffective competition arising from a particular product, type of product, or practices associated with a particular product or type of product.
- 2.5.2 G In deciding whether the *rule* should be made as a *temporary product intervention rule*, the *FCA*'s main consideration will generally be whether prompt action is deemed necessary in seeking to reduce or prevent *consumer* detriment or a threat to market integrity or ineffective competition arising from that product, type of product or practices.

## **2.6 General considerations for product intervention rules**

- 2.6.1 G Together with the considerations in *PROD 2.5*, when making temporary or permanent product intervention *rules*, the *FCA* will have regard to the regulatory principles set out in section 3B of the *Act*, (see *PROD 2.9*).
- 2.6.2 G The *FCA* will also take into account general considerations that include, but are not limited to, whether the proposed *rules* are:
- (1) an appropriate and effective means of addressing actual or potential *consumer* detriment associated with a particular product or group of products;

- (2) a proportionate and deliverable means of addressing actual or potential detriment;
- (3) compatible with the *FCA's* duty to promote effective competition in the interests of *consumers* (section 1B(4) of the *Act*);
- (4) supported by sufficient and appropriate evidence;
- (5) transparent in their aim and operation;
- (6) likely to be beneficial for *clients* when taken as a whole; and
- (7) compatible (where relevant) with other applicable law, for example *EU* law.

2.6.3 G In accordance with the Equality Act 2010, the *FCA* will have due regard to the need to:

- (1) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- (2) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- (3) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;

when making temporary or permanent product intervention *rules*.

## 2.7 Contextual considerations for product intervention rules

2.7.1 G When the *FCA* is considering whether to make temporary or permanent product intervention *rules* in response to an identified issue with a product, the following factors may be taken into account:

- (1) The potential scale of detriment in the market. Issues involving products with a large or potentially large *client* base are more likely to require product intervention.
- (2) The potential scale of detriment to individual *clients*. Issues that may lead to high detriment for individual *clients* are more likely to require product intervention.
- (3) The social context. Issues that may lead to detriment for particular groups of *clients* (such as, in particular, vulnerable *client* groups) are more likely to require product intervention.
- (4) The market context. Market mechanisms such as information disclosure and competition do not always work to protect *consumers*.

- (5) Possible unintended consequences. Whether the use of product intervention *rules* or the timing of the intervention would in itself create undue risk of further *consumer* detriment, including harm to existing *clients* and in the market (although this will not necessarily comprise a full cost benefit analysis).

## 2.8 Competition considerations for temporary product intervention rules

- 2.8.1 G When making a temporary or permanent product intervention *rule*, the *FCA* will seek to promote effective competition in the interests of *consumers* where doing so is compatible with its consumer protection objective or integrity objective.
- 2.8.2 G In accordance with section 1E of the *Act* the *FCA* also has a competition objective and may make *rules*, including *temporary product intervention rules*, specifically to advance competition.
- 2.8.3 G Relevant competition-related considerations for the *FCA* in the context of temporary or permanent product intervention *rules* are likely to include:
  - (1) Whether there is reasonable scope for the *rules* under consideration to promote effective competition in the interests of *consumers*, for instance by addressing *consumer* behaviours that impair their ability to benefit from competition, by reducing information asymmetries or by correcting misaligned incentives.
  - (2) Whether the *rule* under consideration may have a negative impact on competition factors such as product innovation and barriers to entry for new market participants.
  - (3) Whether any negative impact on competition factors is proportionate, having regard to the aims of the *rule* under consideration.
  - (4) Whether alternative solutions may deliver the same intended outcome while having a more positive impact on competition.
  - (5) The overall effect of a proposed *rule* upon the operation of effective competition in the market for financial services, having regard to the interests of *consumers*.

## 2.9 Regulatory principles

- 2.9.1 G The *FCA* will have regard to the regulatory principles set out in section 3B of the *Act* when making *temporary product intervention rules*.
- 2.9.2 G As part of the *FCA*'s consideration of issues including the desirability of facilitating innovation, we will consider the potential deterrent effect on

entry to the market and innovation when making *temporary product intervention rules* against the potential for reducing anticipated *consumer detriment*.

## **2.10 Process for making temporary product intervention rules**

- 2.10.1 G Once initial proposals have been discussed, a paper will be prepared at working group level for a committee (the Committee) with appropriate authority to propose *temporary product intervention rules* to the *FCA Board*.
- 2.10.2 G The Committee will either endorse the proposals and recommend that they are taken to the Board, or suggest rethinking or amending the proposals and coming back at a later date. A decision may be taken to use a different regulatory tool, or not to proceed.
- 2.10.3 G If the Committee decides that the proposals should go to the Board, the paper will be taken to the next available scheduled Board meeting, unless the matter is of great importance or there is an emergency, in which case the Board may convene specifically to consider the issue.
- 2.10.4 G If the Board makes a decision to act on the policy proposals the *FCA* will publish the *temporary product intervention rules* on its website and take the necessary follow-up actions.

## **2.11 Consulting the panels**

- 2.11.1 G The *FCA* will generally seek the views of the Financial Services Practitioner Panel, the Smaller Businesses Practitioner Panel and the Financial Services Consumer Panel during the process for making *temporary product intervention rules* if there is sufficient time to do so.

## **2.12 Consulting the PRA**

- 2.12.1 G Before any proposed product intervention *rules* are made (whether temporary or not) the *FCA* will consult the *PRA*.

## **2.13 Communication, publication and post-implementation review of temporary product intervention rules**

- 2.13.1 G Before making a *temporary product intervention rule*, the Committee will consider how affected *firms* and *clients* are to be informed of the *rule* in good time.



- 2.13.2 G The *FCA* will publish a statement on its website explaining why it is introducing the *rule*. The *FCA* may choose to invite feedback, but this will not amount to a consultation exercise.
- 2.13.3 G The *FCA* may choose to review a *temporary product intervention rule* during the term for which the *rule* is in force. Such a review will generally depend on the perceived risk the *rule* seeks to mitigate. These reviews may be informed by market monitoring and feedback from stakeholders, including product *manufacturers*, *distributors* and *clients*.
- 2.13.4 G Where the *FCA* perceives potential uncertainty about how the *rule* operates, it may consider publishing *guidance*.
- 2.13.5 G Reviews are likely to consider whether a *rule* is functioning as intended, including whether:
- (1) there have been any breaches of the *rule*; or
  - (2) there are any unintended consequences, such as an impact on products that were not intended to be caught by the *rule*; or
  - (3) there is evidence suggesting *firms* are avoiding or seeking to avoid the *rule* rather than complying with it, for instance where new products enter the market or new features are added to existing products that expose *clients* to the same or similar potential detriment; or,
  - (4) new evidence demonstrates that the *rule* is not necessary or detriment is unlikely.
- 2.13.6 G As a result of these reviews, where necessary, the *FCA* may:
- (1) revoke a *temporary product intervention rule*; or
  - (2) amend the *rule*, for example where a *rule* specifies certain criteria under which the sale of a product may continue, change these criteria.
- 2.13.7 G Subsequent changes to a *temporary product intervention rule* will be communicated by issuing a new statement containing the revised *rule* and the rationale for the changes. Such changes will not extend the lifespan of the *temporary product intervention rule*.
- 2.13.8 G However, the *FCA* may consult on a new *rule* to replace the *temporary product intervention rule* from the date on which the *temporary product intervention rule* ceases to have effect. This exercise would be subject to the *FCA*'s standard *rule*-making procedure including market failure analysis, cost benefit analysis and consultation to which all stakeholders, including *manufacturers*, *distributors* and *clients* would be invited to reply.

## 2.14 Revocation or replacement of rules

- 2.14.1 G When making *temporary product intervention rules* the *FCA* will state the duration of the *rule* and the date from which it will be effective. *Temporary product intervention rules* will have a maximum duration of 12 *months* from when the *rule* is made, but the *FCA* may decide on a shorter duration for a *rule*.
- 2.14.2 G The *FCA* may review or revoke *temporary product intervention rules* at any time before the end of the period for which they apply.
- 2.14.3 G *Rules* may be revoked or amended for a number of reasons, including but not limited to:
- (1) new *rules* are introduced on a permanent basis following a consultation exercise; or
  - (2) industry initiatives are developed that specify sufficient minimum standards to address the sources of *consumer* detriment; or
  - (3) further evidence is submitted that demonstrates that *consumer* detriment will not occur; or
  - (4) demand for, or supply of, the relevant product disappears and is deemed unlikely to return; or
  - (5) the *FCA* identifies unforeseen negative effects of the *rule* which outweigh any positive impact upon consumer protection.
- 2.14.4 G Where *temporary product intervention rules* have been made, the *FCA* may not make further *temporary product intervention rules* containing the same, or substantially the same, provisions within 12 *months* beginning on the day on which the limited duration of the initial *rules* ends (whether or not the *rules* were revoked early). This period does not apply to *rules* that are not *temporary product intervention rules*, (i.e. *rules* which had been made subject to consultation, whether or not of set duration).

### 3 Product governance: MiFID

#### 3.1 General

Interpretation: financial instruments and structured products

- 3.1.1 R For the purposes of *PROD* 3, references to *financial instruments* include *structured deposits*.

Proportionate application of rules

- 3.1.2 R (1) A *firm* must, when *manufacturing financial instruments* or deciding on the range of *financial instruments* and *investment services* it intends to *distribute* to *clients*, comply, in a way that is appropriate

and proportionate, with the requirements set out in this chapter.

- (2) In complying with these requirements, a *firm* must take into account:
- (a) the nature of the *financial instrument* or *investment service*; and
  - (b) the target market for the *financial instrument*.

[**Note:** articles 9(1) and 10(1) of the *MiFID Delegated Directive*]

- 3.1.3 G A proportionate application of the requirements in this chapter may mean that complying with the *rules* could be relatively simple for simple *financial instruments* distributed on an *execution-only transaction* basis where such *financial instruments* would be compatible with the needs and characteristics of the mass retail market.

## 3.2 Manufacture of products

### General

- 3.2.1 R A *manufacturer* must:
- (1) ensure that the *financial instruments* it *manufactures* are designed to meet the needs of an identified target market of *end clients* within the relevant category of *clients* (see *COBS 3* for client categories);
  - (2) ensure that the strategy for *distribution* of the *financial instruments* is compatible with the identified target market; and
  - (3) take reasonable steps to ensure that the *financial instrument* is *distributed* to the identified target market.

[**Note:** article 24(2) of *MiFID*]

- 3.2.2 G Consideration of target market factors should permeate all aspects of product development and *distribution*, as well as ensuring the selection of appropriate *distribution* channels and the promotion of the *financial instruments* are accompanied by sufficient and correct information.

### Product governance arrangements

- 3.2.3 R A *manufacturer* must maintain, operate and review a process for the approval of:
- (1) each *financial instrument*, and
  - (2) significant adaptations of existing *financial instruments*,
- in each case before they are marketed or *distributed* to *clients*.

[Note: article 16(3) of *MiFID*]

- 3.2.4 R For each *financial instrument* the product approval process must:
- (1) specify an identified target market of *end clients* within the relevant category of *clients* (see *COBS 3* for client categories);
  - (2) ensure that all relevant risks to the identified target market are assessed; and
  - (3) ensure that the intended *distribution* strategy is consistent with the identified target market.

[Note: article 16(3) of *MiFID*]

- 3.2.5 G When designing *financial instruments*, a *firm* should have in place systems and controls to manage adequately the risks posed by *financial instrument* design.

Manufacture by more than one firm

- 3.2.6 R Where *firms* collaborate to *manufacture* a *financial instrument*, only one target market needs to be identified.

[Note: article 9(9) of the *MiFID Delegated Directive*]

- 3.2.7 R Where *firms* collaborate, including with entities which are not authorised and supervised in accordance with *MiFID* or *third country investment firms*, to create, develop, issue and/or design a *financial instrument*, they must outline their mutual responsibilities in a written agreement.

[Note: article 9(8) of the *MiFID Delegated Directive*]

Target market

- 3.2.8 R *Manufacturers* must identify the potential target market for each *financial instrument* at a sufficiently granular level and must:

- (1) specify the type or types of *client* for whose needs, characteristics and objectives the *financial instrument* is compatible; and
- (2) identify any group or groups of *client* for whose needs, characteristics and objectives the *financial instrument* is not compatible.

[Note: article 9(9) of the *MiFID Delegated Directive*]

- 3.2.9 G The level of granularity of the target market and the criteria used to define the target market and determine the appropriate *distribution* strategy should be relevant for the *financial instrument* and should make it possible to assess which *clients* fall within the target market. For simpler, more common *financial instruments*, the target market could be identified with less detail

while for more complicated *financial instruments* such as bail-inable instruments or less common *financial instruments*, the target market should be identified with more detail.

[**Note:** recital 19 of the *MiFID Delegated Directive*]

3.2.10 R *Manufacturers* must determine for each *financial instrument* they *manufacture*, whether it meets the identified needs, characteristics and objectives of the target market, and in doing so must include an examination of the following elements:

- (1) whether the *financial instrument's* risk/reward profile is consistent with the target market; and
- (2) whether the design of the *financial instrument* is driven by features that benefit the *client* and not by a business model which relies on poor *client* outcomes to be profitable.

[**Note:** article 9(11) of the *MiFID Delegated Directive*]

3.2.11 R *Manufacturers* of *financial instruments* that are *distributed* through other *firms* must determine the needs and characteristics of the *clients* for whom the product is compatible based on:

- (1) their theoretical knowledge of, and past experience with, the *financial instrument* or similar *financial instruments*;
- (2) the financial markets, and
- (3) the needs, characteristics and objectives of potential *end clients*.

[**Note:** article 9(9) of the *MiFID Delegated Directive*]

#### Product testing

3.2.12 R *Manufacturers* must undertake a scenario analysis of their *financial instruments* to assess:

- (1) the risks of poor outcomes for *end clients* posed by the *financial instrument*; and
- (2) in which circumstances those poor outcomes may occur.

[**Note:** article 9(10) *MiFID Delegated Directive*]

3.2.13 R In conducting the scenario analysis *manufacturers* must assess their *financial instruments* under negative conditions covering what would happen if, for example:

- (1) the market environment deteriorated; or

- (2) the *manufacturer* or a third party involved in *manufacturing* and/or the functioning of the *financial instrument* experiences financial difficulties or other counterparty risk materialises; or
- (3) the *financial instrument* fails to become commercially viable; or
- (4) demand for the *financial instrument* is much higher than anticipated, putting a strain on the *firm's* resources and/or on the market of the underlying *financial instrument*.

[**Note:** article 9(10) *MiFID Delegated Directive*]

3.2.14 R *Manufacturers* must consider the charging structure proposed for each *financial instrument*, including examination of the following:

- (1) whether the *financial instrument's* costs and charges are compatible with the needs, objectives and characteristics of the target market;
- (2) whether the charges undermine the *financial instrument's* return expectations, such as where the costs or charges equal, exceed or remove almost all the expected tax advantages linked to a *financial instrument*; and
- (3) whether the charging structure of the *financial instrument* is appropriately transparent for the target market, such as that it does not disguise charges or is too complex to understand.

[**Note:** article 9(12) of the *MiFID Delegated Directive*]

3.2.15 R *Manufacturers* must consider whether the *financial instrument* may represent a threat to the orderly functioning, or to the stability, of financial markets before deciding to proceed with the launch of the *financial instrument*.

[**Note:** article 9(4) of the *MiFID Delegated Directive*]

#### Information disclosure to distributors

3.2.16 R A *manufacturer* must make available to any *distributor* of that *financial instrument*:

- (1) all appropriate information on the *financial instrument*;
- (2) all appropriate information on the product approval process;
- (3) the identified target market of the *financial instrument*, including information about the target market assessment undertaken;
- (4) information about the appropriate channels for *distribution* of the *financial instrument*;

and must ensure that the information is of an adequate standard to enable *distributors* to understand and recommend or sell the *financial instrument* properly.

[**Note:** article 16(3) of *MiFID II* and 9(13) of the *MiFID Delegated Directive*]

- 3.2.17 G When providing information to *distributors*, a *manufacturer* should make it clear if that information is not intended for *end client* use.
- 3.2.18 G *Manufacturers* may consider, for example, with regard to each *distribution* channel or type of *distributor* what information *distributors* of that type already have, their likely level of knowledge and understanding, their information needs and what form or medium would best meet those needs (which could include discussions, written material or training as appropriate).

#### Review of financial instruments

- 3.2.19 R (1) A *manufacturer* must regularly review the *financial instruments* it *manufactures* taking into account any event that could materially affect the potential risk to the identified target market.
- (2) In doing so, a *manufacturer* must assess for each *financial instrument* at least the following:
- (a) whether the *financial instrument* remains consistent with the needs, characteristics and objectives of the identified target market;
  - (b) whether the intended *distribution* strategy remains appropriate;
  - (c) whether the *financial instrument* is being *distributed* to the target market; and
  - (d) whether the *financial instrument* is reaching *clients* for whose needs, characteristics and objectives the *financial instrument* is not compatible.

[**Note:** article 16(3) of *MiFID II* and article 9(14) of the *MiFID Delegated Directive*]

- 3.2.20 G In carrying out the reviews in *PROD 3.2.19R* *manufacturers* should collect and analyse appropriate management information to detect patterns in *distribution* as compared with the planned target market in order to assess the performance of the *distribution* channels through which a *financial instrument* is being *distributed*.
- 3.2.21 G (1) When reviewing the *financial instruments* it *manufactures*, a *firm* should communicate to the *end client* contractual “breakpoints” such as the end of a long tie-in period that may have a material impact on

the *end client* that the *end client* cannot reasonably be expected to recall or know about already.

- (2) If the *manufacturer* does not know the identity of the *end client*, it should communicate any contractual breakpoints to the *distributor*.

3.2.22 R *Manufacturers* must:

- (1) review *financial instruments* prior to any further issue or re-launch if they are aware of any event that could materially affect the potential risk to *clients*; and
- (2) identify crucial events that would affect the potential risk or return expectations of the *financial instrument*.

3.2.23 G Crucial events that would affect the potential risk or return expectations of the *financial instrument* include:

- (1) the crossing of a threshold that will affect the return profile of the *financial instrument*; or
- (2) the solvency of certain issuers whose securities and guarantees may impact the performance of the *financial instrument*.

3.2.24 R When a crucial event affecting the potential risk or return expectation of the *financial instrument* occurs, a *manufacturer* must take appropriate action, which may consist of:

- (1) the provision of any relevant information on the event and its consequences on the *financial instrument* to the *clients* or *distributors* of the *financial instrument* if the *manufacturer* does not offer or sell the *financial instrument* directly to the *clients*;
- (2) changing the product approval process;
- (3) stopping further issuance of the *financial instrument*;
- (4) changing the *financial instrument* to avoid unfair contract terms;
- (5) considering whether the sales channels through which the *financial instrument* is sold are appropriate where the *manufacturer* becomes aware that the *financial instrument* is not being sold as envisaged;
- (6) contacting the *distributor* to discuss a modification of the *distribution* process;
- (7) terminating the relationship with the *distributor*; or
- (8) informing the relevant *competent authority*.

3.2.25 R *Manufacturers* must review *financial instruments* at regular intervals to assess whether they function as intended.



- 3.2.26 R *Manufacturers* must determine how regularly to review their *financial instruments* based on relevant factors including factors linked to the complexity or the innovative nature of the investment strategies pursued.

[**Note:** article 9(15) of the *MiFID Delegated Directive*]

#### Conflicts of interest

- 3.2.27 R *Manufacturers* must establish, implement and maintain procedures and measures to ensure the *manufacture of financial instruments* complies with the requirements on proper management of conflicts of interest (see SYSC 10.1.7R), including *remuneration*.

- 3.2.28 R *Manufacturers* must ensure that the design of each *financial instrument*, including its features, does not:
- (1) adversely affect *end clients*; or
  - (2) lead to problems with market integrity by enabling the *firm* to mitigate and/or dispose of its own risks or exposure to the underlying assets of the product where the *firm* already holds the underlying assets on own account.

[**Note:** article 9(2) of the *MiFID Delegated Directive*]

- 3.2.29 R Each time a *financial instrument* is *manufactured* *manufacturers* must analyse potential conflicts of interests.

- 3.2.30 R In analysing potential conflicts of interest *manufacturers* must assess whether the *financial instrument* creates a situation where *end clients* may be adversely affected if *end clients* take:
- (1) an exposure opposite to the one previously held by the *manufacturer* itself; or
  - (2) an exposure opposite to the one that the *manufacturer* wants to hold after the sale of the product.

[**Note:** article 9(3) of the *MiFID Delegated Directive*]

#### Oversight and training requirements

- 3.2.31 R *Manufacturers* must ensure that their *management bodies* have effective control over their product governance process.

- 3.2.32 R The development and periodic review of product governance arrangements must be monitored by the *person* allocated the *compliance oversight function* of a *firm* in order to detect any risk of failure by the *manufacturer* to comply with applicable provisions of *PROD*.

[**Note:** article 9(6) and article 9(7) of the *MiFID Delegated Directive*]

- 3.2.33 R All relevant staff involved in the *manufacturing* of *financial instruments* must possess the necessary expertise to understand the characteristics and risks of the *financial instruments* they intend to *manufacture*.

[**Note:** article 9(5) of the *MiFID Delegated Directive*]

- 3.2.34 G *Firms* should have regard to SYSC 5.1, and in particular SYSC 5.1.5AB R, when considering whether their relevant staff have the necessary expertise.

#### Compliance reports

- 3.2.35 R Compliance reports to the *management body* must include information about the *financial instruments* that the *firm* has *manufactured*, including information on the *distribution* strategy.

- 3.2.36 R *Manufacturers* must make the compliance reports available to their *competent authority* on request.

[**Note:** article 9(6) *MiFID Delegated Directive*]

### 3.3 Distribution of products and investment services

#### General

- 3.3.1 R A *distributor* must:
- (1) understand the *financial instruments* it *distributes* to *clients*;
  - (2) assess the compatibility of the *financial instruments* with the needs of the *clients* to whom it *distributes investment services*, taking into account the *manufacturer's* identified target market of *end clients*; and
  - (3) ensure that *financial instruments* are *distributed* only when this is in the best interests of the *client* (see *COBS 2.1.1R(1)*).

[**Note:** article 24(2) of *MiFID*]

- 3.3.2 G A *distributor* should consider what impact the selection of a given *manufacturer* could have on the *end client* in terms of charges or the financial strength of the *manufacturer*, or possibly, where information is available to the *distributor*, how efficiently and reliably the *manufacturer* will deal with the *distributor* or *end client* at the point of sale (or subsequently, such as when queries/complaints arise, claims are made, or a *financial instrument* reaches maturity).

#### Obtaining information from manufacturers

- 3.3.3 R *Distributors* must obtain from *MiFID manufacturers* information to gain the necessary understanding and knowledge of the *financial instruments* they

intend to *distribute* in order to ensure that the *financial instruments* will be *distributed* in accordance with the needs, characteristics and objectives of the target market.

[**Note:** article 16(3) *MiFID* and article 10(2) *MiFID Delegated Directive*]

- 3.3.4 G In ensuring that they have obtained sufficient information about the *financial instruments* they *distribute* and in ensuring they understand the *financial instruments* or *investment services distributed*, *distributors*:
- (1) should consider whether they understand the materials provided by the *manufacturer* or *distributor* earlier in the sales chain;
  - (2) should ask the *manufacturer* to supply additional information or training where this seems necessary to understand the *financial instrument* or *investment service* adequately;
  - (3) should not *distribute* the *financial instrument* or *investment service* if they do not understand it sufficiently; and
  - (4) when providing information to another *distributor* in a distribution chain, should consider how the further *distributor* will use the information, such as whether it will be given to *end clients*. *Firms* should consider what information the further *distributor* requires and the likely level of knowledge and understanding of the further *distributor* and what medium may suit it best for the transmission of information.

Distributing financial instruments manufactured by non-MiFID firms, including third country firms

- 3.3.5 R (1) *Distributors* must take all reasonable steps to comply with *PROD 3.3* when *distributing financial instruments manufactured* by any *firm* to which *MiFID manufacturer* product governance requirements (*PROD 3.2* or equivalent requirements of another *EEA State*) do not apply.
- (2) As part of this, *distributors* must put in place effective arrangements to ensure that they obtain sufficient, adequate and reliable information from the *manufacturer* about the *financial instruments* to ensure that they will be *distributed* in accordance with the characteristics, objectives and needs of the target market.
- (3) This *rule* applies to *financial instruments* sold on either the primary or secondary market.
- 3.3.6 R The obligation to obtain adequate and reliable information applies proportionately depending on:
- (1) the degree to which publicly available information is obtainable; and

(2) the complexity of the *financial instrument*.

[**Note:** articles 10(1) and 10(2) of the *MiFID Delegated Directive*]

- 3.3.7 R Where information relevant to the obligation in *PROD 3.3.5R* is not publicly available, *distributors* must take all reasonable steps to obtain such relevant information from the *manufacturer* or its agent.
- 3.3.8 G Acceptable publicly available information is information which is clear, reliable and produced to meet regulatory requirements, such as disclosure requirements under the *transparency rules* or the *prospectus rules*.

[**Note:** article 10(2) of the *MiFID Delegated Directive*]

#### Target market and distribution strategy

- 3.3.9 R *Distributors* must determine the target market for the respective *financial instrument*, even if the target market was not defined by the *manufacturer*.
- [**Note:** article 10(1) of the *MiFID Delegated Directive*]
- 3.3.10 R *Distributors* must identify the target market and their *distribution* strategy using:
- (1) the information obtained from *manufacturers*; and
  - (2) information they have on their own *clients*.
- 3.3.11 G In identifying the target market and creating a *distribution* strategy, *distributors* should consider:
- (1) the nature of the *financial instruments* to be offered or recommended and how they fit with *end clients*' needs and risk appetite;
  - (2) the impact of charges on *end clients*;
  - (3) the financial strength of the *manufacturer*; and
  - (4) where information is available on the *manufacturer's* processes, how efficiently and reliably the *manufacturer* will deal with the *end client* at the point of sale or subsequently, such as when complaints arise, claims are made or the *financial instrument* reaches maturity.
- 3.3.12 G The target market identified by *distributors* for each *financial instrument* should be identified at a sufficiently granular level.
- 3.3.13 G Where a *distributor* is part of a distribution chain, the information referred to in *PROD 3.3.10R(2)* should include information on the intended *end client*.
- 3.3.14 R Where a *firm* acts both as a *manufacturer* and a *distributor*, only one target market assessment is required.

[**Note:** article 10(2) of the *MiFID Delegated Directive*]

- 3.3.15 R (1) *Distributors* must have in place adequate product governance arrangements to ensure that:
- (a) the *financial instruments* and *investment services* they intend to *distribute* are compatible with the needs, characteristics and objectives of the identified target market; and
  - (b) the intended *distribution* strategy is consistent with the identified target market.
- (2) *Distributors* must appropriately identify and assess the circumstances and needs of the *clients* they intend to focus on to ensure that their *clients'* interests are not compromised as a result of commercial or funding pressures.
- (3) *Distributors* must identify any groups of *end clients* for whose needs, characteristics and objectives the *financial instrument* or *investment service* is not compatible.

[**Note:** article 10(2) of the *MiFID Delegated Directive*]

- 3.3.16 R *Distributors* must periodically review their product governance arrangements under *PROD* 3.3.15R and must take appropriate actions where necessary to ensure they remain robust and fit for their purpose.

[**Note:** article 16(3) of *MiFID* and article 10(4) of the *MiFID Delegated Directive*]

- 3.3.17 G In the design of *investment services*, to help *clients* make an informed investment decision, *firms* should consider the support *clients* need before they reach the product selection part of the process.
- 3.3.18 R *Distributors* must have in place procedures and measures to ensure that when deciding the range of *financial instruments* and *investment services* to be *distributed*, and the target market, all applicable *rules* are complied with, including but not limited to:
- (1) disclosure (see *COBS* 4 and *COBS* 14.3A);
  - (2) suitability (see *COBS* 9A);
  - (3) appropriateness (see *COBS* 10A);
  - (4) inducements (see *COBS* 2.3A); and
  - (5) conflicts of interest (see *SYSC* 10.1).
- 3.3.19 G *Distributors* should take particular care to ensure compliance with *PROD* 3.3.18R when they intend to *distribute* new *financial instruments* or there

are variations to the *investment services* they provide.

[**Note:** article 10(3) of the *MiFID Delegated Directive*]

#### Oversight and training requirements

- 3.3.20 R The development and periodic review of product governance arrangements must be monitored by the *person* allocated the *compliance oversight function* of a *firm* in order to detect any risk of failure by the *distributor* to comply with applicable provisions of *PROD*.

[**Note:** article 10(6) of the *MiFID Delegated Directive*]

- 3.3.21 R The *management body* of a *distributor* must have effective control over the *firm's* product governance process to determine:
- (1) the range of *financial instruments* the *firm* offers or recommends; and
  - (2) the *investment services* provided to the respective target markets.

[**Note:** article 10(8) of the *MiFID Delegated Directive*]

- 3.3.22 R All relevant staff must possess the necessary expertise to understand:
- (1) the characteristics and risks of the *financial instruments* that the *firm* intends to *distribute*;
  - (2) the *investment services* provided by the *firm*; and
  - (3) the needs, characteristics and objectives of the identified target market.

[**Note:** article 10(7) of the *MiFID Delegated Directive*]

- 3.3.23 G *Firms* should have regard to SYSC 5.1, and in particular SYSC 5.1.5AB R, when considering whether their relevant staff have the necessary expertise.

#### Compliance reports

- 3.3.24 R Compliance reports to the *management body* must include information about the *financial instruments distributed* by the *firm* and the *investment services* provided.
- 3.3.25 R A *distributor* shall make the compliance reports available to *competent authorities* on request.

[**Note:** article 10(8) of the *MiFID Delegated Directive*]

#### Post-sale review

- 3.3.26 R *Distributors* must regularly review the *financial instruments* they *distribute* and the *investment services* they provide, taking into account any event that

could materially affect the potential risk to the identified target market.

- 3.3.27 R In carrying out the review in *PROD 3.3.26R*, *distributors* must assess at least:
- (1) whether the *financial instrument* or *investment service* remains consistent with the needs, characteristics and objectives of the identified target market; and
  - (2) whether the intended *distribution* strategy remains appropriate.
- 3.3.28 R If a *distributor* becomes aware that it has wrongly identified the target market for a specific *financial instrument* or *investment service*, or the *financial instrument* or *investment service* no longer meets the circumstances of the identified target market, it must take appropriate steps, including at least:
- (1) reconsidering the target market; and/or
  - (2) updating its product governance arrangements.
- 3.3.29 G A *distributor* may need to take action under *PROD 3.3.28R* in circumstances where the *financial instrument* becomes very illiquid or very volatile due to market changes.
- [**Note:** article 16(3) of *MiFID* and article 10(5) of the *MiFID Delegated Directive*]

#### Information sharing

- 3.3.30 R To support the reviews carried out by *manufacturers* under *PROD 3.2.19R* to *PROD 3.2.26R*, a *distributor* must provide to the *manufacturer* of each *financial instrument* it *distributes*:
- (1) information on sales; and
  - (2) where appropriate, information on the reviews carried out under *PROD 3.3.26R* to *PROD 3.3.28R*.
- 3.3.31 G
- (1) Information on sales should include information on any sales made outside the target market.
  - (2) In complying with *PROD 3.3.30R* it is not necessary to report every sale to the *manufacturer*. *Distributors* should provide the data necessary for the *manufacturer* to review the *financial instrument* and check that it remains consistent with the needs, characteristics and objectives of the target market defined by the *manufacturer*. Relevant information could include:
    - (a) summary information of the types of *clients*;
    - (b) a summary of complaints received; and

- (c) responses from *clients* to questions suggested by the *manufacturer* for the purposes of obtaining feedback from a *client* sample.
- (3) In determining when providing information on the reviews carried out under *PROD* 3.3.26R to *PROD* 3.3.28R is appropriate, a *distributor* should have regard to the requirements on the *manufacturer* in *PROD* 3.2. Information on the reviews should be shared if the *manufacturer* requests it.

[**Note:** article 10(9) of and recital 20 to the *MiFID Delegated Directive*]

#### Responsibilities in chains of distributors

- 3.3.32 R (1) A *firm* which *distributes financial instruments* or *investment services* to *end clients* is responsible for ensuring that the obligations in this chapter are met in respect of any *financial instrument* or *investment service* it *distributes* to an *end client*.
- (2) A *firm* which *distributes financial instruments* to *clients* which are not *end clients* must, in addition to complying with the rules in this chapter, consider if they are also undertaking a *manufacturing* role and, if they are, also apply *PROD* 3.2.
- 3.3.33 R A *distributor* which *distributes financial instruments* to other *distributors* must:
- (1) ensure that relevant product information is passed from the *manufacturer* to the final *distributor* in the chain; and
- (2) if the *manufacturer* requires information on product sales in order to comply with its obligations under *PROD* 3.2, enable them to obtain it.

[**Note:** article 10(10) of the *MiFID Delegated Directive*]



## Annex U

### Amendments to the Perimeter Guidance manual (PERG)

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

## 1 Introduction to the Perimeter Guidance manual

...

### 1.5 What other guidance about the perimeter is available from the FCA?

1.5.1 G General *guidance* on the perimeter is also contained in various *FCA* documents (mainly fact sheets and frequently asked questions) that are available on the *FCA* website at [www.fca.org.uk](http://www.fca.org.uk). These documents, and the URL on which they may be accessed, include:

...

(11) joint guidance by the *FSA* and the Office of Fair Trading titled “Payment protection products” (January 2013) which includes discussion whether debt freezes and debt waivers are *contracts of insurance* (~~[www.fca.org.uk/your-fca/documents/finalised-guidance/fsa-fg132](http://www.fca.org.uk/your-fca/documents/finalised-guidance/fsa-fg132)~~ <https://www.fca.org.uk/publication/finalised-guidance/fsa-fg13-02.pdf>); ~~and~~

(12) the *FSA*’s views on whether members of the NHBC who provide insurance to buyers of properties in accordance with the Buildmark scheme carry out *insurance mediation*, contained in a letter to NHBC’s solicitors and put onto the *FSA*’s Freedom of Information Act register in December 2012 (~~[www.fca.org.uk/your-fca/documents/fsa-foi2707-request-information](http://www.fca.org.uk/your-fca/documents/fsa-foi2707-request-information)~~ <https://www.fca.org.uk/publication/foi/fsa-foi2707-info.pdf>).

...

## 2 Authorisation and regulated activities

...

### 2.3 The business element

...

2.3.2 G There is power in the *Act* for the Treasury to change the meaning of the business element by including or excluding certain things. They have exercised this power (see the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177), ~~the Financial Services and Markets Act 2000 (Regulated~~

~~Activities) (Amendment) (No.2) Order 2003 (SI 2003/1476), the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2005 (SI 2005/922), the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) (Amendment) Order 2011 (SI 2011/2304) and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013 as amended from time to time). The result is that the business element differs depending on the activity in question. This in part reflects certain differences in the nature of the activities:~~

...

(2) Except as stated in *PERG 2.3.2G(2A)* and *PERG 2.3.2G(3)*, the business element is not to be regarded as satisfied for any of the following regulated activities unless a person carries on the business of engaging in one or more of them:

- (a) regulated activities carried on in relation to *securities* or *contractually based investments*;
- (b) ~~(or for those regulated activities~~ carried on in relation to ‘any property’);
- (c) the regulated activities listed in *PERG 2.7.2-BG (Accepting deposits and other regulated activities applying to deposits)* so far as they relate to *structured deposits*;
- (d) ~~unless a person carries on the business of engaging in one or more of the activities. This also applies to the regulated activities of advising on P2P agreements, advising on a home finance transaction and arranging a home finance transaction.~~

~~This is a narrower test than that of carrying on regulated activities by way of business (as required by section 22 of the Act), as it requires the regulated activities to represent the carrying on of a business in their own right.~~

This is a narrower test than that of carrying on regulated activities by way of business (as required by section 22 of the Act), as it requires the regulated activities to represent the carrying on of a business in their own right.

...

...

## 2.5 Investments and activities: general

...

- 2.5.4A G The UK has exercised part of the optional exemption in article 3 of *MiFID*. Further information about this exemption is contained in Q48 to 53 in *PERG*

13.5. ~~It is a requirement of article 3 MiFID that the activities of firms relying on the exemption are “regulated at national level”.~~ The investment services to which article 3 apply (namely reception and transmission of orders and investment advice in relation to either *transferable securities* or units in collective investment undertakings) correspond to *regulated activities* (see PERG 13 Annex 2 Tables 1 and 2).

2.5.5 G ... These relate to the exclusions concerned with:

...

(2A) issuing own securities (see PERG 2.8.4G(4));

...

(3A) arranging for the issue of your own securities PERG 2.8.6AG(11);

...

...

2.5.6 G ...

Wider definition of certain specified investments when carrying on some kinds of EU business

2.5.7 G Some *specified investments* are defined so that certain products only come within that *specified investment* when a *person* is providing services under certain *EU* legislation in relation to that product.

2.5.8 G When PERG 2.5.7G applies, the product is only treated as falling within the definition of the *specified investment* concerned if (in relation to that product):

(1) one of the following *persons*:

(a) a *MiFID investment firm*; or

(b) a *third country investment firm*; or

(c) a *CRD credit institution*; or

(d) a *credit institution* that would qualify to be a *CRD credit institution* if its registered or head office were in the *EEA*;

provides or performs *investment services and/or activities* on a professional basis; or

(2) a *UCITS investment firm* is providing certain *investment services and/or activities* under article 6.3 of the *UCITS Directive* (provision of services in addition to *UCITS* management); or

- (3) a market operator (or someone who would be a market operator if it was based in the EEA) is providing the investment services and/or activities of operating a multilateral trading facility or organised trading facility (these activities are described in Q24 and Q24A in PERG 13.3); or
- (4) an AIFM investment firm is providing services under article 6.4 of the AIFMD (provision of services in addition to AIF management).

2.5.9      G      PERG 2.5.7G only applies to the following specified investments:

- (1) an emission allowance (see PERG 2.6.19DG for more details);
- (2) an option (see PERG 2.6.20G for more details);
- (3) a future (see PERG 2.6.22AG for more details);
- (4) a credit derivative treated as a contract for differences (see PERG 2.6.23G for more details); and
- (5) a binary or fixed outcomes derivative treated as a contract for differences (see PERG 2.6.24AG for more details, which also explains that in certain circumstances PERG 2.5.7G does not apply to this product).

2.5.10      G      (1) When deciding whether a person is a MiFID investment firm or a third country investment firm for the purposes of PERG 2.5.8G(1), it is necessary to take into account the services that that person is providing in relation to the product concerned.

(2) For example, say that a UK person does business in an option product to which PERG 2.5.7G applies. When deciding whether that product is a regulated option, it is not necessary for that person already to be:

(a) a MiFID investment firm; or

(b) authorised under the Act;

because of its other activities.

(3) Therefore, when deciding whether the UK person in (2) is a MiFID investment firm and whether it needs to be authorised under the Act, it is necessary to take into account all the business it does, including business in that option product.

## **2.6 Specified investments: a broad outline**

...

Deposits

...

2.6.4 G ...

- 2.6.4-A G (1) A structured deposit is a kind of deposit.
- (2) A structured deposit is a deposit which is fully repayable at maturity on terms under which interest or a premium will be paid or is at risk, according to a formula involving factors such as:
- (a) an index or combination of indices; or
  - (b) a financial instrument or combination of financial instruments; or
  - (c) a commodity or combination of commodities or other physical or non-physical non-fungible assets; or
  - (d) a foreign exchange rate or combination of foreign exchange rates.
- (3) A variable rate deposit whose return is directly linked to an interest rate index such as Euribor or Libor is not a structured deposit under paragraph (2)(a).
- (4) (3) applies whether or not the interest is predetermined and whether it is fixed or variable.
- 2.6.4-B G The reason why there is a definition of a structured deposit is that there are a number of regulated activities that apply to structured deposits that do not apply to other kinds of deposit. See PERG 2.7.2-BG for a list.
- 2.6.4-C G Although the definition of a structured deposit specifically requires that the principal amount be fully repayable, that does not imply that this feature only applies to structured deposits. In the FCA's view, capital certainty is a feature of any kind of deposit.

...

Greenhouse gas ~~emissions~~ emission allowances

- 2.6.19D G (1) ~~This specified investment~~ There are two specified investments relating to the scheme for greenhouse gas emission allowance trading within the EU:
- (a) the first kind comprises ~~emissions~~ emission allowances that are auctioned as financial instruments or two-day emissions spots (together, emissions auction products); and
  - (b) the second kind is an emission allowance itself, subject to (2)).

- (2) An emission allowance is only a *specified investment* under (1)(b) if PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies.
- (3) An emission allowance can also be the underlying for an *option, future or contract for differences*.
- 2.6.19E G ~~‡~~ The *emissions auction product specified investment* relates only to the regulated activity of *bidding in emissions auctions* (whereby a bid is received, transmitted and submitted on an *auction platform*) and captures the two forms of allowance products that may be auctioned under article 4(2) of the *auction regulation*: a two-day spot or a five-day future.
- 2.6.19F G ~~For the purposes of the RAO, this *specified investment* is not~~ See PERG 2.7.6DG for more about:
- (1) how the RAO deals with the overlap between *emission allowances* and *emissions auction products*; and
- (2) whether these products are a *security*, a *contractually-based investment* or a *relevant investment*.
- 2.6.19G G ~~This *specified investment* incorporates definitions from other EU directives or regulations which can be summarised as follows~~ Some other points about *emission allowances* are:
- (1) ~~*Emissions*~~ *Emission allowance* means an allowance as defined in article 3(a) of Directive 2003/87/EC which established the scheme for greenhouse gas ~~emissions~~ *emission allowance* trading within the EU. That article provides that an allowance is an allowance to emit one tonne of carbon dioxide equivalent during a specified period, only valid for the purpose of meeting the requirements of Directive 2003/87/EC and only transferable in accordance with the provisions of that directive (~~*emissions*~~ *emission allowance*).
- ...
- (3) ~~A *financial instrument* is defined as any instrument listed in Section C of Annex I to MiFID. Recital 14 of the *auction regulation* explains that a two-day spot is not a *financial instrument* whereas a five-day future is (see PERG 13.4, Q34). A five-day future is defined in article 3(4) of the *auction regulation* as an allowance auctioned as a *financial instrument* for delivery at an agreed date no later than the fifth trading day from the day of the auction.~~
- (4) The distinction between *emission allowances* that are auctioned as *financial instruments* and those auctioned as two-day spots is no longer relevant as all *emissions auction products* are *financial instruments*. When this part of the *Regulated Activities Order* was brought into force, a *two-day emissions spot* was not a *financial instrument*. Changes in EU legislation since then mean that it is one

now.

## Options

- 2.6.20 G The *specified investment* category of *options* comprises:
- ...
- (2) options to acquire or dispose of other property and falling within paragraphs 5, 6, 7 or 10 of Section C of Annex 1 to MiFID (see article 83(2) of the *Regulated Activities Order* and *PERG 13, Q32 Q33A to Q34* for *guidance* about these instruments), but only where they are options ~~in relation to which a MiFID investment firm or a third country investment firm provides or performs investment services and activities on a professional basis~~ PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies; and
- (3) options to acquire or dispose of an option to which (2) applies ~~– See 2~~ but only where PERG 2.5.7G applies (see article 83(1)(e) of the Regulated Activities Order).
- 2.6.20A G It follows therefore that options not falling within *PERG 2.6.20G(1)*, for example physically settled options on non-precious metals, such as copper options, will not be *options* unless they meet the conditions in *PERG 2.6.20G(2)*. Moreover, where the option in question is one to which *PERG 2.6.20G(2)* applies, it will be an *option* only in relation to the ~~*investment services and activities, or ancillary services where relevant*~~ services referred to in *PERG 2.5.8G*, provided by that person. The same applies in the case of options falling within *PERG 2.6.20G(3)*, for example an option on a physically settled copper option traded on a *regulated market*.

## Futures

- ...
- 2.6.22A G As with *options*, there is an additional category of instruments which are *futures* only ~~when they are the object of investment services or activities provided or performed by certain persons~~ in limited circumstances. These are contracts as described in *PERG 2.6.21G*:
- (1) ...
- (2) that:
- (a) fall within paragraph 4 of Section C of Annex 1 to MiFID and relate to currencies (see *PERG 13, Q31A to Q31S* for *guidance* about these derivatives); or
- (b) fall within paragraphs 5, 6, 7 or 10 of Section C of Annex 1 to MiFID (see *PERG 13, Q32 Q33A to Q34* for *guidance*

about these derivatives); and

- (3) ~~in relation to which a *MiFID investment firm* or a *third country investment firm* provides or performs *investment services and activities* on a professional basis PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies.~~

See article 84(1A)-(1D) of the *Regulated Activities Order*.

- 2.6.22B G ~~The transposition of *MiFID* does not have the effect of turning spot or forward foreign exchange contracts into *financial instruments* where such instruments satisfy the commercial purpose test in article 84(2) of the *Regulated Activities Order*. In our view, very few instruments are likely to fall within PERG 2.6.22AG in practice, given that this category only applies in the case of instruments not falling within PERG 2.6.22G. An example of an instrument falling within PERG 2.6.22AG could be rights under a contract for a derivative which provides for physical delivery of a commodity at a future date and which is entered into on a multilateral trading facility. [deleted]~~

Contracts for differences

- 2.6.23 G The *specified investment* category of *contracts for differences* covers:
- ...
- (3) ~~other derivative contracts for the transfer of credit risk~~ (not within (1) or (2)) falling within paragraph 8 or 9 of Section C of Annex 1 to *MiFID*, that is derivative instruments for the transfer of credit risk (see *PERG 13, Q30 to Q31* for guidance about these instruments), but only where a *MiFID investment firm* or a *third country investment firm* provides or performs *investment services and activities* on a professional basis PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies.

...

- 2.6.24 G ...

- 2.6.24A G (1) A binary or other fixed outcomes bet is also treated as *contract for differences*. This is defined as something that meets the following conditions:
- (a) it is a derivative contract of a binary or other fixed outcomes nature;
- (b) it is not covered by *PERG 2.6.23G(1)* or (2);
- (c) it is settled in cash;



- (d) it is a *financial instrument* that falls within paragraphs 4, 5, 6, 7 or 10 of Section C of Annex 1 to *MiFID* (see *PERG* 13, Q31A to Q34 for *guidance* about these instruments); and
- (e) one of the following requirements is met:
- (i) *PERG* 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies; or
- (ii) a person is making arrangements with a view to transactions in investments in relation to it.
- (2) A product is binary (see *PERG* 2.6.24AG(1) (a)) only if the payout is all or nothing. That is, the overall result will be that one party will pay the other a fixed sum. It is a sort of fixed odds bet.
- (3) The main example of a binary product is a binary or digital option.
- (4) A simple example is a contract between X and Y under which:
- (a) at the start, X pays Y a fixed sum (equivalent to the stake in a bet);
- (b) if shares in ABC PLC close above £5.20 per share at close of trading five days later, Y pays X a fixed sum (a multiple of X's original stake), the result being that Y pays X a fixed sum in net terms;
- (c) if shares in ABC PLC close at or below £5.20 per share at close of trading five days later, X gets nothing, the result being that X pays Y a fixed sum.
- (5) A simple binary sporting bet is not a *contract for differences* as:
- (a) it is not covered by *MiFID* and so it does not meet the condition in *PERG* 2.6.24AG(1)(d); and
- (b) it does not come under any other part of the definition of a *contract for differences*.
- (6) A product that that has fixed outcomes but is not binary (see *PERG* 2.6.24AG(1)(a)):
- (a) is like a binary product in that there are fixed number of possible payouts and they are all known in advance; but
- (b) differs from a binary contract in that the number of possible payouts is three or more rather than just two.
- (7) A simple example of a contract in (6) (although it may not be

common in practice) is a contract between X and Y under which:

- (a) at the start, X pays Y a fixed sum (equivalent to the stake in a bet);
- (b) if shares in ABC PLC close above £5.20 per share at close of trading five days later and (c) does not apply, Y pays X a fixed sum (a multiple of X's original stake), the result being that Y pays X a fixed sum in net terms;
- (c) if shares in ABC PLC close above £5.20 per share at close of trading five days later and the market as a whole rises by more than ten percent, Y pays X a fixed sum that is:
  - (i) a multiple of X's original stake; but
  - (ii) a different (and usually smaller) multiple from the one in (b);the result being that Y pays X a fixed sum in net terms;
- (d) if shares in ABC PLC close at or below £5.20 per share at close of trading five days later, X gets nothing, the result being that X pays Y a fixed sum.

- 2.6.24B    G    (1) Any derivative under MiFID will be an option, future or contract for differences where PERG 2.5.7G (Wider definition of certain specified investments when carrying on some kinds of EU business) applies.
- (2) So for example the following contract between X and Y would be a contract for differences.
- (a) At the start, X pays Y a fixed sum (equivalent to a stake in a bet).
  - (b) If the ABC index closes above 6,500 when the contract expires, Y pays X a fixed sum being the stake and an additional pay out (determined on the opening of the contract), the result of the contract being that Y pays X a fixed sum.
  - (c) If the ABC index closes below 6,500 when the contract expires, X gets nothing (and pays Y the stake paid when X opened the contract), the result of the contract being that X pays Y a fixed sum.
  - (d) If the ABC index was trading at 6,500 when the contract was opened and closes at 6,500 when the contract expires, Y pays X a fixed sum (being a proportion of the amount paid by X to Y on opening of the contract), the result of the contract being

that X pays Y a fixed sum.

...

## 2.7 Activities: a broad outline

...

Accepting deposits and other regulated activities applying to deposits

2.7.2 G ...

2.7.2-A G In general, *accepting deposits* is the only regulated activity that applies to deposits, except for those regulated activities that can apply to property or assets that are not specified investments. However, structured deposits are an exception to this.

2.7.2-B G The following regulated activities apply to deposits that are structured deposits in addition to the regulated activity of accepting deposits:

- (1) dealing in investments as agent;
- (2) arranging (bringing about) deals in investments;
- (3) making arrangements with a view to transactions in investments;
- (4) managing investments; and
- (5) advising on investments.

2.7.2-C G The activities in PERG 2.7.2-BG may be carried out by the person accepting the structured deposit or another person. However the activities in PERG 2.7.2-BG(1) to (3) are unlikely to be relevant to the person accepting the structured deposit because:

- (1) the dealing activity in PERG 2.7.2-BG(1) only applies to an agent; and
- (2) the exclusion described in PERG 2.8.6AG(3) (arranging transactions to which the arranger is to be a party) may apply to the activities in PERG 2.7.2-BG(2) and (3).

...

Dealing in investments (as principal or agent)

...

2.7.6 G Both the activities of *dealing in investments as principal* and *dealing in investments as agent* are defined in terms of 'buying, selling, subscribing for or underwriting' certain investments. These investments are:

...

- (2) for *dealing in investments as agent, securities, structured deposits and relevant investments* (except rights under a *funeral plan contract*).

...

#### Bidding in ~~emissions~~ emission auctions

- 2.7.6B G The RAO and the *auction regulation* together generate three broad categories of *person* in relation to bidding for ~~emissions~~ emission allowances on an *auction platform*:
- (1) The first category consists of an *investment firm* to which *MiFID* applies, ~~and a BCD CRD credit institution and a third country credit institution~~ where ~~either the firm~~ is bidding on behalf of its *clients* ~~for emissions auction products~~ or bidding on its own account for *emissions auction products* ~~that are financial instruments~~. For these purposes a *third country credit institution* refers to a *credit institution* that would qualify to be a *CRD credit institution* if its registered or head office were in the *EEA*.
- (1A) ~~This~~ The first category also consists of a *person* that is exempt from *MiFID* under article 2(1) (i) (j) where it is bidding on behalf of a client of its main business or bidding on its own account (further information on the article 2(1) (i) (j) exemption from *MiFID* is in *PERG* 13.5, Q44).
- (1B) A *person* in this first category is entitled to bid on an *auction platform* but requires *permission* from the *FCA* for *bidding in emissions auctions* to do so.
- (2) The second category ~~consists of an investment firm to which MiFID applies and a BCD credit institution where either is bidding on its own account for two day emissions spot~~. This category also consists of operators or aircraft operators bidding on their own account as well as group entities or business groupings of those operators or public bodies or state-owned entities of Member States that control any of those operators (as set out in article 18 of the *auction regulation*). A *person* or entity in this category is entitled to bid on an *auction platform* but does not require *permission* from the *FCA* to do so as a result of an exclusion from the *regulated activity* of *bidding in emissions auctions* in article 24B of the RAO.
- (3) ...
- (4) Article 24B(2) of the RAO includes in the second category (see (2)) an investment firm to which MiFID applies, a CRD credit institution or a third country credit institution where it is bidding on its own account for emissions auction products that are not financial

instruments under MiFID. This part of the RAO no longer has effect as all emissions auction products are now financial instruments. When it was brought into force, a two-day emissions spot was not a financial instrument.

- 2.7.6C G A person may fall into both the first and the second category. For example, a person might be both exempt from MiFID under article 2(1)(i)(j) (within the first category) and be a group entity of an operator (within the second category). In this case, that person does not require permission for activities that cause that person to fall into the second category because those activities are excluded from the activity of *bidding in emissions auctions*.
- 2.7.6D G (1) As explained in PERG 2.6.19DG, an emission allowance and an emissions auction product are both specified investments. The Regulated Activities Order deals with this as follows.
- (2) A person in the first category in PERG 2.7.6BG requires permission from the FCA for bidding in emissions auctions but does not require any other permission to do so.
- (3) A person in the second category in PERG 2.7.6BG does not require any permission from the FCA for bidding.
- (4) Article 24A(2) of the RAO is the main provision that deals with (2) and (3). It provides that bidding in emissions auctions does not form part of any other regulated activity and so, although in the FCA's view this activity broadly equates to the regulated activities of dealing in investments as principal, dealing in investments as agent, arranging (bringing about) deals in investments, or making arrangements with a view to transactions in investments, a person seeking to carry on this bidding activity will only require permission for bidding in emissions auctions to do so and will not require permission for any other regulated activities. Except for this exclusion, in the FCA's view, bidding in emissions auctions would broadly equate to the following regulated activities:
- (a) dealing in investments as principal;
- (b) dealing in investments as agent;
- (c) arranging (bringing about) deals in investments; or
- (d) making arrangements with a view to transactions in investments.
- (5) An emission allowance is a security. This means that any person wishing to carry out any activity in relation to it will need to consider whether any of the regulated activities relating to securities apply (subject to (8)).
- (6) A derivative on an emission allowance is potentially a contractually based investment and a relevant investment. Therefore any person

wishing to carry out any activity in relation to it will need to consider whether any of the *regulated activities* relating to *contractually based investments* and *relevant investments* apply (subject to (8)).

- (7) An *emission allowance* auctioned under the *auction regulation*, as well as being a *specified investment* in its own right (an *emissions auction product*) may also be included in the *emission allowance category of specified investment* (subject to (8)). It is unlikely to be a *contractually based investment* or a *relevant investment*.
- (8) However (as explained in (2) to (4)), for a *firm* that is bidding under the *auction regulation*:
- (a) the only *regulated activity* is *bidding in emissions auctions*;  
and
- (b) the only *specified investment* is an *emissions auction product*.
- (9) (7) means that a *person* may need *permission* to carry out activities in relation to *emission allowances* that are auctioned under the *auction regulation* other than *bidding activities*, such as:
- (a) buying and selling them in the secondary market; or
- (b) advising a client about buying or selling them.
- (10) Where (9) applies, the *specified investment* involved will be an *emission allowance* or one of the *contractually based investments*. The *emissions auction product category of specified investment* is only relevant to the *regulated activity of bidding in emissions auctions*.
- (11) (9) applies to a *person* in (2) or (3) as well as anyone else wanting to carry out such activities.

Arranging deals in investments and arranging a home finance transaction

...

- 2.7.7A G There are ten arranging activities that are *regulated activities* under the *Regulated Activities Order*. These are:
- (1) *arranging (bringing about) deals in investments* which are *securities*, *relevant investments*, *structured deposits* or the *underwriting capacity of a Lloyd's syndicate* or *membership of a Lloyd's syndicate* (article 25(1));
- (2) *making arrangements with a view to transactions in investments* which are *securities*, *relevant investments*, *structured deposits* or the *underwriting capacity of a Lloyd's syndicate* or *membership of a Lloyd's syndicate* (article 25(2));

...

...

### Operating a multilateral trading facility

2.7.7D G *Guidance on the MiFID investment service of operating a multilateral trading facility is given in PERG 13, Q24. ~~So far as~~ An activity that comes within the regulated activity of operating a multilateral trading facility is concerned, this does not comprise the activities come within the regulated activities of dealing in investments as agent, dealing in investments as principal, or arranging deals in investments. Where a firm carries on one or more of these activities in addition to operating a multilateral trading facility, these are separate regulated activities for which it requires permission.*

2.7.7DA G The definition of a multilateral trading facility covers:

- (1) a multilateral trading facility as defined by MiFID (see PERG 13, Q24) operated by an investment firm, a credit institution or a market operator; or
- (2) a facility which:
  - (a) is operated by an investment firm, a credit institution or a market operator that is set up outside the EEA; and
  - (b) would come within (1) if its operator was set up in the EEA.

### Operating an organised trading facility

2.7.7DB G Guidance on the MiFID investment service of operating an organised trading facility is given in PERG 13, Q24A. An activity that comes within the regulated activity of operating an organised trading facility does not come within the regulated activities of dealing in investments as agent, dealing in investments as principal or arranging deals in investments.

2.7.7DC G The definition of an organised trading facility covers:

- (1) an organised trading facility as defined by MiFID (see PERG 13, Q24A) operated by an investment firm, a credit institution or a market operator; or
- (2) a facility which:
  - (a) is operated by an investment firm, a credit institution or a market operator that is set up outside the EEA; and
  - (b) would come within the MiFID definition if its operator was set up in the EEA.

- 2.7.7DD G (1) The regulated activity of operating an organised trading facility only covers a trading facility on which non-equity MiFID instruments are traded.
- (2) Subject to (3), a non-equity MiFID instrument means:
- (a) a debenture, an alternative debenture, a government and public security, a warrant, a certificate representing certain securities, a unit, an emission allowance, an option, a future or a contract for differences; or
- (b) rights to or interests in investments relating to anything in (a).
- (3) However, a product in (2) is only a non-equity MiFID investment if it also falls into one of the following categories:
- (a) a bond; or
- (b) a structured finance product; or
- (c) an emission allowance; or
- (d) an instrument falling within paragraphs 4 to 10 of Section C of Annex 1 of MiFID (these are described in PERG 13.4) if the instrument is a transferable security.

...

#### Managing investments

- 2.7.8 G The regulated activity of managing investments includes several elements.

...

- (3) Third, the property that is managed must consist of (or include) *securities, structured deposits or contractually based investments*. Alternatively, discretionary management will generally be caught if it is possible that the property could consist of or include such *securities or investments products*. This is the case even if there never has been any investment in ~~*securities or contractually based investments*~~ these products, as long as there have been representations that there would be.

...

#### Advising on investments

...

- 2.7.15 G The regulated activity of advising on investments (except P2P agreements) under article 53(1) of the Regulated Activities Order applies to advice on



*securities, structured deposits or relevant investments. It does not, for example, include giving advice about deposits (except structured deposits), or about things that are not specified investments for the purposes of the Regulated Activities Order. ...*

...

#### Agreeing

- 2.7.21 G Agreeing to carry on most *regulated activities* is itself a *regulated activity*. But this is not the case if the underlying activities to which the agreement relates are those of *accepting deposits, issuing electronic money, effecting or carrying out contracts of insurance, operating a multilateral trading facility, operating an organised trading facility, managing dormant account funds, the meeting of repayment claims, managing a UCITS, acting as ~~depository~~ trustee or depository of a UCITS, managing an AIF, acting as trustee or depository of an AIF, establishing, operating or winding up a collective investment scheme, establishing, operating or winding up a stakeholder pension scheme or establishing, operating or winding up a personal pension scheme*. A person will need to make sure that ~~he~~ it has appropriate *authorisation* at the stage of agreement and before ~~he~~ it actually carries on the underlying activity (such as the *dealing* or *arranging*).

...

## 2.8 Exclusions applicable to particular regulated activities

...

#### Dealing in investments as principal

...

- 2.8.4C G The exclusions referred to in *PERG 2.8.4G(1), (2), (4), (5) and (6)(b), (c) and (d)* will not be available to *persons* who, when carrying on the activity of *dealing in investments as principal*, are *MiFID investment firms* or *third country investment firms* (see *PERG 2.5.4G to PERG 2.5.5G* (Investment services and activities)).

...

#### Arranging deals in investments and arranging a home finance transaction

...

- 2.8.6B G The exclusions referred to in *PERG 2.8.6AG(4), PERG 2.8.6AG(11) and PERG 2.8.6AG(13)(b), (c), (d), (e) and (l)* will not be available to *persons* who, when carrying on an *arranging* activity, are *MiFID investment firms* or *third country investment firms* (see *PERG 2.5.4G to PERG 2.5.5G* (Investment services and activities)).

...

## 2.9 Regulated activities: exclusions applicable in certain circumstances

2.9.1 G The various exclusions outlined below deal with a range of different circumstances.

- (1) Each set of circumstances described in *PERG 2.9.3G* to *PERG 2.9.17G* has some application to several *regulated activities* relating to *securities*, *structured deposits*, *relevant investments* or *home finance transactions*. ...

...

...

### Overseas persons

2.9.15 G This group of exclusions applies, in specified circumstances, to the *regulated activities* of:

...

- (3B) ...

(3C) *operating an organised trading facility*;

...

...

2.9.17B G (1) The exclusion for *overseas persons* described in *PERG 2.9.17G* does not apply to an *investment firm* or *credit institution* set up in a third country that has been found equivalent under article 46 or 47 of *MiFIR*, as described in more detail in the rest of this paragraph.

(2) Article 46 of *MiFIR* has a mechanism under which *ESMA* may register a *third country investment firm* or a *third country credit institution* without a *branch* in the *EEA*. Registration allows the *third country investment firm* or *third country credit institution* to provide certain services to certain customers within the *EEA* without the need for further authorisation by an *EEA State*.

(3) (2) only applies where the European Commission has made a formal assessment that the legal and supervisory arrangements of that third country ensure that *investment firms* and *credit institutions* authorised in that third country comply with legally binding prudential and conduct of business requirements which have equivalent effect to *MiFID*, *MiFIR* and *CRD*.

(4) Under article 47 of *MiFIR* an *investment firm* or *credit institution*

that:

- (a) has a branch in an EEA State and is authorised in that EEA State; and
- (b) is set up in a third country that is subject to an equivalence assessment in (3);

may provide certain services to certain clients in other EEA States without the need for further authorisation.

- (5) The exclusion for overseas persons described in PERG 2.9.17G does not apply to investment services or activities provided by an investment firm or credit institution in (1) if:
  - (a) it is registered as described in (2); or
  - (b) its branch is authorised in an EEA State other than the United Kingdom as described by (4); or
  - (c) it provides the investment services or activities at the initiative of certain EEA-based clients.
- (6) However, (5) only applies from three years after the equivalence decision in (3). For the first three years following the equivalence decision, the exclusion for overseas persons described in PERG 2.9.17G continues to apply in the normal way.
- (7) The purpose of the three year period is to implement article 54 of MiFIR (transitional provisions) under which the national regimes of EEA States continue to apply for three years after the equivalence decision in (3).
- (8) There are currently no special provisions in the Act or related legislation such as the Regulated Activities Order dealing expressly and specifically with the treatment of third country investment firms and third country credit institutions under the general prohibition after the overseas persons exclusion is switched off at the end of the three year period in (6).

...

Insolvency practitioners

- 2.9.25 G This group of exclusions applies, in specified circumstances, to the regulated activities of:

...

- (5) ...

(5A) operating an organised trading facility;

...

## 2 Annex 2 Regulated activities and the permission regime

...

2 Table

<b>Table 1: Regulated Activities (excluding PRA-only activities) [See note 1 to Table 1]</b>	
<b>Regulated activity</b>	<b>Specified investment in relation to which the regulated activity (in the corresponding section of column one) may be carried on</b>
...	
<b>Designated investment business [see notes 1A, 1B and 1C to Table 1]</b>	
(d) <i>dealing in investments as principal</i> (article 14) [see note 2 to Table 1]	...
(e) <i>dealing in investments as agent</i> (article 21) [see notes 1B and 2 to Table 1] [ <u>also see Section of Table 1 headed ‘Activities relating to structured deposits’</u> ]	
(f) <i>arranging (bringing about) deals in investments</i> (article 25(1)) [see note 1B to Table 1] [also see Sections of Table 1 headed ‘The Lloyd’s market’ and ‘Regulated mortgage activity’ and ‘Activities relating to structured deposits’]	
(g) <i>making arrangements with a view to transactions in investments</i> (article 25(2)) [see note 1B to Table 1] [also see Sections of Table 1 headed ‘The Lloyd’s market’ and ‘Regulated mortgage activity’ and ‘Activities relating to structured deposits’]	
(ga) operating a <i>multilateral trading facility</i> (article 25D) [see note 2A]	...
(gb) operating an <i>organised trading facility</i> (article 25DA) [see note 2A]	certain kinds of <i>securities or contractually based investments</i> which are <i>financial instruments</i> . <i>PERG 2.7.7DDG</i> lists the

	<u>securities and contractually based investments covered.</u>
(h) <i>managing investments</i> (article 37) [see note 3 to Table 1] [also see <u>Section of Table 1 headed ‘Activities relating to structured deposits’</u> ]	
...	...
(j) <i>advising on investments (except P2P agreements)</i> (article 53(1)) [see note 1B to Table 1] [also see <del>Section</del> <u>Sections of Table 1 headed ‘Regulated mortgage activity’ and ‘Activities relating to structured deposits’</u> ]	
...	
(zaf) <i>providing credit references</i> (article 89B)	...
<b><u>Activities relating to structured deposits</u></b>	
(zag) <i>dealing in investments as agent</i> (article 21) (zah) <i>arranging (bringing about) deals in investments</i> (article 25(1)) (zai) <i>making arrangements with a view to transactions in investments</i> (article 25(2)) (zaj) <i>managing investments</i> (article 37) [see note 3 to Table 1] (zak) <i>advising on investments (except P2P agreements)</i> (article 53(1))	<u>structured deposits</u>

3 Table

<b>Notes to Table 1</b>
<p>Note 1:</p> <p>In addition to the <i>regulated activities</i> listed in Table 1, article 64 of the <i>Regulated Activities Order</i> specifies that <i>agreeing to carry on a regulated activity</i> is itself a <i>regulated activity</i> in certain cases. This applies in relation to all the <i>regulated activities</i> listed in Table 1 apart from:</p> <p style="text-align: center;">...</p>

*operating a multilateral trading facility* (article 25D)

*operating an organised trading facility* (article 25DA)

...

Note 3:

The *regulated activities* of *managing investments* (article 37) and *safeguarding and administering investments* (article 40) may apply in relation to any assets, in particular circumstances, if the assets being managed or safeguarded and administered include, (or may include), any *security*, ~~or~~ *contractually based investment* or (in the case of *managing investments*) *structured deposit*.

...

4 Table

<b>Table 1A: PRA-only regulated Activities</b> [See notes 1 and 2 to Table 1A]	
<b>Regulated activity</b>	<b>Specified investment in relation to which the regulated activity (in the corresponding section of column one) may be carried on</b>
<b>Accepting deposits</b>	
(a) <i>accepting deposits</i> (article 5)	<i>deposit</i> (article 74) <u>See note (3)</u>
...	

5 Table

<b>Notes to Table 1A</b>
...
<u>Note 3:</u>
<u><i>Accepting deposits</i> is not the only <i>regulated activity</i> relating to <i>deposits</i>. For a <i>deposit</i> that is a <i>structured deposit</i>, certain other <i>regulated activities</i> apply. These are listed in Table 1.</u>

...

7 Table

**Table 3: Securities, contractually based investments and relevant investments**  
[see notes 1 and 2 to Table 3]

Security (article 3(1))	Contractually based investment (article 3(1))	Relevant investments (article 3(1))
<p>...</p> <p><i>personal pension scheme</i> (article 82(2));</p> <p><u><i>emission allowance</i></u> (article 82B)</p> <p>...</p>	<p>...</p> <p><i>contract for differences</i> (article 85)</p> <p>For the purposes of the <i>permission</i> regime, <i>contract for differences</i> is subdivided into:</p> <ul style="list-style-type: none"> <li>● <i>contract for differences</i> (excluding a <i>spread bet</i>, a <u><i>binary bet</i></u> and a <i>rolling spot forex contract</i>);</li> <li>● <i>spread bet</i>;</li> <li>● <i>rolling spot forex contract</i>; <u>and</u></li> <li>● <u><i>binary bet</i></u>.</li> </ul> <p>...</p>	<p>...</p>

...

## 7 Periodical publications, news services and broadcasts: applications for certification

...

### 7.3 Does the activity require authorisation?

7.3.1 G Under article 53(1) of the *Regulated Activities Order* (Advising on investments), advising a *person* is a specified kind of activity if:

- (1) the advice is given to the *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a

potential investor; and

- (2) is advice on the merits of his doing any of the following (whether as *principal* or agent):
- (a) *buying, selling*, subscribing for or underwriting a particular *investment* which is a *security, structured deposit* or a *relevant investment*; or
  - (b) exercising any right conferred by such an *investment* to *buy, sell*, subscribe for or underwrite such an *investment*.

...

Carrying on the regulated activity by way of business

- 7.3.3 G Under section 22 of the *Act* (Regulated activities), for an activity to be a regulated activity it must be carried on ‘by way of business’. There is power in the *Act* for the Treasury to change the meaning of the business test by including or excluding certain things. It has exercised this power (through the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177) (the Business Order), ~~This has been as amended from time to time by article 18 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2003 (SI 2003/1476), by article 28 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2006 (SI 2006/2383) and article 27 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2009 (SI 2009/1342) as explained in PERG 7.3.3AG.~~

...

- 7.3.7 G ... Also, the *general prohibition* will not be contravened if the exclusion for *overseas persons* in article 72 of the *Regulated Activities Order* (Overseas persons) applies. That exclusion applies in relation to the giving of advice on *securities, structured deposits* or *relevant investments* by an *overseas person* as a result of a ‘legitimate approach’ (defined in article 72(7)). ...

...

## 8 Financial promotion and related activities

...

### 8.13 Exemptions applying to financial promotions concerning deposits and certain contracts of insurance

...

- 8.13.1 G The exemptions in Part V of the *Financial Promotion Order* concern *financial promotions* relating to *deposits* and *contracts of insurance* ~~other than life policies~~. The exemptions may be combined with exemptions in Part



IV and Part VI (see *PERG* 8.11.3G (Types of exemption under the Financial Promotion Order). The exemptions in Part V do not apply to *life policies* or *structured deposits*.

...

## 8.21 Company statements, announcements and briefings

...

Article 67: Promotions required or permitted by market rules

- 8.21.13 G Article 67 exempts any *financial promotion* other than an *unsolicited real time financial promotion* which relates to *shares, debentures, alternative debentures, government and public securities, warrants or certificates representing certain securities* which are permitted to be traded or dealt in on a relevant market. A relevant market for the purposes of article 67 is one which meets the criteria in Part I of, or is specified in or established under the rules of an exchange specified in ~~Parts II or Part III of~~, schedule 3 to the *Financial Promotion Order*. This includes *recognised investment exchanges* and ~~EEA regulated markets that are exempt persons under article 36 of the Exemption Order, together with various other overseas markets (including OFEX (UK))~~. The *financial promotion* must, however, be required or permitted to be *communicated* by the rules of the market or by a body which either regulates the market or regulates offers or issues of *investments* to be traded on the market.

...

Article 68: Promotions in connection with admission to certain EEA markets

- 8.21.16 G Article 68 applies where the *financial promotion* relates to *securities* which have not yet been admitted to trading but for which application has been or is to be made. It exempts a *non-real time* or a *solicited real-time financial promotion* which a relevant *EEA* market requires to be *communicated* before admission to trading can be granted. A relevant *EEA* market for this purpose is a market with its head office in an *EEA State* and which meets the conditions in Part I of ~~, or is specified in or established under the rules of an exchange specified in Part II of~~, Schedule 3 to the *Financial Promotion Order*. Article 68 also requires that the *financial promotion* be one:

...

...

## 8.24 Advising on investments

- 8.24.1 G Under article 53(1) of the *Regulated Activities Order*, *advising on investments (except P2P agreements)* covers advice which:
- (1) is given to a *person* in his capacity as an investor or potential investor, or in his capacity as agent for an investor or a potential

investor; and

- (2) is advice on the merits of his (whether as principal or agent) *buying, selling*, subscribing for or underwriting a particular *investment* which is a *security, structured deposit* or a *relevant investment* or exercising any right conferred by such an *investment* to *buy, sell*, subscribe for or underwrite such an *investment*.

8.24.2 G The effect of advice being given in the circumstances referred to in *PERG* 8.24.1G is that:

- (1) it must relate to an *investment* which is a *security, structured deposit* or a *relevant investment*;

...

...

## **8.25 Advice must relate to an investment which is a security or contractually based investment**

8.25.1 G For the purposes of article 53(1) of the *Regulated Activities Order*, a *security* or *relevant investment* is any one of the following:

...

- (7) ...

(7A) *emission allowances*;

..

8.25.2 G Article 53(1) does not apply to advice given on any of the following:

- (1) *deposit* or other bank or *building society* accounts (but note ~~that providing basic advice on a stakeholder product including stakeholder deposit accounts is a separate regulated activity under article 52A of the *Regulated Activities Order*— see the guidance in *PERG* 2.7.14AG (Providing basic advice on stakeholder products) the exceptions and points in *PERG* 8.25.3G);~~

...

8.25.3 G (1) There are some circumstances in which giving advice about a *deposit* is a *regulated activity*.

- (2) *Providing basic advice on a stakeholder product* is a separate *regulated activity* under article 52A of the *Regulated Activities Order*. A *stakeholder product* includes a stakeholder deposit account. See the *guidance* in *PERG* 2.7.14AG (Providing basic advice on stakeholder products) for more about this.

(3) Article 53(1) does apply to advice on structured deposits.

...

**8.32 Arranging deals in investments**

8.32.1 G Under article 25 of the *Regulated Activities Order*, arranging deals in investments covers:

(1) making ~~arrangements~~ arrangements for another *person* (whether as principal or agent) to *buy, sell*, subscribe for or underwrite a particular *investment* which is:

(a) a *security* or a structured deposit; or

...

...

...

**8.36 Illustrative tables**

...

8.36.3 Table Controlled activities

...	
3.	Dealing in securities, <u>structured deposits</u> and contractually based investments
...	
4C.	...
<u>4D.</u>	<u>Operating an organised trading facility</u>
...	

8.36.4 Table Controlled investments

...	
12.	...
<u>12A.</u>	<u>Emission allowances</u>
...	

...

## 10 Guidance on activities related to pension schemes

...

### 10.4A The application of EU Directives

**Q41A. Are pension scheme trustees and administration service providers likely to be subject to authorisation under the Markets in Financial Instruments Directive or subject to the Directive on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms?**

This is possible, but in many instances it is likely that pension scheme trustees and service providers will either not be providing an investment service for the purposes of, or otherwise be exempt under article 2.1 of, of the *Markets in Financial Instruments Directive*. The following table expands on this in broad terms.

As for the *CRD*, this will only apply to persons who are *MiFID investment firms* or *CRD credit institutions*.

Detailed guidance on the scope of ~~MiFID~~ MiFID and the *CRD* and *EU CRR* is in *PERG 13*.

Activity	Potential MiFID investment activity or service	Potential application of MiFID or of a MiFID article 2.1 exemption?
Dealing in scheme assets as trustee	Execution of orders on behalf of clients	<p>MiFID will not apply provided the trustees are wither not acting by way of business or otherwise are not holding themselves out as persons who provide a dealing service to third parties. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis.</p> <p>In any event, the trustee should be exempt under article 2.1<del>(h)</del> (i) as manager or depositary (or both) of a pension fund</p>
...		
Pension scheme service provider:  a. dealing in scheme assets as agent for the trustees	a. Execution of orders on behalf of clients	<p><del>MiFID</del> <u>MiFID</u> will potentially apply where the investments are <del>MiFID</del> <u>MiFID</u> financial instruments (such as shares, debt securities or units)</p> <p>However, many pension schemes will</p>

<p>b. arranging deals in scheme assets as agent for the trustees</p> <p>c. arranging for persons to join the scheme or to switch or dispose of, or to acquire further, rights under the scheme</p>	<p>b. Receiving and transmitting orders</p> <p>c. None - the rights are not MiFID financial instruments and neither are any rights to or interests in financial instruments that the scheme member may acquire under the scheme</p>	<p>be employee participation schemes, the administration of which is exempt under article 2.1(<del>e</del>) <u>(f)</u></p> <p>Where the service provider is providing services exclusively for the benefit of a corporate trustee who is a member of its group, the exemption in article 2.1(b) should apply. And article 2.1(<del>f</del>) <u>(g)</u> will provide for the exclusions in 2.1(b) and 2.1(<del>e</del>) <u>(f)</u> to be combined where the service provider is both administering an employee participation scheme and providing services to a trustee who is a group member</p> <p>Where the activity is receiving and transmitting orders and the service provider is authorised, the optional intermediaries exemption in article 3 of MiFID may apply</p> <p>If the service provider is acting as the operator of a stakeholder or personal pension scheme (for example, as the scheme administrator), he should be exempt under article 2.1(<del>h</del>) <u>(i)</u> as manager of a pension fund</p>
<p>Managing the assets of the scheme</p>	<p>Investment management</p>	<p>MiFID will not apply to trustees provided they are either not acting by way of business or otherwise are not holding themselves out as, or are additionally remunerated for, providing investment management services. This is because the trustees would not be regarded as providing an investment service to third parties on a professional basis</p> <p>In any event, trustees should be exempt under article 2.1(<del>h</del>) <u>(i)</u> as manager or depositary (or both) of a pension fund</p> <p>If a service provider is acting as the operator of a stakeholder or personal pension scheme, he should also be exempt under article 2.1(<del>h</del>) <u>(i)</u> as manager of a pension fund</p> <p>But a service provider who is merely managing the assets of a pension fund without being the manager or</p>

		<p>depository of the scheme will not be exempt under article 2.1(<del>h</del>) (i). The manager and depository are those persons charged with responsibility for managing the fund or safeguarding its assets and not persons to whom such functions may be delegated or outsourced</p>
...		
<p>a. Pension scheme trustee advising fellow trustees or members or prospective members</p> <p>b. Pension scheme service provider advising trustees or members or prospective members</p>	Investment advice	<p>MiFID will potentially apply where the advice concerns MiFID financial instruments (such as shares, debt securities or units) and so may apply to advice given to the trustees about scheme assets. However, beneficial interests in financial instruments held under the trusts of a pension scheme will not themselves be financial instruments under MiFID. And rights under a personal pension or stakeholder pension scheme are also not financial instruments. So, advice given to scheme members or prospective members should not be investment advice under MiFID</p> <p>MiFID will not apply to trustees who are advising their fellow trustees for the purposes of the trust provided they are not additionally remunerated for providing investment advisory services</p> <p>Also, trustees will be exempt under article 2.1(<del>h</del>) (i) in respect of anything they do in the capacity of manager or depository of a pension fund (including advising their fellow trustees)</p> <p>If a service provider is acting as the operator of a stakeholder or personal pension scheme, he should also be exempt under article 2.1(<del>h</del>) (i) as manager of a pension fund if he gives advice to the trustees</p> <p>Where the service provider is providing advice to a corporate trustee who is a member of its group, the exemption in article 2.1(b) may apply (and may be combined with the exemption for</p>

		administration of an employee participation scheme under article 2.1(f) (g) where relevant)
--	--	---

...

## 13 Guidance on the scope of MiFID and CRD IV

### 13.1 Introduction

~~Note: ESMA has also issued guidelines under article 16(3) of the ESMA Regulation covering ‘The application of the definitions in Sections C6 and C7 of Annex I of Directive 2004/39/EC (MiFID)’. See [https://www.esma.europa.eu/system/files/2015-05-06\\_final\\_guidelines\\_c6\\_and\\_7.pdf](https://www.esma.europa.eu/system/files/2015-05-06_final_guidelines_c6_and_7.pdf).~~

The purpose of this chapter is to help UK firms consider:

- whether they fall within the scope of the Markets in Financial Instruments Directive ~~2004/39/EC~~ 2014/65/EU (‘MiFID’) and therefore are subject to its requirements;

...

- If so, which category of investment firm they are for the purposes of the transposition of the recast CAD or *CRD* and the *EU CRR*.

This chapter is mostly aimed at questions that are relevant to someone who wants to know whether they need to be authorised under the Act. This means that this chapter does not cover those types of persons for whom MiFID or MIFIR requirements are applied outside the authorisation regime under the Act, such as:

- a data reporting service provider;
- those subject to position limit requirements in derivatives markets;
- those subject to an obligation to trade in derivatives on a regulated market, OTF or MTF;
- persons with a proprietary interest in benchmarks who are obliged to provide access to certain information; or
- central counterparties subject to the requirements about non-discriminatory access for financial instruments.

#### Background

MiFID replaces the Markets in Financial Instruments Directive 2004/39/EC (MiFID 1), which in turn replaced the Investment Services Directive (ISD). ~~It expands the kinds of business which must be regulated in the UK to include, in particular, activities relating to a wider range of commodity and other non-financial derivatives. As a result of MiFID, the categories of firm which can~~

~~exercise passporting rights and the categories of business for which the passport is available are wider than under the ISD. In particular, whereas investment advice was a non-core service under ISD, it is an investment service in its own right under MiFID and so can be provided on a cross-border basis as a standalone business.~~

MiFID is complemented by regulation (EU) No. 600/2014 on markets in financial instruments ('MiFIR'). MiFID is and MiFIR are supplemented by "Level 2 measures"; Commission Regulation (EC) No 1287/2006 (*MiFID Regulation*) and Commission Directive 2006/73/EC (*MiFID Implementing Directive*). The most relevant for the purposes of this chapter are Commission Delegated Regulation (EU) 2017/565 (the *MiFID Org Regulation*) and Commission Delegated Regulation (EU) 2017/592 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business). These implementing measures amplify and supplement certain of the concepts and requirements specified in MiFID and MiFIR.

...

We have also included guidance in the form of flow charts to help firms decide whether MiFID and the *CRD* and the *EU CRR* (which allow the recast CAD to apply to certain firms) apply to them as well as permission maps indicating which regulated activities and *specified investments* correspond to MiFID investment services, activities and MiFID financial instruments (see *PERG 13 Annex 1*, *PERG 13 Annex 2* ; *and PERG 13 Annex 3*, ~~*PERG 13 Annex 4*~~).

...

## 13.2 General

### Q1. Why does it matter whether or not we fall within the scope of MiFID?

Depending on whether or not you fall within the scope of MiFID, you may be subject to:

- domestic legislation implementing MiFID (for example, FCA rules);
- directly applicable legislation made by the European Commission (~~the *MiFID Regulation* and *MiFIR*, *EU CRR* and *EU* regulations made under them or under MiFID~~); and
- domestic legislation implementing the *CRD* (see *PERG 13.6*).

...

### Q3. How much can we rely on these Q and As?

The answers given in these Q and As represent the FCA's views but the interpretation of financial services legislation is ultimately a matter for the courts. How the scope of MiFID and the *CRD* and the *EU CRR* affect the regulatory position of any particular person will depend on his individual circumstances. If



you have doubts about your position after reading these Q and As, you may wish to seek legal advice. The Q and As are not a substitute for reading the relevant provisions in MiFID, the *CRD* and the *EU CRR* (and the recast CAD for certain firms), the MiFID implementing measures and The Treasury's implementing legislation, ~~including the statutory instruments listed in Annex 4 ('Principal Statutory Instruments relating to MiFID scope issues')~~.

Moreover, ~~although MiFID and the CRD and the EU CRR set out most of the key provisions and definitions relating to scope, some provisions may be~~ are subject to further legislation by the European Commission. In addition to FCA guidance, ~~MiFID's scope provisions may also be the subject of guidance or~~ and communications by the European Commission ~~or the~~ European Securities and Markets Authority ('ESMA'). ~~Similarly, the CRD and the EU CRR provisions may be the subject of technical standards and guidance or communications by the European Commission or~~ and the European Banking Authority ('EBA').

...

**Q5. We are a credit institution. How does MiFID apply to us?**

If you are an EEA credit institution, article ~~4.2~~ 1.3 MiFID provides that selected MiFID provisions apply to you, including organisational and conduct of business requirements, when you are providing investment services to your clients or performing investment activities. In our view, MiFID will apply when you are providing ancillary services in conjunction with investment services. Where you provide ancillary services on a standalone basis, MiFID will not apply in relation to those services. Article ~~4.2~~ 1.3 MiFID is reflected in paragraph (2) of the *Handbook* definition of "MiFID investment firm".

In addition, article 1.4 MiFID provides that various MiFID provisions apply when selling or advising clients about structured deposits (see Q34B).

...

**Q7. We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?**

...

Where you are a firm with more than one business, you can still be an investment firm. ~~We expect that the vast majority of firms which were subject to the requirements of the ISD are subject to MiFID requirements where they continue to provide the same investment services. We also expect some firms that were not subject to the ISD (for example, certain commodity dealers) to be investment firms for the purposes of MiFID and subject to MiFID-based requirements. What amounts to a "professional basis" depends on the individual circumstances and in our view relevant factors will include the existence or otherwise of a commercial element and the scale of the relevant activity.~~

**Q8. We do not provide investment services to others but we do buy and sell financial instruments (for example, shares and derivatives) on a regular**

### **basis. Are we an investment firm for the purposes of MiFID?**

Yes, if you are trading in MiFID financial instruments for your own account as a regular occupation or business on a “professional basis”. You can be an investment firm even if you are not providing investment services to others; this is a change from the position under the ISD, arising from the fact that you are also an investment firm under MiFID where you perform investment activities on a professional basis.

Even if you are an investment firm you may still be able to rely on one or more exemptions in article 2 MiFID, in which case MiFID will not apply (see *PERG* 13.5 and in particular article 2.1(d) (see Q40 and Q41); and 2.1(i)(j) (see Q44 and Q45) and 2.1(k) (see Q46).

...

### **Q11. How will we know whether we are a tied agent (article 4.1(25)(29))?**

A tied agent under MiFID is a similar concept to an *appointed representative* under the *Act*. A tied agent does not require authorisation for the purposes of MiFID, just as an *appointed representative* does not require authorisation under the *Act*. In our view, you will only be a tied agent if your principal is an investment firm (including a credit institution) to which MiFID applies. So, if you act for a principal that is subject to an exemption in either article 2 or 3 of MiFID (as implemented by The Treasury—see Q48 and Q49), you are not a tied agent for the purposes of MiFID although you may be an *appointed representative* for domestic purposes. You will still not require authorisation under MiFID, either because you are not performing investment services and activities or, if you are, because you fall within an exemption in article 2 or 3 of MiFID.

MiFID says that firms exempt under article 3 should be subject to requirements which are at least analogous to the MiFID regime for tied agents of investment firms. This has been implemented in the UK through the *appointed representative* regime. If you are an *appointed representative* of a principal who is exempt under article 3 you will also be exempt under MiFID. Q48 to Q53 deal with the article 3 exemption.

Assuming your principal is an investment firm to which MiFID applies, if you are registered as an *appointed representative* on the *Financial Services Register* and carry on the activities of *arranging (bringing about) deals in investments* or *advising on investments*, in either case in relation to MiFID financial instruments, you are likely to be a tied agent for the purposes of article 4.1(25)(29).

...

## **13.3 Investment Services and Activities**

### **Introduction**

### **Q12. Where do we find a list of MiFID services and activities?**

In Section A of Annex 1 to MiFID. There are ~~eight~~ nine investment services and activities in Section A (A1 to ~~A8~~ A9), ~~four of which are further defined in article~~ Article 4 MiFID. Those activities that are further defined are ~~defines some of~~ them in more detail:

- ...
- portfolio management (article 4.1(9)(8) MiFID).

...

A further provision relating to investment advice is contained in article ~~52 of the~~ MiFID implementing Directive 9 of the MiFID Org Regulation.

As explained in PERG 13.1, this chapter only covers the MiFID activities dealt with through the authorisation regime under the Act. The other activities covered by MiFID and MiFIR are not dealt with in section A of Annex 1.

**Q12A. We carry out the activity of bidding in emissions auctions. Is this a MiFID service or activity? [deleted]**

~~Article 6(5) of the auction regulation deems as an investment service or activity the reception, transmission and submission of a bid for a financial instrument (the ‘five-day future’ auction product – see PERG 2.6.19GG(3)) on an auction platform by an investment firm to which MiFID applies or a CRD credit institution. It does not specify which investment service or activity. In the FCA’s view, it is likely to be the reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients or dealing on own account.~~

~~As a result of some of bidding in emissions auctions being MiFID business, the regulated activity of bidding in emissions auctions is divided for the purposes of the Handbook, and the different requirements that apply, into two parts: MiFID business bidding and auction regulation bidding.~~

### **Reception and transmission**

**Q13. When might we be receiving and transmitting orders in relation to one or more financial instruments? (A1 and recital ~~20~~ 44) ?**

...

The extended meaning of the service only applies if the firm brings together two or more investors, ~~and a~~ A person issuing new securities, including a collective investment undertaking, should not be considered to be an ‘investor’ for ~~this the~~ purpose of this extended meaning. This limitation does not apply though to However, an issuer may be an investor for the purpose of the general definition of the service. Accordingly whilst an arrangement whereby a person, on behalf of a client, receives and transmits an order to an issuer will, in our view, amount to reception and transmission, one in which it simply brings together an issuer with a potential source of funding for investment in a company, will not.

...

~~Where you are receiving, transmitting and submitting bids on an *auction platform* in relation to *financial instruments* on behalf of your clients, you may be receiving and transmitting orders in relation to one or more *financial instruments*.~~

...

### **Executing orders**

**Q15. When might we be executing orders on behalf of clients? (A2, article 4.1(5) and recital ~~21~~ 45) ?**

...

~~Where you bid on behalf of your *client* on an *auction platform* for a *financial instrument*, you may be *executing orders on behalf of clients*. This activity includes the issue of their own *financial instruments* by an *investment firm* or a credit institution.~~

**Q15A. Is every issue of financial instruments a MiFID investment service?**

No. Although the answer to Q15 says that executing client orders includes issuing your own *financial instruments*, not every issue of *financial instruments* amounts to the MiFID investment service of execution of orders on behalf of clients. This is explained in more detail in the rest of this answer.

One difficult question is whether the extension of the executing orders service only applies to firms that are already *investment firms* because of other services and activities they provide or whether this part of the definition is also relevant to someone who is deciding whether they are an *investment firm* in the first place.

In the *FCA*'s view, this part of the definition is not limited to someone that is already an *investment firm* because of its other activities and services. This is because the risks at which recital 45 of MiFID says this part of the definition is aimed apply whether or not the issuer is already an investment firm for another reason. For example, there is no reason why a *firm* that issues its own complicated securities to the retail market should not need authorisation if a *firm* that distributes ones issued by another *firm* requires authorisation.

On the other hand, it cannot be the case that raising capital by issuing its own capital causes an ordinary commercial company to become an *investment firm*. The reasons why this should not be the case include the following:

- If you do not issue *financial instruments* on a professional basis and do not otherwise execute orders on behalf of clients, you will generally not need permission or authorisation to do this. See Q8 for more information.
- The investor may not be your *client*. For example, an ordinary commercial company issuing debt securities to financial investors is unlikely to be providing a service; it is more likely to be receiving one.

- Recital 45 of MiFID confirms that the definition is intended to catch issuers when distributing their own *financial instruments*. Thus if you get another investment firm or credit institution to distribute your *financial instruments*, you will not be executing client orders.

### Dealing on own account

#### **Q16. What is dealing on own account? (A3 and, article 4.1(6) and recital 24) ?**

Dealing on own account is trading against proprietary capital resulting in the conclusion of transactions in one or more MiFID financial instruments. ~~In most cases, if you were a firm who was dealing for own account under the ISD, the FCA would expect you to be dealing on own account for the purposes of MiFID if you continue to perform the same activities.~~

...

If a firm executes client orders by standing between clients on a matched principal basis (back-to-back trading), it is both dealing on own account and executing orders on behalf of clients. In our view, where you are a A firm which is still dealing on own account under MiFID if it meets all of the conditions of article 29(2) of CRD (see Q61) or article 5.2 of the recast CAD, as applicable under the CRD and the EU CRR to certain firms (see Q58A), you will not be dealing on own account. However, a firm which meets all the conditions of these articles of CRD or the recast CAD will not be considered as dealing on own account when determining which category of firm it is for the purposes of the FCA's base own funds requirements (see PERG 13.6).

~~Where you bid for your own account on an auction platform for a financial instrument, you may be dealing on own account.~~

### Portfolio management

#### **Q17. What is portfolio management under MiFID? (A4 and article 4.1(9 8)) ?**

...

### Investment advice

#### **Q18. What is investment advice under MiFID? (A5 and article 4.1(4)) ?**

...

#### **Q19. What is a 'personal recommendation' for the purposes of MiFID (article 52 of the MiFID implementing Directive) (article 9 of the MiFID Org Regulation)?**

A personal recommendation is ~~one given to a person~~ a recommendation that meets the following conditions:

- it is given to a person in his capacity as an investor, or potential investor, or as agent for either ~~which is~~; and
- it:
  - is presented as suitable for him or based on a consideration of his personal circumstances; and
  - constitutes a recommendation to him to do one or more of the following:
    - buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument; or
    - exercise, or not to exercise, any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

...

**Q20. Can you give us some other practical examples of what are not personal recommendations under MiFID?**

A recommendation is not a personal recommendation if it is issued exclusively ~~through distribution channels or~~ to the public (article 52 9 of the *MiFID implementing Directive MiFID Org Regulation*) and a ‘distribution channel’ is ~~one through which information is, or is likely to become, publicly available because a large number of people have access to it.~~ Advice about financial instruments in a newspaper, journal, magazine, publication, internet communication addressed to the public in general or in a radio or television broadcast should not amount to a personal recommendation for the purposes of MiFID (recital 79 to the MiFID implementing Directive). However, use of the internet does not automatically mean that a communication is not a personal recommendation on the grounds that it is made to the public. Therefore, for instance, while advice through a generally accessible website is unlikely to be a personal recommendation, an email communication provided to a specific person, or to several persons, may amount to investment advice.

...

If you provide an investment research service to your clients or otherwise provide recommendations intended for ~~distribution channels or~~ the public generally, this is not MiFID investment advice (A5) although it may be an ancillary service (B5) for the purposes of MiFID and may also amount to the regulated activity of *advising on investments* for which you are likely to require *authorisation*.

**Q21. Is generic advice investment advice for the purposes of MiFID (recitals 79 and 81 *MiFID implementing Directive* 15 to 17 to the MiFID Org Regulation)?**

...

If you are an investment firm to which MiFID applies, however, the generic advice that you provide may be subject to MiFID-based requirements. For example, if you recommend to a client that it should invest in equities rather than bonds and this advice is not in fact suitable, you are likely, depending on the circumstances of the case, to contravene MiFID requirements to:

- act honestly, fairly and professionally in accordance with the best interests of your clients; and
- provide information to clients that is fair, clear and not misleading.

Acts carried out by an investment firm that are preparatory to the provision of a MiFID investment service or activity are an integral part of that service or activity. This would include the provision of generic advice. Therefore if a person provides generic advice to a client or a potential client prior to or in the course of the provision of investment advice or any other MiFID investment service or activity, that generic advice is part of that MiFID investment service or activity.

Providing a general recommendation about a transaction in a financial instrument or a type of financial instrument is an ancillary service within Section B(5) of Annex I of MiFID.

### **Underwriting and firm commitment placing**

**Q22. What is underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis? (A6) ?**

...

### **Placing without a firm commitment**

**Q23. When might placing of financial instruments without a firm commitment basis arise (A7)?**

...

### **Operating a multilateral trading facility**

**Q24. What is a multilateral trading facility? (A8, article 4.1(15) 22 and recital 6 7 of MiFIR) ?**

~~The concept of a multilateral trading facility (MTF) draws on standards, issued by CESR (now known as ESMA), on which the FSA's previous alternative trading system regime was based. It includes~~ A multilateral trading facility involves a multilateral trading systems system (for example, a trading platforms platform) operated either by an investment firms firm or by a market operators operator which bring brings together multiple buyers and sellers of financial instruments (for more on multilateral systems, see the answer to Q24B).

~~As was the case with the alternative trading systems regime, in our view a~~ A multilateral trading facility does not include bilateral systems where an investment

firm enters into every trade on own account (as opposed to acting as a riskless counterparty interposed between the buyer and the seller).

For there to be an MTF, the buying and selling of MiFID financial instruments in these systems must be governed by non-discretionary rules in a way that results in contracts. As the rules must be non-discretionary, once orders and quotes are received within the system an MTF operator must have no discretion in determining how they interact. The MTF operator instead must establish rules governing how the system operates and the characteristics of the quotes and orders (for example, their price and time of receipt in the system) that determine the resulting trades. An MTF may be contrasted with an OTF (see Q24A for OTFs) in this regard, because the operator of an OTF is required to carry out order execution on a discretionary basis.

~~In our view, a firm can be an MTF operator whether or not it performs any other MiFID investment service or activity listed in A1 to A7.~~

### **Operating an organised trading facility**

#### **Q24A. What is an organised trading facility (A9, article 4.1(23) and recitals 8 and 9 of MiFIR)?**

An OTF is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in certain products are able to interact in the system in a way that results in a contract (for more on multilateral systems, see the answer to Q24B).

Only bonds, *structured finance products*, emission allowances and derivatives may be traded. Equity instruments may not be traded on an OTF.

Order execution must be carried out on an OTF on a discretionary basis. By contrast with the operation of an MTF or regulated market, the operator of the OTF must exercise discretion in either of, or both:

- placing/retracting client orders; or
- matching client orders.

In exercising its discretion, the operator must comply with the requirement under article 18 of MiFID to establish objective criteria for the efficient execution of orders, and must also comply with the best execution requirements under article 27 of MiFID.

### **Multilateral system**

#### **Q24B. Where can I find more information about what a multilateral system is (article 4.1(19))?**

There is some *guidance* on multilateral systems in MAR 5AA.1.2G.

...



## 13.4 **Financial Instruments instruments**

### **Introduction**

#### **Q27. Where do we find a list of MiFID financial instruments?**

In Section C of Annex 1 to MiFID. There are ~~ten~~ eleven categories of financial instruments in Section C (C1 to ~~C10~~ C11). Transferable securities (C1) and money market instruments (C2) are defined in article 4. ~~Further provisions relating to certain derivatives under C7 and C10~~ Some financial instruments are contained further defined in articles 38 and 39 of the *MiFID Regulation* the *MiFID Org Regulation*.

### **Transferable securities**

#### **Q28. What are transferable securities? (C1 and article 4.1(~~18~~)(44))?**

...

### **Money market instruments**

#### **Q28A. What are money market instruments (C2 and article 4.1(17) of MiFID and article 11 of the MiFID Org Regulation)?**

This means those classes of instruments which are normally dealt in on the money market. Examples include treasury bills, certificates of deposit and commercial paper. A money market instrument does not include an instrument of payment.

An instrument is only a money market instrument if it also meets the following conditions:

- it has a value that can be determined at any time;
- it does not fall into sections C4 to C10 of Annex 1 to MiFID (derivatives);  
and
- it has a maturity at issuance of 397 days or less.

### **Collective investment undertakings**

#### **Q29. What are units in collective investment undertakings (C3)?**

This category of *financial instrument* includes *units* in regulated and unregulated *collective investment schemes* and ~~units~~ units or *shares* in an *AIF* (whether or not the *AIF* is also a *collective investment scheme*). In our view, in accordance with article 1.2(a) and 2.1(o) of the *Prospectus Directive*, ~~units~~ units or *shares* in an *AIF* include shares in closed-ended corporate schemes, such as shares in investment trust companies, and so are also ~~units~~ units in collective investment undertakings for this purpose (as well as being transferable securities). There is guidance on what an *AIF* is in chapter 16 of *PERG* (Scope of the Alternative Investment Fund Managers Directive).

**Derivatives: general****Q30. Which types of financial derivative fall within MiFID scope (C4, C8 and C9)?**

The scope of financial following derivatives fall under MiFID is wider than under the ISD and includes the following:

- derivative instruments relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or measures, that may be settled physically or in cash (C4), emission allowances or certain other underlyings (see Q31A to Q31S);
- commodity derivatives (see Q32 to Q33C);
- derivative instruments for the transfer of credit risk (C8) (see Q31); and
- financial contracts for differences (C9); (these are included in paragraph 9 of Section C of Annex 1 to MiFID); and
- derivatives on miscellaneous underlyings (see Q34).

The scope of C4, C8 and C9 these derivatives does not extend to spot transactions, transactions which are not derivatives (such as forwards entered into for commercial purposes) and sports spread bets. In our view, neither C4 nor C9 comprise forward foreign exchange instruments unless they are caught by the scope of the Regulated Activities Order (see *PERG 2.6.22BG*). A non-deliverable currency forward which is not a “future” for the purposes of the Regulated Activities Order because it is made for commercial purposes will likewise fall outside the scope of MiFID.

**Credit derivatives****Q31. What are derivative instruments for the transfer of credit risk (C8)?**

...

**General financial and emission derivatives (C4): General****Q31A. Which types of financial derivative fall within this heading?**

The C4 category of financial instruments covers:

- options;
- futures;
- swaps;
- forward rate agreements; and
- any other derivative contracts;

relating to:

- securities;
- currencies;
- interest rates or yields;
- emission allowances; or
- other derivatives instruments, financial indices or financial measures.

A derivative contract is covered whether it is settled physically or in cash.

### **General financial and emission derivatives (C4): Treatment of foreign exchange contracts**

#### **Q31B. Is every foreign exchange contract caught by MiFID (article 10 of the MiFID Org Regulation)?**

No. There are two exclusions:

- There is an exclusion for spot contracts (see the answer to Q31C).
- There is an exclusion for a foreign exchange transaction connected to a payment transaction (see the answer to Q31G).

Technically these exclusions relate to the other “any other derivative contracts” type of C4 derivative contract listed in the answer to Q31A. However in the FCA’s view no contract that has the benefit of one of these exclusions could be a C4 future either.

These exclusions do not apply to an option or a swap on a currency, regardless of the duration of the swap or option and regardless of whether it is traded on a trading venue or not (recital 13 to the MiFID Org Regulation).

#### **Q31C. What is the exclusion for foreign exchange spot contracts mentioned in Q31B?**

A contract for the exchange of one currency against another currency is excluded if under its terms delivery is scheduled to be made within a specified number of trading days. The number of trading days depends on the type of contract. For these purposes, there are three types of contract.

The first type of contract is one for the exchange of one major currency against another major currency. The contract is exempt if under its terms delivery is scheduled to be made within two trading days.

The second type of contract is one for the exchange of a non-major currency against either another non-major currency or against a major currency. The contract is excluded if under its terms delivery is scheduled to be made within the

longer of:

- two trading days; and
- the period generally accepted in the market for that currency pair as the standard delivery period.

The third type of contract is one used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking. The contract is excluded if under its terms delivery is scheduled to be made within whichever is the shorter of the following:

- the period generally accepted in the market for the settlement of that security or unit as the standard delivery period; or
- five trading days.

An example of this third category is as follows. Say that X buys a share in Country P for delivery in four days' time (the standard settlement time in Country P for share purchases). X wishes to pay for the shares (and for associated taxes and costs) in local currency. The exclusion applies if X enters into the contract for the purchase of the local currency four or fewer days before the share settlement date.

If a foreign exchange contract falls into the third category (contract for the purpose of purchase of securities) it may also fall into one of the other two categories. As a result there are potentially two maximum delivery periods. Where this is the case, the longer of the two delivery periods applies for the purpose of deciding whether the exclusion applies.

If there is an understanding between the parties to the contract that delivery of the currency is to be postponed beyond the date specified in contract, it is the longer period that is used to calculate the delivery period.

Physical settlement does not require the use of paper money. It can include electronic settlement.

This exclusion only applies if there is a direct and unconditional exchange of the currencies being bought and sold (recital (13) to the *MiFID Org Regulation*). However a contract may still benefit from the exclusion if the exchange of the currencies involves converting them through a third currency.

See the answer to Q31E for what major and non-major currency means and see the answer to Q31F for what a trading day means.

**Q31D. How are contracts for multiple exchanges of currency treated under the exclusion for foreign exchange spot contracts mentioned in Q31C?**

The exclusion can cover a single contract with multiple exchanges of currencies. In such a contract, each exchange of a currency should be treated separately for the purpose of the exclusion (recital 13 to the *MiFID Org Regulation*).

**Q31E. What are the major currencies referred to in the answer to Q31C?**

The major currencies for these purposes are the US dollar, euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Singapore dollar, Norwegian krone, Mexican peso, Croatian kuna, Bulgarian lev, Czech koruna, Danish krone, Hungarian forint, Polish złoty and Romanian leu.

All other currencies are non-major currencies for these purposes.

**Q31F. What does a trading day mean in the answer to Q31C?**

A day is a trading day if it is a day of normal trading in the jurisdiction of both the currencies that are exchanged.

If either of the following conditions is met:

- the exchange of the currencies involves converting them through a third currency for the purposes of liquidity; or
- the standard delivery period for the exchange of the currencies references the jurisdiction of a third currency;

a day is a trading day if it is a day of normal trading in the jurisdiction of both the currencies that are exchanged and also in the jurisdiction of that third currency.

**Q31G. What is the second exclusion for foreign exchange contracts mentioned in Q31B?**

A contract is excluded if:

- it is a means of payment (see the answer to Q31H for what this means);
- it must be settled physically (although non-physical settlement is permissible by reason of a default or other termination event);
- at least one of the parties is not a financial counterparty as defined in article 2(8) of EMIR;
- it is entered into in order to facilitate payment for identifiable goods, services or direct investment; and
- it is not traded on a trading venue.

The table in the answer to Q31M gives some examples of what is and is not covered by the exclusion.

**Q31H. What do identifiable and means of payment as referred to in the answer to Q31G mean?**

The most straightforward example (Example (1) of what this means is a contract where one of the parties to the contract:

- sells currency to the other party which that other party will use to pay for specific goods or services or to make a direct investment; or
- buys currency from the other party which the first party will use to achieve certainty about the level of payments that it is going to receive:
  - for specific goods or services that it is selling; or
  - by way of a direct investment.

See Example (10) in Q31M (Can you give me some more examples of how the means of payment exclusion referred to in the answer to Q31G works?) for an example of the second type of foreign exchange contract in Example (1) (contract to achieve certainty about the level of payments).

The table in the answer to Q31M gives some more examples of what identifiable goods and services means.

The MiFID Org Regulation says that the foreign exchange contract must be a means of payment. Therefore the exclusion requires that not only should the currency contract facilitate payment for identifiable goods, services or direct investment but that it should also be a means of payment. This combined requirement does not mean that there has to be a three-party arrangement between the buyer and seller of goods or services and the foreign exchange supplier. So, for example, if a UK company (A) is buying goods from an exporter in Germany (B) and is paying in euro and A buys the euro forward from a bank (C), there is no need for C to issue some sort of instrument to B (Example (2)).

Instead this combined requirement means that the currency contract that is to be excluded should facilitate the payment in the way described in Example (1) at the start of this answer or that there should be an equivalent close connection between the currency contract and the payment transaction.

Even though there is no requirement for a formal instrument of payment, the exclusion can cover such arrangements. So in Example (2) in this answer, the exclusion may apply to an arrangement that involves bank C issuing a euro letter of credit at the request of A for the benefit of B.

### **Q31I. What do goods, services and direct investment mean in the answer to Q31G?**

The reference to goods and services should be interpreted widely. It can cover, for example, intellectual property (such as computer software and patents) and land.

However, in the FCA's view MiFID investments are only covered by the exclusion if they constitute a direct investment.

In the FCA's view, making a direct investment means making a capital investment in an enterprise to obtain a lasting interest in that enterprise. A lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise, and an investor's significant influence on the

management of the enterprise.

The requirement for the investment to be direct does not prevent the investor acquiring an investment in a wholly-owned subsidiary of a holding company by making the investment in the holding company. However this requirement does mean that the investor should acquire its investment from the enterprise or holding company itself rather than by acquiring a stake through the secondary market.

A foreign exchange contract connected to the purchase of a MiFID investment may still be covered by the exclusion for spot contracts if the payment instrument exclusion does not apply. The spot exclusion makes particular provision for purchases of transferable securities and units in a collective investment undertaking (see the answer to Q31C). The result is that the means of payment exclusion does not undermine the specific provisions of the spot contract exclusion dealing with such transactions.

**Q31J. How is an agent treated under the means of payment exclusion referred to in the answer to Q31G?**

This question is about a foreign exchange contract carried out through agents where:

- at least one of the principals is a non-financial counterparty (see the answer to Q31G for what a financial counterparty means);
- both the agents are financial counterparties; and
- the contract would otherwise meet the exclusion conditions.

If the agents contract with each other on a principal-to-principal basis with back-to-back contracts with their respective clients, the exclusion is not available for the contract between the two agents. It may be available for the contracts between the agent and its client.

If the arrangement is made in such a way that there is a single contract, to which the two principals are party and which is entered into on their behalf by the agents, the exclusion is available.

**Q31K. How do I know whether the conditions for the means of payment exclusion described in the answer to Q31G are met?**

A financial counterparty (A) selling currency to a client may want to know whether the client (B) is going to use the foreign currency in a way that meets the exclusion conditions. This may be relevant to whether MiFID conduct of business obligations apply.

A non-financial counterparty (A) may sell currency to another non-financial counterparty (B) in circumstances where the currency that A buys is not being used in a way that qualifies for the exclusion. A may therefore want to rely on B using the currency that B purchases in a way that would qualify.

In each example, the application of the exclusion depends on the use to which the other party is going to put the currency.

In these examples A may rely on B's assurances about the purpose of the currency purchase as long as it has no reason to doubt what B says. Such an assurance could be given in several ways:

- Option 1     A may ask B to explain to A what the purpose of the transaction is, leaving it to A to work out whether the exclusion applies.
- Option 2     B may tell A that the exclusion applies to the transaction in question (for instance by way of a representation in the forward contract). A should only rely on such an assurance if satisfied that B is sufficiently expert to understand what the exclusion means.
- Option 3     B may give A an assurance or representation that applies to all foreign exchange transactions that may take place between them from time to time (which might be included in a master agreement governing all forward currency contracts between them). In this case:
- o     Option 2 (B should have sufficient expertise) applies.
  - o     In addition, A should be satisfied that B has procedures in place for B to consider whether the exclusion applies in particular cases. This may include for example a procedure under which B:
    - should tell A that a particular proposed transaction does not qualify for the exclusion; or
    - is obliged not to ask A to enter into a contract under that master agreement that will be outside the exclusion.

Where B is an ordinary individual consumer or a small business, A may not be able to rely on B's judgement about whether the exclusion applies. In that case A should decide whether the exclusion applies based on questions A asks B (Option 1).

**Q31L. Can a flexible forward come within the means of payment exclusion described in the answer to Q31G?**

A forward contract may have a flexible delivery date. For example a forward contract may:

- say that delivery can take place at any point in a two-week period rather than on a fixed date; or
- have an expiry date by which delivery has to be taken but part, or parts, of the delivery can take place before that date.

A flexible delivery date within a defined and reasonably short window can still



benefit from the exclusion. If the delivery period is very long, it is doubtful whether the requirement for the contract to facilitate payment for identifiable goods, services or direct investment (see the answer to Q31G) can be met.

These examples provide for delivery of the full amount by the end of the delivery period. There might also be a contract under which the purchaser may choose not to take delivery of part. An example of this kind of foreign exchange contract is as follows:

A UK importer of goods buys from a German seller and has to pay in euro. The importer may not know exactly how much it wants to import during the next quarter but may want to fix its foreign exchange risk in advance. The foreign exchange contract allows the importer to take delivery of no more than it needs to pay the exporter. Any balance not needed to pay for imports is cancelled and is not available to the importer.

In the FCA’s view, if the contract meets the conditions of the exclusion (and in particular the need for there to be identifiable goods or services) the exclusion potentially applies.

The requirement for there to be identifiable goods or services means that the maximum amount that can be drawn down under the flexible forward contract should be a reasonable estimate of what is payable under an identified potential payment transaction or transactions. The table in the answer to Q31M gives examples of what a reasonable estimate means.

An argument against the availability of the means of payment exclusion is that a flexible forward contract is an option and that the exclusion is not available for an option. However in the FCA’s view, the approach in the answer to Q31B applies. That is, a flexible forward contract that meets all the conditions of the exclusion is not a traditional option but rather a hybrid contract that is in the “any other derivative” contract category listed in the answer to Q31A (Types of C4 derivative contracts), even in the example in which the unused balance is cancelled.

Another argument against the availability of the exclusion for a flexible forward under which the unused balance is cancelled is that it does not meet the requirement for the contract to be settled physically. In the FCA’s view this argument is not correct because this requirement is aimed at preventing net cash settlement and does not deal with the cancellation of the contract resulting in there being no need for any kind of settlement.

**Q31M. Can you give me some more examples of how the means of payment exclusion referred to in the answer to Q31G works?**

<b><u>Examples of how the means of payment exclusion works</u></b>	
<b><u>Example</u></b>	<b><u>Explanation</u></b>
<u>(1) A customer wants to hedge its balance sheet because it has a euro exposure but</u>	<u>The exclusion is not available as the foreign exchange contract is not entered into in order</u>

<p><u>reports financially in sterling.</u></p>	<p><u>to facilitate payment for identifiable goods or services.</u></p> <p><u>If, as is likely to be the case, the foreign exchange contract is a swap or a non-deliverable forward, that is another reason for the exclusion not being available as the exclusion does not apply to this sort of contract (see the answers to Q31B and Q31R).</u></p>
<p><u>(2) A UK customer (X) of a UK payment institution (Y) has a sterling account with a bank (P) in the United Kingdom and a separate euro bank account with another bank (Q) in the Eurozone. X wishes to pay its supplier in euro in 3 months. X enters into a forward contract with Y and requests that the euro be sent to its euro account with Q rather than directly to the supplier. The sterling that X pays under the foreign exchange contract comes from its account with P. Q makes the payment to the supplier for X.</u></p>	<p><u>The exclusion is potentially available as the foreign exchange transaction facilitates payment for identifiable goods, even though Y does not itself pay the suppliers.</u></p> <p><u>The exclusion can cover an arrangement in which the firm selling the foreign currency is not the firm that makes the payment on behalf of the customer buying the identifiable goods.</u></p>
<p><u>(3) A UK importer has bought €100,000 worth of goods. The supplier has not yet issued an invoice and the sum is not yet due from the importer. However the importer knows the price. It buys the euro forward.</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion is potentially available. There is no need for the invoice to have been issued or the sum yet to be due.</u></p>
<p><u>(4) A UK importer of goods has ordered a specific quantity of an identified type of goods from the supplier. The price will be payable in euro but the euro price has not yet been fixed. The UK importer makes an estimate of the euro price and buys the euro forward.</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion is potentially available.</u></p> <p><u>There is no need for the amount to be paid under the foreign exchange contract to match precisely the amount of the payment that it is facilitating. An estimate is permissible. The goods are specifically identifiable by purchase order.</u></p>
<p><u>(5) A UK importer knows that it wants to purchase €100,000 worth of goods from an identified Eurozone supplier in the next quarter but it has not yet entered into a</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign</u></p>

<p><u>formal contract with the supplier. It buys the euro forward.</u></p>	<p><u>exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion is potentially available. There is no need for the contract for the supply of goods to have been entered into at the time of the currency purchase.</u></p> <p><u>The goods are specifically identifiable by type, price and supplier and by the purpose for which the importer is buying them.</u></p>
<p><u>(6) A UK importer knows that it wants to purchase €100,000 worth of goods from a Eurozone company in the next year, but does not know from which specific supplier it is going to purchase them. It knows which goods it wishes to buy. It buys the euro forward.</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion is potentially available.</u></p> <p><u>The goods are specifically identifiable by type and price and by the purpose for which the importer is buying them.</u></p>
<p><u>(7) A UK importer of goods wishes to buy currency in order to allow it to pay for goods in the next quarter. It does not know precisely how many of the goods it will want or what their exact price will be. However it has a sufficiently good idea of the amount of goods to make it unlikely that its estimate will be seriously wrong. It knows this because it has an established practice of buying these sorts of goods.</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion is potentially available.</u></p> <p><u>The exclusion may be available even though the precise details of the goods to be bought are not known yet.</u></p> <p><u>The goods are identifiable by reference to an established practice and need.</u></p>
<p><u>(8) A firm wishes to import goods for a project and needs foreign exchange to pay for them. It does not know precisely how many of the goods it will buy or what their exact specification or price will be. However it knows broadly what goods it needs. In this example it knows all this because the goods are needed for a specific purpose in a specific project.</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion is potentially available.</u></p> <p><u>The exclusion may be available even though the precise details of the goods to be bought are not known yet.</u></p> <p><u>The goods are identifiable by reference to an established project and a particular purpose within that project.</u></p>
<p><u>(9) A customer wishes to undertake a sterling/euro conversion to purchase</u></p>	<p><u>The exclusion is potentially available. See the answer to Q31L (Can a flexible forward</u></p>

<p><u>€100,000 in three months. This amount is to cover 20 individual payments of €5,000 which will be drawn down at different times.</u></p> <p><u>This type of contract benefits the customer who obtains a better rate by setting up one contract for a larger value than could be obtained on 20 individual low value contracts.</u></p>	<p><u>come within the means of payment exclusion described in the answer to Q31G?).</u></p>
<p><u>(10) An exporter (A) sells goods to a French importer for payment on delivery in euros. A, before the due date for payment for the goods, sells the euro for the equivalent amount in sterling. The foreign exchange contract is made at the applicable forward rate on the date of the currency contract. Settlement of the currency contract is due on the same day as payment for the goods. A is thereby protected against adverse movements in sterling against the euro.</u></p>	<p><u>The exclusion is potentially available. Recital 10 to the <i>MiFID Org Regulation</i> says that a contract to achieve certainty about the level of payments for identified goods is covered by the exclusion.</u></p>
<p><u>(11) A UK importer (A) has bought €100,000 worth of goods from several suppliers. A has a number of purchase contracts with each supplier and each supplier has issued a number of invoices. The due dates for payment on each invoice are quite close together and so A buys €100,000 forward from one provider in a single contract.</u></p>	<p><u>The exclusion is potentially available. There is no need for there to be a single currency contract for each contract under which payment arises. Nor do the payment dates under the purchase contracts have to match exactly the settlement dates under the forward contract.</u></p>
<p><u>(12) A UK importer (A) has bought €100,000 worth of goods. A buys €100,000 forward from several currency providers.</u></p>	<p><u>The exclusion is potentially available. There is no need for A to use a single currency provider.</u></p>
<p><u>(13) A UK importer (A) has bought €100,000 worth of goods from several suppliers. A has a number of purchase contracts with each supplier and each supplier has issued a number of invoices. The due dates for some of the invoices are quite close together and so A buys €50,000 forward from one provider in a single contract to meet these payment obligations. The result is that €50,000 is allocated between a number of import contacts in differing amounts and none of the import contracts are covered in full.</u></p> <p><u>A decides to meet the other €50,000 from its own resources.</u></p>	<p><u>The exclusion is potentially available. The exclusion may apply even where the excluded currency contract is applied to a number of different payment obligations under a number of import contracts.</u></p> <p><u>The exclusion is available even if A relies on its own resources for part of the payment transaction.</u></p>
<p><u>(14) A UK importer (A) has bought €40,000</u></p>	<p><u>The exclusion is potentially available. There</u></p>

<p>worth of goods from one supplier and €60,000 from another. The suppliers have issued invoices but payment is not yet due from A. A buys €40,000 forward to meet the payment on the first and decides to meet the €60,000 due under the other contract from its own resources.</p>	<p>is no requirement that A should cover every contract for goods to which the exclusion might apply.</p>
<p>(15) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from A. A buys €200,000 forward. A will use other €100,000 for purposes that do not meet the exclusion conditions.</p>	<p>The exclusion is not available where A uses part of the currency it buys for purposes that do not meet the conditions of the exclusion. The contract should not be treated as partly excluded and partly as a C4 currency derivative.</p> <p>If however A enters into two foreign exchange contracts, each for €100,000, the exclusion may apply to one of them. Also see example (16).</p>
<p>(16) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from the importer. A buys the €100,000 forward. Later A buys another €100,000 forward.</p>	<p>The exclusion is not available for the second contract. The first contract should be taken into account when deciding whether A may rely on the exclusion for second contract.</p> <p>See the answer to Q31N (How do the examples in the table in the answer to Q31M apply to an exporter or importer with a large portfolio of contracts?) for an example of where the exclusion can apply in similar circumstances.</p>
<p>(17) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due A. A decides to meet the payment out of its own resources. Later A changes its mind and buys the €100,000 forward.</p>	<p>The exclusion is potentially available. The currency contract and the contract generating the payment obligation do not need to be entered into at the same time.</p>
<p>(18) A UK importer (A) has bought €100,000 worth of goods. The supplier has issued an invoice but the sum is not yet due from A. A buys the US dollar equivalent of €100,000 forward.</p>	<p>The exclusion will not generally be available because the currency contract is not a means of payment facilitating the payment due from A to the supplier. This is because the payment is due in euro and so the dollar contract is not sufficiently connected to the payment transaction.</p>
<p>(19) A farmer's farm payment under the EU basic payment scheme will be €10,000 and will be paid in sterling. The payment will be made in three months' time. In order to fix the sterling amount they will receive, the</p>	<p>The issue here is whether the forward exchange contract relates to identifiable goods and services as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts</p>

<p><u>farmer wishes to book a forward with a currency provider to sell €10,000 and buy sterling in three months' time.</u></p>	<p><u>mentioned in Q31B?).</u></p> <p><u>The exclusion may not be available. This is because the payment may not be linked to any specific goods or services being sold or bought by the farmer.</u></p> <p><u>However it is possible that the farmer is going to use the payments under the scheme to purchase goods or stock for their farming business. If there is an identifiable payment transaction in accordance with the examples in this table the exclusion will potentially be available.</u></p> <p><u>If the exclusion is not available it is unlikely that the farmer will be carrying on MiFID business for the reasons described in the answer to Q7 (We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?).</u></p>
<p><u>(20) An overseas student is given a grant by their home country in their local currency to study at a UK university, payable in six months' time. As the fees are payable in sterling, the student wishes to book a forward with a currency provider to sell their home state currency and buy sterling in six months' time. They wish to enter into the forward contract to guarantee the amount of sterling they will receive.</u></p>	<p><u>The issue here is whether the forward exchange contract relates to identifiable goods and services as referred to in the answer to Q31G (What is the second exclusion for foreign exchange contracts mentioned in Q31B?).</u></p> <p><u>The exclusion may be available because the grant helps the student to pay for the UK university's fees.</u></p> <p><u>The exclusion is still available if some of the grant is to meet living costs and the student has not yet decided what exactly they will need to buy (see the answer to Q31Q (holiday spending money) for more on this).</u></p>
<p><u>(21) A hedge fund manager has investors in the UK and a fund which is made up of euro denominated securities. The value of the fund to the investor will fluctuate due to the market value of the securities but it will also go up or down in accordance with the euro/sterling exchange rate. The fund manager seeks to hedge this risk by purchasing a forward contract to sell euro and buy sterling for three months in the future. The purpose of the trade is to ensure the investors will not be subject to currency volatility affecting the value of their</u></p>	<p><u>The exclusion is not available because the currency transaction is not linked to any payment for specific goods, services or direct investment.</u></p>

<p><u>investment.</u></p>	
<p><u>(22) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. However, the machinery purchase is delayed and A asks to extend the forward contract. This may involve A paying more money for the euro depending on the exchange rate at the date of the contract extension.</u></p>	<p><u>The fact that the currency forward is later amended by mutual consent to match the changed payment date for the machinery does not prevent the exclusion from applying as long as the amended version meets the exclusion conditions in the light of the changed circumstances.</u></p> <p><u>If the foreign exchange provider refuses to amend the contract the exclusion is not lost as long as the exclusion conditions were met at the time the foreign exchange contract was entered into.</u></p>
<p><u>(23) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling.</u></p> <p><u>The machinery purchase falls through but A wants to extend the contract length as they have identified replacement machinery with a similar price.</u></p>	<p><u>The answer to (22) applies. As explained in the answer to (7), the exclusion may be available for the proposed new machinery contract even though the precise details are not yet known.</u></p>
<p><u>(24) A UK importer (A) wishes to buy some machinery from a Eurozone seller in three months for €500,000. A enters into a three-month forward for the purchase of €500,000 using sterling. However, the machinery purchase is delayed and the specifications are changed. The currency contract therefore no longer facilitates payment under the machinery contract. A decides to close out the existing currency contract. A also enters into a new forward contract with another currency provider that matches the revised machinery contract.</u></p>	<p><u>The exclusion is potentially available for the close out contract and also for the new currency contract.</u></p> <p><u>If A decides to meet the payment due under the revised machinery contract out of its own resources, the exclusion is still potentially available for the close out contract.</u></p>
<p><u>(25) A customer is due to receive an inheritance in euro and is advised of the amount but, owing to the need to complete probate, the funds will not be released for a number of months. The customer wishes to ensure that there is no depreciation in value of the inheritance in sterling terms and enters into a euro-sterling forward.</u></p>	<p><u>The exclusion is not available because the foreign exchange contract is not linked to any specific goods, services or direct investment.</u></p>
<p><u>(26) A UK parent company wishes to inject capital in euro into a European subsidiary in</u></p>	<p><u>The exclusion is potentially available as the foreign exchange contract is made to</u></p>

<u>four months' time and enters into a forward contract to purchase the euro.</u>	<u>facilitate a direct investment in the subsidiary.</u>
<u>(27) A customer asks a UK payment institution to make a payment to a family member living abroad. The payment is to be made in the currency of the country where the family member lives. The customer buys the foreign currency on a forward basis.</u>	<u>The exclusion is not necessarily available. The exclusion is only available if the family member is going to use the currency for a purpose that comes within the exclusion.</u>
<u>(28) A UK firm (A) has employees abroad. A pays them in local currency. A buys forward the currency with which it will pay its employees.</u>	<u>The exclusion potentially applies.</u>

**Q31N. How do the examples in the table in the answer to Q31M apply to an exporter or importer with a large portfolio of contracts?**

This question deals with the fact that the examples in the table in the answer to Q31M have relatively simple facts, where the purchaser of the foreign currency only has one or a few payment obligations. In many cases a seller or buyer of goods will have frequent payment transactions for which it needs foreign exchange and it may not wish to meet this need by having a separate currency contract for each import or export contract.

The exclusion can still apply in these cases. This is because, as the examples in the table in the answer to Q31M illustrate, there is some flexibility in the amount and timing of currency contracts, the ability to estimate currency needs, the ability to close out currency contracts and the use of different currency providers.

However the requirements of the exclusion still apply, including the need to show that the currency contract is a means of payment that is entered into in order to facilitate payment for identifiable goods, services or direct investment. This means that it will be necessary to look at all the importer or exporter's incoming and outgoing payments and currency resources each time the importer or exporter enters into a new currency contract to see whether the exclusion is available for that new currency contract.

Say:

- a UK importer (A) has bought €100,000 worth of goods under a contract with a Eurozone supplier (Contract P);
- the supplier has issued an invoice but the sum is not yet due from A;
- A buys the €100,000 forward; and
- later A buys another €100,000 forward.

When A enters into the second currency contract, changes to Contract P or to A's



payment profile may mean that:

- the new currency contract will better facilitate the payment obligation under Contract P and the first currency contract will facilitate another identified payment obligation; or
- the first contract no longer facilitates the payment under Contract P and A needs the new currency contract to allow it to make the payments due under Contract P.

When deciding whether the exclusion applies to the second currency contract entered into by A there is no need to treat the first currency contract as tied to the payment under Contract P just because the payment due under Contract P justified the application of the exclusion when A entered into the first currency contract. Instead it is necessary to look again at all A's incoming and outgoing payments and currency resources at the time A enters into the second currency contract (including both currency contracts).

**Q31O. I am a payment services provider under the Payment Services Regulations. How do the spot contract and means of payment exclusions referred to in the answers to Q31C and Q31G apply to me?**

(See PERG 15 (Guidance on the scope of the Payment Services Regulations 2009) for the Payment Services Regulations)

This answer only relates to a payment service provider authorised under the *Payment Services Regulations*. It does not cover, for example, banks that are subject to the conduct of business requirements of those Regulations.

The *Payment Services Regulations* allow you to provide foreign exchange services that are closely related and ancillary to your payment services. That right does not allow you to provide foreign exchange derivative services that would otherwise require authorisation under MiFID. You therefore need to consider the availability of MiFID exclusions for your foreign exchange business.

The most common sort of foreign exchange contract you are likely to carry out is where you execute a payment for your customer that involves a currency conversion. For example, you may make a payment for your customer in euros from the customer's sterling payment account to a payee's payment account. The foreign exchange part of this transaction is separate from the payment part of the transaction (see Q12 in PERG 15.2 (We provide electronic foreign exchange services to our customers/clients. Will this be subject to the PSD regulations?)).

The foreign exchange part of this example may involve a MiFID C4 derivative if it has a forward element. However in practice it is likely that such foreign exchange transactions will fall outside MiFID because the spot exclusion applies.

The following are examples of how the delivery period should be calculated for the MiFID spot exclusion. They are all based on a payment being made in one currency funded from a payment account in another currency.

- If your customer asks for the payment to be made immediately, the delivery period starts on the date of request.
- If your customer asks for the payment to be made some time after the request and the foreign exchange conversion is to be carried out at the spot rate on the transfer date, the delivery period starts on that transfer date.
- If your customer asks for the payment to be made some time after the request and the foreign exchange conversion rate is fixed on the date the customer gives you your instructions, the delivery period starts on that instruction date.
- The date on which the payment is received by the payee's payment services provider should normally be treated as the delivery date.
- If you debit your customer's payment account after receipt by the payee's payment services provider and the foreign exchange conversion rate is fixed on the debit date, the availability of the exclusion is based on the gap between the debit date and the payment to the payee's payment services provider.

If your customer wants to make a foreign currency transfer some time in the future and buys the foreign currency from you in advance at the spot rate and immediately credits it to a payment account with you, the spot exclusion should apply.

If the delivery period is too long for the spot contract exclusion to apply, the means of payment exclusion is potentially available because you are not a financial counterparty for the purposes of that exclusion.

However, the means of payment exclusion only applies if the payment by your customer meets the requirements about identifiable goods, services or direct investments described in the answer to Q31G.

**Q31P. Can a non-deliverable forward come within the exclusion for spot foreign exchange contracts in the answer to Q31C or the means of payment exclusion in the answer to Q31G?**

No.

A non-deliverable forward is a cash-settled foreign exchange contract relating to a thinly traded or non-convertible foreign currency against a freely traded currency. The first currency may be non-convertible for example because of exchange controls or restrictions on currency dealing. On the contracted settlement date, the profit or loss is adjusted between the two counterparties based on the difference between the contracted rate for the non-deliverable currency and the prevailing spot rate. The price for the convertible currency may be expressed in terms of a second convertible currency.

As settlement is for the difference between an exchange rate agreed before delivery and the actual spot rate at maturity, a non-deliverable forward is not a

spot contract, regardless of the settlement period (recital (12) of the *MiFID Org Regulation*), and the means of payment exclusion is also not available. See the answer to Q31R about why settlement for a difference does not come within either exclusion.

**Q31Q. How is holiday spending money treated under the spot contract and means of payment exclusions referred to in the answers to Q31C and Q31G?**

One way of buying holiday currency is for the holidaymaker to order currency to be collected, for example, a week after the order, to be paid for at the currency seller's spot rate on the day of collection. This contract is not a MiFID investment either because it does not fall into the category C4 type of derivative in the first place or because the spot contract exclusion described in the answer to Q31C applies.

Another way of buying holiday money is for the holidaymaker to order currency to be collected, for example, a week after the order, to be paid for at the currency seller's spot rate on the day the currency is ordered. This type of contract is potentially within the C4 type of derivative. However the means of payment exclusion is potentially available. The holiday can be treated as identifiable goods or services even though the holidaymaker may not know what restaurant they are going to eat at or what tourist attractions they are going to visit.

In either case the seller of the holiday money may agree to buy back any unused currency at a price fixed at the same time as the rate at which the holidaymaker is to buy the currency is fixed and linked to the original rate. Such an arrangement may also benefit from the means of payment exclusion. This is because the promise to buy back the currency is so closely connected to the original purchase that it can be seen as being an integral part of the same transaction.

These answers are relevant to whether the currency seller requires authorisation under MiFID. The holidaymaker will of course not require authorisation because a holiday-maker buying holiday money is not acting on a professional basis in the way described in the answer to Q7.

**Q31R. How does netting affect the exclusions for foreign exchange contracts in the answers to Q31C and Q31G?**

A foreign exchange contract may involve a valuation of the currencies being bought and sold for the purposes of settlement and a single payment being made.

The spot contract exclusion described in the answer to Q31C requires there to be exchange and delivery. The means of payment exclusion described in the answer to Q31G requires there to be physical settlement delivery. Therefore neither exclusion applies to a contract involving this type of netting. An instrument that provides for a single payment like this is more like a swap, which is outside the scope of the exclusions.

The fact that a foreign exchange contract provides for early termination and netting on default does not mean that the exclusions cannot apply. Similarly, the existence of force majeure provisions dealing with bona fide inability to settle

physically does not prevent a contract from benefiting from the exclusions.

The parties to a foreign exchange contract may also have entered into other foreign exchange or financial contracts with each other. The result may be that the parties exchange multiple cash flows during a given day. In order to reduce operational and settlement risks they may agree to net those cash flows into one payment for each currency (payment netting). For example the parties may each have to make and receive multiple payments in sterling, euro and US dollars on the same day. The result of payment netting is that there will only be three payments to be made on that day, one in each of the three currencies. This sort of payment netting is compatible with the exclusions.

**Q31S. I enter into my foreign exchange contracts on a trading venue. What exclusions or exemption can I rely on?**

The spot contract exclusion described in the answer to Q31C may be available.

The means of payment exclusion described in the answer to Q31G will not be available.

If neither exclusion is available, and the contract is a C4 derivative, you may find the own account exemption described in the answer to Q40 helpful. Although that exemption is usually unavailable to those who have direct electronic access to a trading venue, this is not the case where the contract is for hedging purposes.

**Commodity derivatives**

**Q32. Which types of commodity derivative fall within MiFID scope?**

Broadly speaking, the following commodity derivatives fall within the scope of MiFID:

- ...
- ~~cash-settled commodity derivatives (including physically settled derivatives that provide for settlement in cash at the option of one of the parties other than in the event of default or termination as explained in more detail in Q33A) (C5);~~
- ~~physically settled commodity derivatives traded on a regulated market or MTF certain markets or facilities (as explained in more detail in Q33B) (C6); and~~
- ~~other commodity derivatives capable of physical settlement and not for commercial purpose, that is standardised contracts subject to clearing house or margin arrangements so long as they fall into one of the following categories purposes (as explained in more detail in Q33C) (C7);~~
  - ~~instruments traded on a non-EEA trading facility that performs an analogous function to a regulated market or MTF;~~

- ~~instruments expressly stated to be traded on or subject to the rules of a *regulated market*, MTF or a non-EEA trading facility that performs an analogous function; or~~
- ~~back-to-back contracts with clients or counterparties equivalent to contracts traded on a *regulated market*, MTF or such a non-EEA trading facility.~~

The definition of commodity derivative in MiFIR also includes derivatives falling into paragraph C10 of Section A of Annex 1 to MiFID (see the answer to Q34 for this type of derivative).

### **Q33. What is a commodity for the purposes of MiFID?**

“Commodity” means any goods of a fungible nature that ~~is~~ are capable of being delivered, including metals and their ores and alloys, agricultural products and energy such as electricity (article ~~2.4~~ 2.6 of the ~~*MiFID Regulation*~~ *MiFID Org Regulation*). The fact that energy products, such as gas or electricity, may be “delivered” by way of a notification to an energy network (such as notifications under the Network Code or the Balancing and Settlement Code) does not prevent them being “capable of being delivered” for these purposes. If a good is freely replaceable by another of a similar nature or kind for the purposes of the relevant contract (or is normally regarded as such in the market), the two goods will be fungible in nature for these purposes. Gold bars are a classic example of fungible goods. In our view, the concept of commodity does not include services or other items that are not goods, such as currencies or rights in real estate, or that are entirely intangible (~~recital 26 of the *MiFID Regulation*~~).

#### **Q33A. Can you tell me more about category C5 commodity derivatives?**

This type of commodity derivative is one that must be settled in cash or one that provides for settlement in cash at the option of one of the parties. A derivative that only allows a party to opt for cash in the event of default or termination is not included.

#### **Q33B. Can you tell me more about category C6 commodity derivatives?**

This type of commodity derivative is one that:

- can be physically settled; and
- is traded on a regulated market, an MTF or an OTF.

The category C6 type of commodity derivative excludes a wholesale energy product traded on an OTF that must be physically settled. The *MiFID Org Regulation* defines physical settlement in more detail.

Article 6 of the *MiFID Org Regulation* has special definitions for what types of oil, coal and wholesale energy products are included in the C6 category of commodity derivative.

A contract that can be physically settled but which is not traded on a regulated market, MTF or OTF might still fall within the C5 or C7 category of commodity derivative even though it falls outside category C6.

**Q33C. Can you tell me more about category C7 commodity derivatives (recital 5 to, and article 7 of, the MiFID Org Regulation)?**

This type of commodity derivative is one that meets all the following conditions:

- It can be physically settled.
- It is not a C6 commodity derivative.
- It is not a spot contract. A spot contract means one under the terms of which delivery is scheduled to be made within the longer of the following periods:
  - two trading days; or
  - the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

For these purposes a contract is not a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the spot period described earlier in this answer.

- It meets one of the following criteria:
  - it is traded on a non-EEA trading venue that performs a similar function to a regulated market, an MTF or an OTF (an “equivalent third country trading venue”); or
  - it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or an equivalent third country trading venue; or
  - it is equivalent to a contract traded on a regulated market, MTF, OTF or equivalent third country trading venue. Equivalence is judged by reference to the price, the lot, the delivery date and other contractual terms such as quality of the commodity or place of delivery.
- It is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.

Certain contracts entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network are excluded from the C7 category of commodity derivative.

**Miscellaneous derivatives (C10)****Q34. Are there any other derivatives subject to MiFID regulation? What types of derivatives fall into the C10 category?**

There is a miscellaneous category of derivatives in C10, which is supplemented by articles ~~38~~ 7 and ~~39~~ 8 of the ~~MiFID Regulation~~ MiFID Org Regulation. These relate to:

...

- ~~emissions allowances;~~

...

- any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred; ~~or~~
- an index or measure related to the price or volume of transactions in any asset, right, service or obligation; or
- an index or measure based on actuarial statistics.

C10 derivatives must also meet at least one of the following criteria:

● ...

- the contract is traded in a *regulated market*, ~~or~~ an MTF, an OTF or a non-EEA trading venue that performs a similar function; or
- ~~the contract is standardised, subject to clearing house or margin arrangements and falls into one or more of the categories described under the fourth bullet point in Q32 above~~ meets the following criteria in the answer to Q33C:

- o it is not a spot contract;
- o it meets the requirements about trading on (or being stated to be traded on), being subject to the rules of or being equivalent to contracts traded on, certain trading venues;
- o standardisation; and
- o it does not fall within the exclusion about transmission grids, energy balancing mechanisms or pipeline networks.

All these criteria are explained in more detail in the answer to Q33C.

~~In relation to emissions auction products, recital 14 together with the definitions of 'two day spot' and 'five day future' in article 3(3) and 3(4) of the auction regulation, indicate that a 'five day future' (one of two forms of auction product permitted under the auction regulation) falls within this category of derivative.~~

A contract of insurance or reinsurance is not a C10 commodity derivative (recital 6 to the *MiFID Org Regulation*). Neither is a contract falling under one of the other paragraphs of section C of Annex 1 to MiFID.

### **Emission allowances**

#### **Q34A. How are emission allowances treated?**

They are covered in the following ways:

- Article 6(5) of the *auction regulation* deems as an investment service or activity the reception, transmission and submission of a bid for a financial instrument on an *auction platform* by an investment firm to which MiFID applies or a *CRD credit institution*.
- The *auction regulation* regulates bids for allowances in the form of two-day spot contracts or five-day futures.
- The *auction regulation* allows the following to bid:
  - aircraft operators and others referred to in (5) below;
  - investment firms and credit institutions; and
  - a person exempt under article 2(1)(j) of MiFID (see Q44 to Q45 for more on this exemption).
- An *emission allowance* is itself a financial instrument (C11).
- An option, future, swap, forward rate agreement or any other derivative contract relating to *emission allowances* is included as a C4 derivative.

It is not always clear how all this overlapping legislation fits together but in the FCA's view, it works like this:

- (1) An *emission allowance* auctioned as a five-day future or a two-day spot contract is regulated under the *auction regulation*.
- (2) The five-day future auction product is a financial instrument and is regulated under MiFID. It is included under C4 and C11.
- (3) The two-day spot contract product is also a financial instrument. It is included under C11. It is therefore also regulated under MiFID.
- (4) In the FCA's view an *emission allowance* (including when auctioned under the *auction regulation*) will not come within C1.
- (5) The *auction regulation* provides certain exemptions for aircraft operators and operators of plant and other installations. These exemptions continue to apply whether or not a MiFID exemption is available, but only for bidding activities covered by the *auction regulation*.



- (6) Thus for example, article 18 of the *auction regulation* allows business groupings of operators in (5) to submit bids. The MiFID exemption in (12) below may not cover all such persons but they are still entitled to submit bids under the *auction regulation* without obtaining MiFID authorisation.
- (7) The mere fact of being exempt under MiFID does not allow someone to bid under the *auction regulation*. The *auction regulation* regulates who can and cannot bid.
- (8) The *auction regulation* covers the reception, transmission and submission of a bid. This corresponds to the MiFID activities of the reception and transmission of orders in relation to one or more financial instruments, execution of orders on behalf of clients and dealing on own account.
- (9) Therefore the *auction regulation* activities of receiving, transmitting and submitting a bid are all also covered by MiFID, whether the *emission allowance* is auctioned as a five-day future or a two-day spot contract. However, a person exempt under (5) is not subject to MiFID when bidding (subject to (10)).
- (10) If a person who is allowed to bid under the *auction regulation* is authorised under MiFID (because for example it wants to carry out other activities for which it needs MiFID authorisation), MiFID will apply to its bidding activities.
- (11) The MiFID activities that apply to a product covered by the *auction regulation* are not limited to the bidding activities listed in paragraph (8) of this list. All the MiFID investment services and activities apply to emission allowances auctioned as a financial instrument. Therefore, for example, giving personal recommendations about bids for *emission allowances* is covered by MiFID. Anyone wishing to carry out such activities will need to be authorised as a MiFID firm, unless some other exemption is available.
- (12) Article 2.1(e) of MiFID exempts an operator with compliance obligations under Directive 2003/87/EC (Emissions Trading Scheme) from MiFID.
- (a) The exemption covers some of the same ground as the exemption in the *auction regulation* described in (5) to (7) above. However this overlap neither extends nor narrows the effect of the *auction regulation* exemption.
- (b) The article 2.1(e) exemption also covers activities not covered by the *auction regulation*. So, for example, the article 2.1(e) exemption covers buying and selling the underlying *emission allowance* or the five-day future or two-day spot auction product in the secondary market.
- (c) See the answer to Q35A for more details about the conditions of the exemption.

**Structured deposits****Q34B. How are structured deposits covered?**

Article 1.4 of MiFID applies certain provisions of MiFID to an investment firm or credit institution that sells or advises on *structured deposits*.

A *structured deposit* is not a financial instrument. This means, for example, that a firm does not become a *MiFID firm* by advising on or selling them.

**13.5 Exemptions from MiFID****Introduction****Q35. Where do we find a list of MiFID exemptions?**

...

**Q35A. Can you give me a complete list of exemptions?**

<b><u>Description of exemption</u></b>	<b><u>MiFID reference</u></b>	<b><u>Guidance in this chapter</u></b>
<u>Insurers</u>	<u>article 2.1(a)</u>	<u>Q36</u>
<u>Intra-group services</u>	<u>article 2.1(b)</u>	<u>Q37 and Q38</u>
<u>Services complementary to other professional activities</u>	<u>article 2.1(c)</u>	<u>Q39</u>
<u>Own account dealing (except in commodities or emission allowances)</u>	<u>article 2.1(d)</u>	<u>Q40 to Q40C</u>
<u>An operator with compliance obligations under Directive 2003/87/EC (Emissions Trading Scheme) who, when dealing in emission allowances, does not:</u> <ul style="list-style-type: none"> <li>● <u>execute client orders; or</u></li> <li>● <u>provide any investment services or perform any investment activities other than dealing on own account; or</u></li> </ul>	<u>article 2.1(e)</u>	<u>Q34A</u>

<ul style="list-style-type: none"> <li>● <u>apply a high-frequency algorithmic trading technique.</u></li> </ul>		
<u>Employee share schemes and pension schemes</u>	<u>article 2.1(f) and (g)</u>	<u>Q42</u>
<p><u>The following public financial institutions:</u></p> <ul style="list-style-type: none"> <li>● <u>members of the European System of Central Banks;</u></li> <li>● <u>other national bodies performing similar functions in the EU;</u></li> <li>● <u>other public bodies charged with or intervening in the management of the public debt in the EU; or</u></li> <li>● <u>international financial institutions established by two or more EU Member States which have the purpose of mobilising funding and providing financial assistance to the benefit of their members that are experiencing or threatened by severe financing problems.</u></li> </ul>	<u>article 2.1(h)</u>	<u>None</u>
<u>Collective investment undertakings and pension funds</u>	<u>article 2.1(i)</u>	<u>Q43</u>
<u>Activities relating to commodity derivatives or emission allowances</u>	<u>article 2.1(j)</u>	<u>Q44 to Q45</u>
<p><u>Persons providing investment advice in the course of providing another professional activity not covered by MiFID</u></p> <p><u>This only applies if the provision of such advice is not specifically remunerated.</u></p>	<u>article 2.1(k)</u>	<u>None</u>

<u>Transmission system operators as defined in article 2(4) of Directive 2009/72/EC or article 2(4) of Directive 2009/73/EC (Directives about common rules for the internal markets in electricity and natural gas). This exemption is subject to various detailed conditions</u>	<u>article 2.1(n)</u>	<u>None</u>
<u>Central securities depositories when providing services explicitly listed in Sections A and B of EU Regulation 909/2014 (Securities settlement and central securities depositories regulation)</u>	<u>article 2.1(o)</u>	<u>None</u>
<u>Optional article 3 exemption</u>	<u>article 3</u>	<u>Q48 to Q53</u>
<u>Exemptions relevant to Italy, Denmark and Finland</u>	<u>articles 2.1(l) and (m)</u>	<u>None</u>

### **Insurance**

#### **Q36. We are an insurer. Does MiFID apply to us?**

...

### **Intra-group activities**

#### **Q37. We are a non-financial services group company providing investment services to other companies in the same group. Are we exempt under the group exemption in article 2.1(b)?**

Yes, if you provide these services exclusively for your parent company, your subsidiaries and those of your parent company. ~~This means that providing investment services for the benefit of group companies must be the only investment service that you undertake.~~ The exemption is narrower than the corresponding exclusion in article 69 of the Regulated Activities Order (groups and joint enterprises) insofar, for example, as it does not apply to investment services supplied to a joint venture participant (see *PERG 2.9.10G*).

#### **Q38. We also buy and sell financial instruments for ourselves. Are we still able to use the group exemption?**

Yes. ~~The group exemption applies to investment services and not investment activities. So, as As long as your own account dealing does not involve you providing an investment service (to which MiFID applies) to non-group entities, you can still rely on the group exemption in respect of the services you provide solely to other group companies.~~

So far as your own account dealing is concerned, you may be able to rely upon the exemption in ~~article 2.1(i)~~ 2.1(d) (see Q39) or 2.1(j) (see Q44 ~~and to~~ Q45) if you meet the relevant conditions. The ability to combine reliance on article 2.1(b) and ~~article articles~~ 2.1(i) 2.1(d) or 2.1(j) could be relevant to companies performing group treasury functions.

The answer to Q46 (Is it possible to combine article 2 exemptions?) explains why it is possible to combine exemptions.

### **Incidental services as part of a professional activity**

**Q39. We provide investment services as a complement to our main professional activity. Are we exempt (article 2.1(c) of MiFID and article 4 of the MiFID Org Regulation)?**

Yes, you will be exempt under article 2.1(c) MiFID if:

- ~~you provide these services in an incidental manner~~ in the course of your professional activity;
- a close and factual connection exists between your professional activity and the provision of the investment service to the same client, such that the investment service can be regarded as accessory to your main professional activity;
- the provision of investment services to the clients of your main professional activity does not aim to provide a systematic source of income to you;
- you do not market or otherwise promote your ability to provide investment services, except where these are disclosed to clients as being accessory to your main professional activity; and
- ~~that your professional activity is regulated by legal or regulatory provisions or a code of ethics that do not exclude the provision of investment services. The meaning of ‘incidental’ is potentially subject to further Commission legislation pursuant to article 2.3 MiFID.~~

This exemption is relevant, for example, to firms belonging to *designated professional bodies*, such as accountants, actuaries and solicitors, to whom Part XX of the *Act* applies. It could also apply to *authorised professional firms* which provide investment services in an incidental manner in the course of their professional activity. In our view, the criteria set out in *PROF* 2.1.14G in relation to section 327(4) of the *Act* are also relevant to considering whether a firm can rely on ~~the this MiFID exemption in article 2.1(c) of MiFID, as they were in relation to the corresponding ISD exemption~~ (see further guidance in *PROF* 2.1.16G).

...

### **Own account**

**Q40. We regularly buy and sell financial instruments ourselves but never as a service to third parties. Are there any exemptions which might apply to us?**

Yes, you could fall within the article 2.1(d) MiFID exemption but not if you:

- are a market maker (please see Q41 below); or
- deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them. A system for these purposes might include a trading platform, website or other mechanism that functions on the basis of a set of rules. are a member of, or a participant in, a regulated market or an MTF (except that non-financial entities can be members or participants as described in the answer to Q40A);
- have direct electronic access to a regulated market, an MTF or an OTF (except that non-financial entities can have such access, as described in the answer to Q40A);
- apply a high-frequency *algorithmic trading* technique (see Q41A); or
- deal on own account when executing client orders.

~~You cannot rely, however, on the article 2.1(d) MiFID exemption if you provide any investment services or activities other than dealing on own account. If buying and selling MiFID financial instruments is not your main business, or, as the case may be, the main business of your group, you might though wish to consider further the exemption in article 2.1(i) MiFID (see Q44 and Q45).~~

This exemption does not apply to dealing on own account in commodity derivatives, emission allowances or derivatives thereof (the exemption discussed in the answer to Q44 (Activities in relation to commodity derivatives) is relevant instead).

MiFID says that persons exempt under the commodities exemption described in the answer to Q44 are not required to meet the conditions laid down in the own account exemption described in this answer in order to be exempt. In the FCA's view that does not mean that you can do business of the type covered by the article 2.1(d) exemption without meeting the exemption conditions described in this answer just because you qualify for the commodities exemption. Recital 22 to MiFID confirms that the two exemptions apply cumulatively. Another reason for this conclusion is that articles 2.1(d) and (j) apply to different asset classes and there does not seem to be any reason apparent from MiFID why exemption under article 2.1(j) should be relevant to the asset classes in article 2.1(d).

See the answer to Q46 for more information about combining this exemption with other exemptions, particularly the exemption for commodity derivatives business.

**Q40A. When can a non-financial entity have direct electronic access to or be a participant in a trading venue without losing the benefit of the own account exemption described in the answer to Q40?**

The article 2.1(d) exemption can still be available if you are a member of, or a participant in, a regulated market or an MTF or you have direct electronic access to a regulated market, an MTF or an OTF, as long as:

- you are a non-financial entity; and
- your transactions are objectively measurable as reducing risks directly relating to your commercial or treasury financing activity, or the commercial or treasury financing activity of your group.

#### **Q40B. What does direct reduction of risk mean in the answer to Q40A?**

The second condition described in the answer to Q40A (objectively measurable reduction of risks) is designed to allow a non-financial business to hedge without losing the exemption. The following points are relevant to whether hedging meets this second condition:

- The exception covers hedging for commercial activities as well as treasury activities. It can therefore cover risks to a change in value of your group's assets, services, inputs, products, commodities or liabilities.
- Hedging may cover potential indirect impacts on your business as well as direct ones.
- A transaction may qualify as risk-reducing taken on its own or in combination with other hedging transactions.
- A transaction may be treated as risk-reducing even though it is not a perfect hedge. Thus for example your group may use proxy hedging through a closely correlated instrument to cover an exposure, such as an instrument with a different but very close underlying in terms of economic behaviour.
- If your group uses portfolio or macro hedging, it may not be able to establish a one-to-one link between a specific hedging transaction and a specific risk directly related to the commercial and treasury financing activities being hedged. The risks related to the commercial and treasury financing activities may be complex. For example, the risks may cover several geographic markets, products, time horizons or entities. Nevertheless, macro or portfolio hedging used to hedge a risk in relation to your group's overall risks may be treated as risk-reducing.
- Positions do not qualify as risk-reducing solely on the grounds that they form part of a risk-reducing portfolio on an overall basis. In such cases your group's risk management systems should prevent such transactions from being categorised as risk-reducing.
- A risk may evolve over time and, in order to adapt to the evolution of the risk, a hedging transaction initially executed for reducing risk may have to be offset through the use of additional hedging transactions. As a result, hedging of a risk may be achieved by a combination of hedging

transactions and offsetting transactions that close out earlier hedging transactions that have become unrelated to the risk.

- If a transaction originally qualifies as risk-reducing it does not stop being treated as risk-reducing just because the risk it hedges has since evolved.
- A transaction may be treated as risk-reducing if it qualifies as a hedging contract pursuant to International Financial Reporting Standards adopted in accordance with article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council.

#### **Q40C. What does non-financial entity mean in the answer to Q40A?**

In the FCA’s view, non-financial entity means the same thing as it does in *MiFID RTS 21*.

#### **Q41. What is a market maker?**

A market maker is “a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against ~~his~~ that person’s proprietary capital at prices defined by ~~him~~ that person” (article 4.1(8 7) MiFID). ~~This is likely to be the case if you are recognised or registered as a market maker on an investment exchange. However, in~~ In our view anyone who satisfies the definition will be a market maker for the purposes of MiFID, even if they ~~are not under an obligation to make quotes, for example retail service providers who make a market in shares traded on the Stock Exchange Electronic Trading Service (‘SETS’) but without doing so as registered market makers under the rules of the London Stock Exchange~~ have not entered into the agreement with the regulated market required by article 48(2) of MiFID (Systems resilience, circuit breaker and electronic trading).

#### **Q41A. What is a high-frequency algorithmic trading technique?**

This question is included here because it is relevant to the own account exemption described in the answer to Q40 and to the commodities exemption described in the answer to Q44.

A high-frequency *algorithmic trading* technique is a type of *algorithmic trading* technique.

Article 4.1(40) of MiFID defines a high-frequency *algorithmic trading* technique as an *algorithmic trading* technique characterised by:

- infrastructure intended to minimise network and other types of latencies, including at least one of the following facilities for algorithmic order entry:
  - co-location;
  - proximity hosting; or
  - high-speed direct electronic access;



- system-determination of order initiation, generation, routing or execution without human intervention for individual trades or orders; and
- high message intraday rates which constitute orders, quotes or cancellations.

### **Employee share and company pension schemes**

#### **Q42. Is there an exemption, ~~as there was under the ISD~~, relating to employee share schemes and company pension schemes?**

Yes, there is an exemption in article 2(1)(~~e~~)(f) MiFID for persons providing investment services consisting exclusively in the administration of employee-participation schemes, for example employee share schemes and company pension schemes. In our view, whilst administration for these purposes could extend to services comprising reception and transmission or execution of orders on behalf of clients or placing, it would not include *personal recommendations* in relation to, or managing, the assets of employee share schemes or company pension schemes.

This exemption can also be combined with the “group exemption” in article 2.1(b) of MiFID, by virtue of article 2.1(e) (g) of MiFID. ~~In our view, it may also be combined with the exemption in article 2.1(i) MiFID if a firm is dealing on own account in financial instruments as an ancillary activity to its main business, or, as the case may be, the main business of its group. See the answer to Q46 for more about combining exemptions.~~

### **Collective investment undertakings**

#### **Q43. Are we right in thinking that MiFID does not apply to collective investment undertakings and their operators?**

... To the extent that it also provides investment services or performs investment activities in a different capacity, for example, if it provides investment advice to, or manages the assets of, an individual third party, these services and activities fall outside the scope of ~~the article 2.1(h) this~~ exemption.

...

### **Exemption for commodity derivatives business**

#### **Q44. Who can rely on the exemption in article 2.1(~~h~~) (j)?**

You may be able to rely on the exemption if:

- you deal on own account in ~~MiFID financial instruments~~ commodity derivatives or emission allowances or derivatives thereof; or
- provide other investment services in commodity derivatives or ~~€10 derivative contracts~~ emission allowances or derivatives thereof to clients or suppliers of your main business (or if you are part of a group, the group’s main business); or

- both.

This exemption can include someone dealing on own account as a market maker.

If you deal on own account when executing client orders you can only meet the exemption condition if the client is a client or supplier of your group's main business.

The article 2.1(j) exemption does not apply to you if you apply a high frequency algorithmic trading technique.

~~However, the~~ The exemption will only apply if what you do is ancillary to your main business (see Q45 for more about this).

~~and that~~ The exemption is not available if your group's main business is any of the following (see the answer to Q44A for what main business means in this context):

- ~~neither~~ the provision of investment services ~~nor~~ ; or
- the provision of banking services; or
- acting as a market maker in relation to commodity derivatives. If you are part of a group, what you do must be ancillary to the main business of your group whose main business is neither the provision of investment services nor banking services.

~~In our view, a firm which is part of a group whose main business is not investment or banking services and which provides, for example, as a stand alone business, investment services in commodity derivatives or C10 contracts for its own clients (who are not clients of the group's main business), is likely to fall outside the scope of the article 2.1(i) exemption.~~

#### **Q44A. How do I know whether my main business is investment, banking or commodities?**

~~When considering what is a firm's or group's 'main business' for the purpose of the requirement described in the answer to Q44 that your main business should not be investment services, banking services or commodity derivatives market making, in our view various factors are likely to be relevant including turnover, profit, capital employed, numbers of employees and time spent by employees. These factors should then be considered in the round in deciding whether any one operation or business line amounts to a firm's or your group's main business. In our view, a similar approach can be applied when determining a firm's 'main business' for the purposes of article 2.1(k) (see Q46).~~

The determination of your main business as described in this answer is not directly related to the test for deciding whether your commodities business is ancillary to your main business (the ancillary test is referred to in the answer to Q45). This is because the ancillary test compares the size of your commodities business with the rest of your business but does not specify how to identify what

your main business is within your non-commodities business.

**Q44B. Are there any formalities for using the commodities exemption?**

It is a condition of the commodities exemption described in the answer to Q44 that you:

- should notify annually the relevant competent authority that you make use of this exemption; and
- upon request, report to the competent authority the basis on which you consider that the requirement for the commodities business to be ancillary is met.

If you are a UK firm, the FCA is the relevant competent authority for these purposes.

If you carry out some occasional commodity derivatives activities you may not need to rely on this exemption. See the answer to Q7 (We provide investment services to our clients. How do we know whether we are an investment firm for the purposes of article 4.1(1) MiFID?) for more on this.

**Q44C. Can the commodities exemption be combined with other exemptions?**

Yes.

There is no requirement that someone relying on this exemption must not carry on an activity covered by one of the other exemptions. In particular, this exemption can be combined with the exemption for own account transactions described in the answer to Q40 (see recital 22 to MiFID). For more on combining exemptions, please see the answer to Q46.

**Q45. What is an ancillary activity for these the purposes of the commodities exemption?**

The You can find the meaning of ‘ancillary’ for the purposes of the commodities exemption described in the answer to Q44 is potentially subject to further European Commission legislation pursuant to article 2.3 MiFID. For an activity to be ‘ancillary’ for these purposes, in our view, it must at least be both directly related and subordinate to the main business of the group. Where, for example, a commodity producer buys or sells commodity derivatives for the purposes of limiting an identifiable risk of its main business, for instance in circumstances where the risk management exclusion in article 19 of the Regulated Activities Order would apply, in our view this would qualify as ancillary for the purposes of this exemption. On the other hand, where a commodity producer deals on own account for speculative purposes, it is unlikely that this would be ancillary to the main business in the case of article 2.1(i) MiFID. This activity may fall, however, within the article 2.1(k) MiFID exemption (see Q46) in Commission Delegated Regulation (EU) 2017/592 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business).

This answer does not give a full summary as the definition is too detailed for PERG. Instead this answer summarises the broad approach.

There are two tests. The exemption only applies if you meet both tests. Both are based on commodities trading activities in the EEA.

The first test looks at the size of trading activities of members of your group in various asset classes. For each class, this is calculated by comparing their trading activities in that class with the overall trading activity in the EEA for that class.

The asset classes are made up of emission allowances and various types of commodity derivatives. The emission allowances asset class includes emission allowances to which the exemption for emission allowances in article 2.1(e) (see the table in the answer to Q35A) applies and any bidding under the *auction regulation*.

For this test to be met, the trading level of persons within your group needs to be below the maximum amount for each asset class. There is a different maximum amount for each class.

Certain privileged transactions are excluded from the calculation:

- intra-group transactions that serve group-wide liquidity or risk management purposes;
- transactions in derivatives that reduce risks directly relating to commercial activity or treasury financing activity in accordance with criteria set out in Commission Delegated Regulation (EU) 2017/592 (regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business);
- transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a *trading venue*, where such obligations are required by:
  - regulatory authorities in accordance with EEA law;
  - national laws, regulations and administrative provisions; or
  - those *trading venues*; and
- transactions executed by a group member authorised under MiFID or the CRD.

The second test has two calculation methods. If the result of either calculation is that you fall below the specified threshold, you meet the second test.

- One method is based on the size of group trading activities in commodity derivatives and emission allowances.
- The second measure compares the estimated capital employed for carrying out commodity derivative and emission allowance activities with group

capital.

**Q46. Our main business is producing commodities and we buy and sell commodity derivatives. We are a member of a non-financial services group. Are we exempt from MiFID? Is it possible to combine article 2 exemptions?**

Yes. You will be exempt under article 2.1(k) MiFID because you are a person:

- whose main business consists of dealing on own account in commodities and/or commodity derivatives, and
- who is not part of a group whose main business is the provision of other investment services or banking services.

The question of what is your main business for the purposes of the first bullet point above is determined on an entity basis and not on a group basis (which is different from the approach taken in article 2.1(i) MiFID). You should also note that the article 2.1(k) MiFID exemption refers to commodities and/or commodity derivatives but not C10 derivatives.

Recital 22 of the *MiFID Regulation* indicates that the exemptions in article 2.1(i) and (k) MiFID could be expected to exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers and commodity merchants.

Various other answers to questions in this section deal with certain detailed combinations of exemptions:

- Q42 deals with employee share schemes and company pension schemes.
- It is possible to combine the exemption for own account dealing in article 2.1(d) and the exemption for commodity derivatives in article 2.1(j). The answer to Q40 deals with the treatment of the commodity derivatives business of a firm relying on article 2.1(d). The answer to Q44C deals with the treatment of business within article 2.1(d) for a firm relying on the commodity derivatives exemption in article 2.1(j).

In certain cases a firm will not need to combine exemptions. For example an insurer relying on the exemption described in the answer to Q36 (We are an insurer. Does MiFID apply to us?) does not need to rely on any other exemption.

The answer to this question (Q46) is about whether there is a more general principle that article 2 exemptions can be combined.

There is an argument that the drafting of some of the exemptions does not allow this approach. For example, the group exemption (see the answer to Q37) says that the exemption is available to persons providing investment services exclusively for their fellow group members. However in the FCA's view it is generally possible to combine article 2 exemptions. Recital 22 to MiFID says that exemptions apply cumulatively and that the ability to combine the exemptions in articles 2.1(d) (own account dealing) and 2.1(j) (commodity derivatives) is just an example of this principle. This is consistent with the point that there is no reason

apparent from MiFID why combining exemptions should not be allowed.

Where an exemption is only available if the person only carries on a limited range of investment services or activities (as is the case for example with the group exemption) it can be argued that this restriction does not cover a service or activity which is covered by another exemption. This is on the basis that an exempt activity is not an investment service or activity for these purposes. The European Commission's Q&A's dealing with MiFID 1 take this approach.

Treating an exempt activity as not being a MiFID investment service or activity in this way only applies for the purpose of article 2 of MiFID, meaning that it is only relevant for deciding whether a person is a MiFID investment firm.

#### **Q46A. Is it possible to combine the article 2 and article 3 exemptions?**

The FCA does not believe that it is generally possible to combine the exemptions in article 2 with the exemption in article 3. However in the FCA's view, a firm that relies on the article 2(1)(i) exemption (see Q43) can combine this with article 3 in relation to business falling outside the article 2(1)(i) exemption.

If however you are subject to the UCITS Directive or the AIFMD you may be restricted in your ability to carry out all the activities within the article 3 exemption.

#### **Locals**

#### **Q47. We traded on an investment exchange as a local firm and were exempt from ~~the ISD~~ MiFID 1. Are we exempt under MiFID?**

Yes. If you fell within the exemption in article 2.2(j) ISD for local firms and continue to perform the same services and activities, you should generally fall within the exemption in article 2.1(1) MiFID. If you provide *personal recommendations* in relation to MiFID financial instruments, however, you will not be able to rely upon the exemption in article 2.1(1) MiFID. The exemption for locals in MiFID 1 no longer applies. It is unlikely that the own account exemption in article 2.1(d) will be available as that exemption does not apply to members of, or participants in, a regulated market (see Q40).

#### **The article 3 exemption**

#### **Q48. Article 3 is an optional exemption. Will the exemption apply to UK firms?**

Yes, in part. ~~the optional~~ The exemption in articles 3.1(a) to (c) has been exercised by The Treasury. The answers to Q49 to Q53 explain the exemption in more detail.

Articles 3.1(d) and (e) of MiFID provide additional optional exemptions, but they have not been implemented in the UK.

#### **Q49. Which firms might fall within this exemption?**

The exemption applies to persons who meet all the following conditions:

- they do not hold clients' funds or securities and do not, for that reason, at any time, place themselves in debit with their clients;
- ...
- they transmit orders only to one or more of the following:
  - ...
  - branches of third country investment firms or credit institutions ~~complying~~ which are subject to, and comply with, prudential rules considered by the FCA *appropriate regulator* to be at least as stringent as those laid down in MiFID, ~~or~~ the *CRD* ~~and~~ or the *EU CRR*;
  - ...
- ...

**Q53. What is the practical effect of exercising the optional exemption for those firms falling within its scope?**

You are not a firm to which MiFID applies and so are not a *MiFID investment firm* for the purposes of the Handbook. As such you are not subject to the requirements of the *CRD* as transposed in the Handbook and the *EU CRR* and cannot exercise passporting rights.

Article 3.2 of MiFID applies certain MiFID requirements to firms making use of the article 3 exemption. These are implemented in the *Handbook* and the *Act*.

...

**13.6 CRD IV**

...

**Q55. Are we subject to the CRD and the EU CRR?**

...

Despite being subject to the requirements of MiFID, broadly speaking, if you are one of the following investment firms, *CRD* and the *EU CRR* will only apply to you in a limited way:

...

- a firm that:
  - ...
  - is not authorised to provide the following ~~investment~~ investment

services: (a) to deal in any *financial instruments* for its own account; (b) to underwrite issues of *financial instruments* on a firm commitment basis; (c) to place *financial instruments* without a firm commitment basis; ~~and~~ (d) to operate a multilateral trading facility; and (e) to operate an organised trading facility;

...

...

There is also a special an exemption under the *EU CRR* for locals that do not fall within the exemption for local firms under MiFID (see Q47). However, we do not think that UK regulated firms that were subject to the regulatory regime for locals prior to MiFID implementation are likely to fall within the exemption under the *EU CRR*. This is because they are likely to fall within article 2.1(1) MiFID *local firms*.

...

**Q58. How do we know whether we are an exempt CAD firm and what does this mean in practice?**

...

If you are an *exempt CAD firm* which has opted into MiFID legislation (see Q52), you will need to consider whether you are subject to the audit requirements of companies legislation (see Part VII of the Companies Act 1985 and Part 16 of the Companies Act 2006). You can benefit from the auditing exemption for small companies in companies legislation if you fulfil the conditions of regulation 4C(3) of the Financial Services and Markets Act 2000 (Markets in Financial Instruments Regulations) 2007. In other words, if you continue to meet the conditions of the article 3 *MiFID* exemption (notwithstanding that you are an *exempt CAD firm*), you can benefit from the auditing exemption for small companies, as provided for in companies legislation. For further details, see The Markets in Financial Instruments Directive (Consequential Amendments) Regulations 2007 (SI 2007/2932). The same regulations also contain a transitional regime which has the effect of exempting *exempt CAD firms* from statutory audit requirements in relation to a financial year beginning before 1 November 2007 and ending on or after that date, where the *exempt CAD firm* was not an *ISD investment firm*.

**Q58A. How do we know whether we are a BIPRU firm and what does that mean in practice?**

This category may be relevant to you if you have permission to execute orders on behalf of clients and/or carry out portfolio management in relation to MiFID financial instruments. In summary, a *BIPRU firm*:

...

- is not authorised to provide the *investment investment* services of dealing in any *financial instruments* for its own account, underwriting issues of *financial instruments* on a firm commitment basis, placing financial



~~instruments~~ financial instruments without a firm commitment basis ~~and~~,  
operating a multilateral trading facility or operating an organised trading facility;

...

#### **Q64. Are we a limited licence firm?**

A *limited licence firm* is one that is not authorised to:

...

- underwrite and/or place financial instruments on a firm commitment basis (see Q22).

For the purpose of the definition of a *limited licence firm*, a firm does not deal on own account when executing client orders by matching them on a matched principal basis (back-to-back trading) if its activities are consistent with the conditions of article 29(2) of CRD (see Q61) or article 5.2 of the recast CAD (see Q58A).

...

Generally, you cannot be a *limited licence firm* if you are an *IFPRU 730K firm*. However, you may be a *limited licence firm* if you operate a multilateral trading facility or an organised trading facility (and therefore are an *IFPRU 730K firm*) and do not have a *dealing in investments as principal* permission enabling you to deal on own account or to underwrite or place financial instruments on a firm commitment basis. Therefore if you deal on own account under article 20(3) of MiFID (Specific requirements for OTFs) you will not be a *limited licence firm*.

...

...

Delete PERG 13.7 in its entirety. The deleted text is not shown.

### **13.7 The territorial application of MiFID [deleted]**

**~~Q67. What is the territorial application of MiFID? [deleted]~~**

**~~Q68. What is the ‘prudential regulation’ and ‘conduct of business regulation’ in this context? [deleted]~~**

**~~Q69. What does this mean for my firm? [deleted]~~**

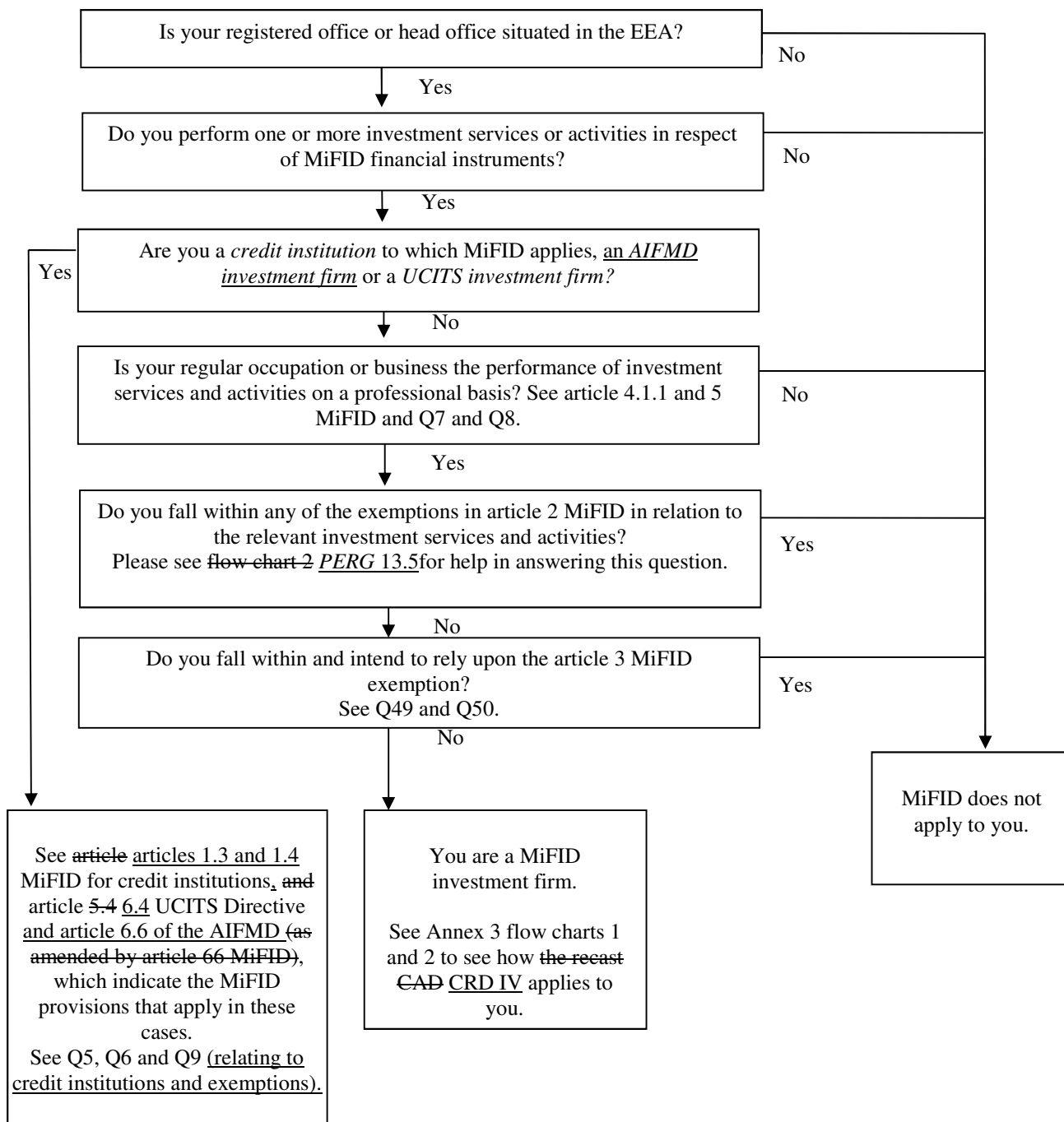
**~~Q70. How are the high level standards, like the Principles, affected by MiFID? [deleted]~~**

**Q71. ~~What is the position in relation to record keeping in branches?~~ [deleted]**

**Q72. ~~Will a branch need to report to the competent authority of the Member State where it is located?~~ [deleted]**

13 Annex 1G Annex 1

**Flow chart 1 – Does MiFID apply to us?**



Flow chart 2 (Am I exempt under article 2 MiFID?) is deleted. The deleted chart is not shown.

**13 Annex 2 Table 1 - MiFID Investment services and activities and the Part 4A permission regime**

MiFID Investment Services and Activities	Part 4A permission	Comments
A1- Reception and transmission of orders in relation to one or more financial instruments	...	<p><del>This was an ISD service.</del></p> <p>...</p> <p>See <del>Q12A</del>, <del>Q13</del>, <del>and</del> <del>Q14</del> <u>and Q34A</u> for further guidance.</p>
A2- Execution of orders on behalf of clients	...	<p><del>This was an ISD service.</del></p> <p>...</p> <p>See <del>Q12A</del>, <del>and</del> <del>Q15</del>, <del>Q15A</del> <u>and 34A</u> for further guidance.</p>
A3- Dealing on own account	...	<p><del>Dealing on own account falls within the ISD, but only where a service is provided. Under MiFID, dealing on own account is caught even if no service is provided.</del> Where a firm is dealing on own account, it needs permission to carry on the activity of dealing in investments as principal.</p> <p>See <del>Q12A</del> <u>and Q16</u> <u>and 34A</u> for further guidance.</p>
A4- Portfolio management	...	<p><del>This was an ISD service.</del></p> <p>...</p> <p>See <del>Q6</del>, <del>Q6A</del>, <del>Q17</del> <u>and Q43</u> for further guidance.</p>
A5- Investment advice	...	<p><del>This was an ISD non-core service.</del></p> <p>...</p> <p>See <del>Q18</del> <u>and Q19</u> <u>to Q21</u> for further guidance.</p>

A6- Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis	...	<p>This corresponds broadly to the service of underwriting and/or placing described in Section A4 of the Annex to ISD.</p> <p>...</p>
A7- Placing of financial instruments without a firm commitment basis		<p>This corresponds in part to the service in Section A4 of the Annex to ISD outlined in the commentary to A6.</p> <p>...</p>
A8- Operation of Multilateral Trading Facilities	Operating a multilateral trading facility (article 25D RAO)	<p><del>This service replaces the ATS operators regime.</del></p> <p>Firms performing this service will need permission to carry on the regulated activity of operating a multilateral trading facility. <del>Broadly speaking, any authorised person who operated an alternative trading system prior to 1 November 2007 was automatically granted permission to operate a multilateral trading facility, unless it notified the FSA to the contrary by 1 October 2007.</del></p> <p>...</p>
<u>A9- Operation of organised trading facilities</u>	<u>Operating an organised trading facility (article 25DA RAO)</u>	<p><u>Firms performing this service will need permission to carry on the regulated activity of operating an organised trading facility.</u></p> <p><u>Firms will not require permission to carry on any other regulated activities if all they do is operate an organised trading facility. If they carry on additional regulated activities, they should ensure that their permission properly reflects this.</u></p> <p><u>See Q24A for further guidance.</u></p>
<p><b>Note:</b> The activity of <i>bidding in emissions auctions</i> can form part of A1, A2 or A3. In terms of the <i>permission</i> regime, <i>bidding in emissions auctions</i> does not form part of any other <i>regulated activity</i> (see <i>PERG 2.7.7CG</i>) and so a <i>firm</i> must have a separate <i>permission</i> to undertake that activity.</p>		

Table 2 - MiFID financial instruments and the Part 4A permission regime

MiFID financial instrument	Part 4A permission category	Commentary
C1- Transferable securities	<p>...</p> <p>contract for differences (excluding a spread bet and a rolling spot forex contract and a binary bet)</p> <p>spread bet</p>	<p><del>Transferable securities are securities negotiable on the capital market excluding instruments of payment and include:</del></p> <p><del>(a) shares in companies;</del></p> <p><del>(b) bonds;</del></p> <p><del>(c) depositary receipts;</del></p> <p><del>(d) warrants; and</del></p> <p><del>(e) miscellaneous securitised derivatives.</del></p> <p><del>Transferable securities comprise various categories of derivatives in the permission regime: for example, options (excluding commodity options and options on commodity futures); futures (excluding commodity futures and rolling spot forex contracts); contracts for differences (excluding spread bets and rolling spot forex contracts).</del></p> <p>The permission investment categories above <u>in column 2 (Part 4A permission category)</u>, however, are wider than the MiFID definition of transferable securities, as they comprise both securitised and non-securitised instruments. <u>A</u> <u>An instrument is not a transferable security under MIFID if it is not negotiable on the capital market. Therefore an investment listed in column (2) will not always be a transferable security.</u></p>

		<p>Firms with permissions containing <del>these</del> <u>any of the Part 4A permission</u> investment categories <u>in column (2)</u> will fall outside the article 3 MiFID exemption as transposed in domestic legislation, where they provide investment services in relation to financial instruments which are non-securitised investments (for example, OTC derivatives concluded by a confirmation under an ISDA master agreement).</p> <p><u>It is possible in theory that options, futures and contracts for differences under the RAO that are not mentioned in column (2) could be a MiFID transferable security. However column (2) includes the main RAO derivatives that the FCA thinks may in practice be transferable securities.</u></p> <p>...</p>
C2- Money market instruments	...	<p><del>The definition in article 4.1(19) MiFID refers to</del> <u>Money market instruments</u> are classes of instruments normally dealt in on the money markets.</p> <p><u>For further guidance on money market instruments see Q28A.</u></p>
...		
C4- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, <u>emission allowances</u> or other derivatives instruments, financial indices or financial measures which may be settled physically	<p>...</p> <p>contract for differences (excluding a spread bet <del>and</del>, a rolling spot forex contract <u>and a binary bet</u>)</p> <p>spread bet</p> <p><u>binary bet</u></p>	<p>C4 includes <del>the financial instruments in sections B3-6 of the Annex to the ISD and</del> in our view derivatives relating to commodity derivatives, for example options on commodity futures.</p> <p>For further guidance, see <u>Q30 and Q32 Q31A to Q31S.</u></p> <p>...</p>

or in cash		
C5- Options, futures, swaps, <del>forward rate agreements</del> <u>forwards</u> and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event)	...  contract for differences (excluding a spread bet <del>and</del> , a rolling spot forex contract <u>and a binary bet</u> )  <u>binary bet</u>	...  For further guidance see <u>Q32</u> <del>and Q33</del> <u>Q33A</u> .
C6- Options, futures, swaps, and any other derivative contracts relating to commodities that can be physically settled provided that they are traded on a regulated market <del>and/or</del> , an MTF <u>or an OTF</u>	...  contract for differences (excluding a spread bet <del>and</del> , a rolling spot forex contract <u>and a binary bet</u> )  <u>binary bet</u>	...  For further guidance see <u>Q32</u> <del>and Q33</del> <u>Q33B</u> .
C7- Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in C.6 <del>and not being</del> . <u>This category does not include spot contracts or contracts that meet certain conditions that are designed to exclude contracts for commercial purposes, which have the characteristics of other derivative financial instruments, having regard to whether,</u>	...  contract for differences (excluding a spread bet <del>and</del> , a rolling spot forex contract <u>and a binary bet</u> )  <u>binary bet</u>	<del>C7 is supplemented by Level 2 measures (see article 38 of the MiFID Regulation).</del>  For further guidance see <u>Q32</u> <del>and Q33</del> <u>Q33C</u> .



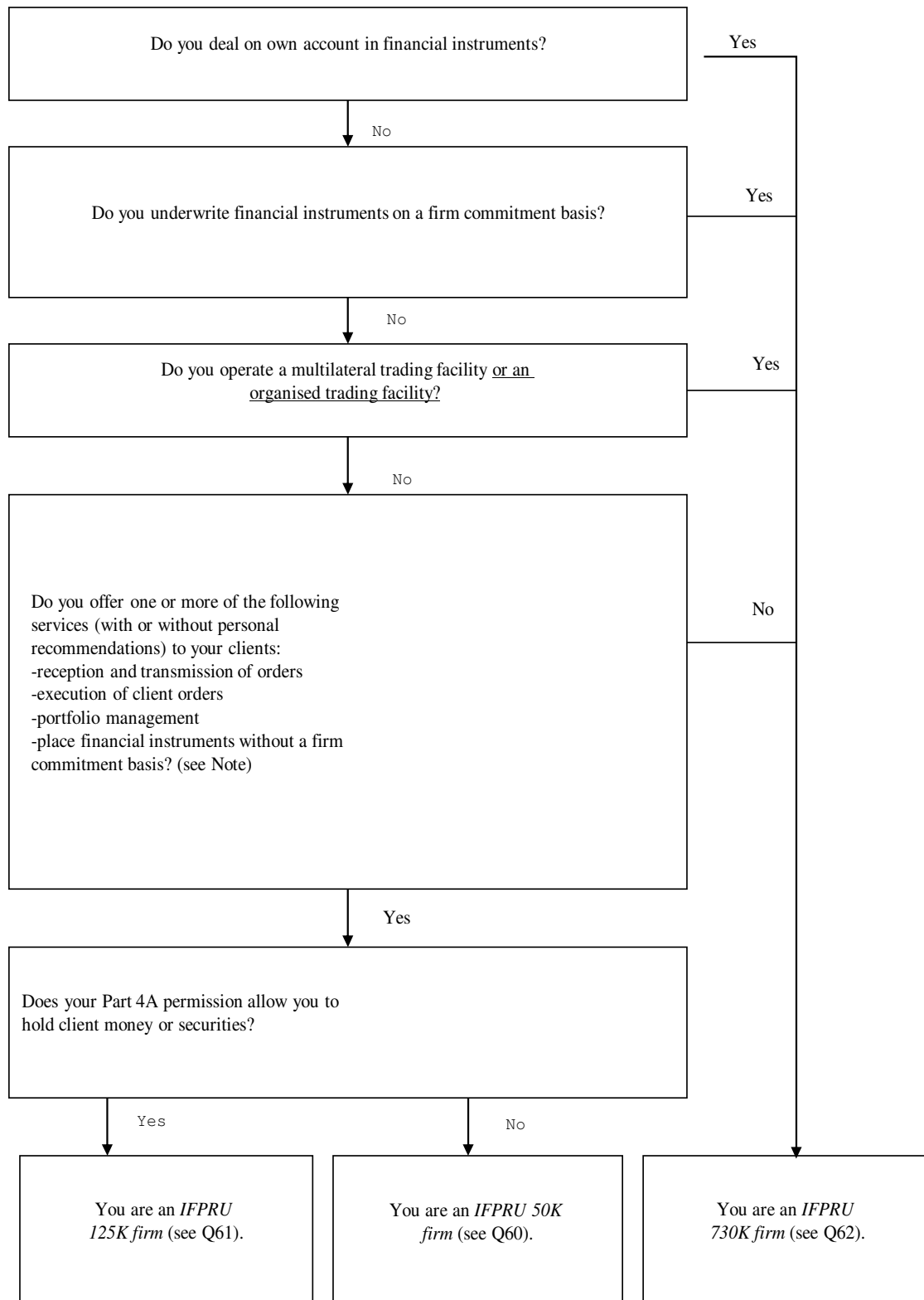
inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls		
C8- Derivative instruments for the transfer of credit risk	<p>...</p> <p>contract for differences (excluding a spread bet <del>and</del> a rolling spot forex contract <u>and a binary bet</u>)</p> <p>...</p>	<p>...</p>
C9- Financial contracts for differences	<p>contract for differences (excluding a spread bet <del>and</del> a rolling spot forex contract <u>and a binary bet</u>)</p> <p>...</p>	<p>...</p>
<p>C10- Options, futures, swaps, forward rate agreements and any other derivative contracts relating to <del>climatic variables, freight rates, emission allowances or inflation rates or other official economic statistics</del> <u>various specified underlyings</u> that must be settled in cash or may be settled in cash at the option of one of the parties (otherwise than by reason of a default or other termination event), <del>as well as any other derivative contracts relating to</del></p>	<p>...</p> <p>contract for differences (excluding a spread bet <del>and</del> a rolling spot forex contract <u>and a binary bet</u>)</p> <p>spread bet</p> <p><del>emissions auction product</del></p> <p><u>binary bet</u></p>	<p><del>C10 is supplemented by Level 2 measures (see articles 38 and 39 of the MiFID Regulation) and comprises miscellaneous derivatives.</del></p> <p>For further guidance see Q34.</p>

<p>assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market or an MTF, are cleared and settled through recognised clearing houses or are subject to regular margin calls <u>This category does not include contracts that meet certain conditions designed to exclude non-financial derivative instruments.</u></p>		
<p><u>C11- Emission allowances</u></p>	<p><u>Emission allowances</u></p>	<p><u>See Q34A</u></p>
<p><b>Note:</b></p> <p>In our view, the categories of financial instrument in C1 to <del>C10</del> <u>C11</u> are not mutually exclusive, so a financial instrument may fall within more than one category. For example, an interest in an investment trust company falls within C1 and C3.</p>		

13 Annex 3 Annex 3

...

Are we an *IFPRU 50K firm*, an *IFPRU 125K firm* or an *IFPRU 730K firm*?



...

Delete PERG 13 Annex 4 (Principal Statutory Instruments relating to MiFID scope issues) in its entirety. The deleted text is not shown.

**13**      **Principal Statutory Instruments relating to MiFID scope issues [deleted]**  
**Annex 4**