A new Consumer Duty

UK Finance response

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Company number: 10250295
Registered address: UK Finance Limited, 1 Angel Court, London EC2R 7HJ

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Introduction and summary

Introduction

1. UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms, we act to enhance competitiveness, support customers and facilitate innovation. We welcome the opportunity to respond to the Financial Conduct Authority's (FCA) consultation paper CP21/13 on proposals for a new Consumer Duty.[1]

2. It is encouraging that the FCA recognises there are many firms already delivering the right outcomes for consumers. This is the standard to which our members hold themselves.

3. While we support the FCA's aims for the Consumer Duty, we are concerned that shortcomings in its formulation and implementation, as well as unintended consequences, could mean its introduction does more harm than the benefits it seeks to achieve, to the detriment of consumers and firms alike. We hope that the comments and recommendations that follow serve to help avoid that eventuality and we stand ready to discuss these collaboratively with the FCA as it moves to the next stage of its consultation.

4. Notwithstanding ongoing changes to financial services regulation since the global financial crisis and the prospect of fundamental reform of the regulatory framework as a whole,[2] Parliament has required the FCA to carry out a public consultation "about whether it should make general rules providing that authorised persons owe a duty of care to consumers."[3] CP21/13 fulfils that duty under section 29 of the Financial Services Act 2021.

5. The FCA asserts that it wants to see a higher level of consumer protection in retail financial markets, so it is proposing a new Consumer Duty that would set higher expectations for the standard of care that firms provide to consumers. It believes that implementation of the Consumer Duty will create a paradigm shift in its expectations of firms in retail markets, requiring a significant shift in culture and behaviour for many firms, where they consistently focus on consumer outcomes and put customers in a position where they can act and make decisions in their interests.

6. Banking and finance markets rely on consumers having the capability and the capacity to participate effectively. Firms have a significant role to play in enabling that to happen, and they have worked hard to improve since the Financial Services Authority first set out the principle of treating customers fairly (TCF). Those efforts have been variously underpinned and catalysed by further regulatory interventions in respect of high-cost credit, overdraft charges, credit cards, persistent debt, mortgages and more.

7. Firms have also made a huge difference to the financial wellbeing of their customers during the covid-19 pandemic, helping millions to stay in their homes, keep their finances in check, and keep their businesses running. At the same time, the pandemic has

[1] https://www.fca.org.uk/publication/consultation/cp21-13.pdf.
[2] https://www.gov.uk/government/consultations/future-regulatory-framework-frf-review-consultation.
[3] https://www.legislation.gov.uk/ukpga/2021/22/section/29/enacted.

challenged long-held assumptions about how firms can best serve their customers, particularly through digital channels.

8. If you have any questions relating to this response, please contact Matthew Conway, Director of Strategy & Policy, at matthew.conway@ukfinance.org.uk.

Summary

9. The FCA has chosen the Consumer Duty as its preferred approach to meeting its obligations under the Financial Services Act, but that was not its only option. In particular, it could have sought to address damaging "sludge practices" and encourage firms to avoid consumer harm by "getting it right in the first place" by enforcing existing principles and rules more forcibly against the firms that breach them. The absence of a clear articulation of the harms that the FCA believes it cannot adequately address in this fashion, coupled with a lack of clarity about many of its core proposals, runs a significant risk of regulatory failure, raises the prospects of a litigation culture and presents fundamental difficulties in responding to the consultation in meaningful detail.

10. If the FCA decides to introduce the Consumer Duty, it first needs to resolve a number of key concerns about its proposals. These are set out below in our answers to the questions posed in CP21/13. We highlight the following issues of particular significance, which the FCA should address if it is to achieve its aims.

    a. **Clarifying the scope of the Consumer Duty.** The obligations of firms within the supply chain of a product or service should be proportionate to their ability to influence the outcomes of end-customers. We recommend that the Consumer Duty be owed primarily to whomever a firm ultimately contracts with and that it extends to others only where harm is reasonably foreseeable, there is sufficient proximity and it is fair, just and reasonable for the Consumer Duty to apply. Similarly, including in the definition of "retail clients" all small and medium-sized enterprises (SMEs) to which the provision of products and services falls within the regulatory perimeter fails to reflect the different nature, relative sophistication and needs of larger businesses. We consider this to be too wide and think the Consumer Duty should instead apply only to the smallest businesses, consistent with the application of the FCA's conduct of business rules (i.e., deposit taking from customers within BCOBS, lending to customers within CCA/CONC etc.—see below our proposal as to how this would work on a product by product basis). Furthermore, in general the FCA's rules allow firms to apply a proportionate approach, taking into account the nature, scope and complexity of the firm's activities. We would expect the FCA to take the same approach to firms when applying the Consumer Duty Principle, Outcomes and underlying rules and guidance, and to make this expressly clear in any future rules and guidance.

    b. **Further consideration of the most appropriate articulation of the Consumer Principle.** We think this should focus on firms delivering outcomes for retail clients rather than acting in their best interests, but consideration should be given to whether these outcomes should be "fair" or some other qualification rather than "good."

    c. **Providing thorough guidance, including examples, on what is and is not reasonable for firms to do in complying with the Consumer Duty and how this differs from existing practices.** It must also clarify what responsibility consumers retain for their own decision-making.

d. **Delivering assurances that the Consumer Duty will not apply retrospectively to past business and practices will not be judged with the benefit of hindsight.** Clarity is needed about the application of the Consumer Duty to past, present and future interactions with existing customers. The FCA should expressly state in the new Consumer Duty that it has no retrospective application. It is also important that it not be used to reopen previously resolved disputes.

e. **Focusing the requirement for fair value on addressing poor conduct, particularly sludge practices.** Concerns about the effectiveness of competition should be addressed through the application of the FCA's existing competition powers. Price regulation should be explicitly excluded as a use of the Consumer Duty and the focus should instead be on transparent pricing practices.

f. **Disapplying existing regulation that is superseded by the Consumer Duty, because there is overlap between those existing regulations and the current proposals.** Firms would otherwise have to navigate an unnecessarily complicated rulebook where a number of rules have been superseded by the Consumer Duty and therefore have no residual purpose. The FCA must also clarify the relationship between the Consumer Duty and industry codes of practice.

g. **Minimising the burden on firms of demonstrating ongoing compliance with the Consumer Duty in the absence of concerns that they are in breach.** The FCA should also establish clear, objective measures for assessing whether the outcomes it is seeking are being achieved.

h. **Allowing firms a reasonable implementation period from the point at which rules are made.** Firms cannot start implementation until they have certainty about the requirements to which they will be subject. Feedback from our members has suggested the entire process is likely to take two years or more to implement and will be a significant undertaking in terms of the costs involved. The FCA should be mindful of competing pressures, including from other important regulatory initiatives, on firms' capacity to implement the Consumer Duty.

i. **Taking steps to mitigate unintended consequences that could result from the current proposals.** These range from increased financial exclusion to reduced competition and diversity of supply and heightened regulatory unpredictability from findings by the Financial Ombudsman Service (FOS). We are especially concerned that the Consumer Duty could jeopardise firms' ability to cater to the needs of significant customer demographics on a commercially viable basis. Vulnerable customers, but also people who are self-employed, have multiple incomes or are on zero-hours contracts are among those at risk of being underserved in key products and services. Moreover, it is unclear that the additional costs to firms, that will ultimately be offset through products and services, will be justified by the benefits to consumers.

j. **Demonstrating that the Consumer Duty is the best means to achieve the FCA's objectives and now is the time to introduce it.** The vagueness of aspects of the FCA's proposals has limited our ability to inform the FCA's forthcoming cost/benefit analysis (CBA), although we have included the evidence that members have been able to provide. That CBA must consider all the available options, from "do nothing" through to better enforcement of existing rules and guidance. The FCA should identify

in the CBA the benefits and added protections the Consumer Duty will provide, over and above those which the regulatory requirements and coverage currently in place, provide. The FCA must also recognise the impact on firms of implementing the Consumer Duty at the same time as other significant regulatory initiatives (such as on operational resilience) come to bear, and in the light of discretionary consumer-facing investment programmes that will need to be delayed or set aside.

11. **The FCA should rectify the lack of clarity that prevents fully informed responses to many of its proposals at this stage.** We are concerned that this will leave a great deal of policy detail untested as the FCA moves to a second consultation by the end of the year with proposed text for any new rules and guidance. The FCA should indicate how it plans to address these concerns within the constraints of the statutory timetable to which it is working and, indeed, whether it believes that timetable remains achievable.

12. Finally, we restate our opposition to introducing a private right of action enabling consumers to bring private court proceedings for breach of the Consumer Duty or any of the current FCA principles. This would fundamentally alter the nature of financial services regulation, displacing the FCA as the arbiter of its own requirements in favour of uncertain and expensive litigation in the courts and encouraging greater risk aversion by firms to the ultimate detriment of consumers. It would also undermine the regulatory predictability for which the UK is renowned, and which is a key factor in the UK's success as a global financial centre and its attractiveness as a destination for domestic and international investment.

Question 1. What are your views on the consumer harms that the Consumer Duty would seek to address, and/or the wider context in which it is proposed?

13. We support the broad intention behind the Consumer Duty: achieving the right outcomes for consumers in financial services markets and stopping consumer harm before it arises. If it is sufficiently considered and properly balanced when implemented, the Consumer Duty could be a useful regulatory tool to encourage firms to put customers in a position where they can act and make decisions in their interests, and would continue to require firms to focus on consumer outcomes in the target markets for their products and services, as is already the case under the existing TCF framework.

14. The FCA indicates that the Consumer Duty would add to the range of regulatory tools it uses, giving firms more certainty about the standards it expects. However, without sufficient clarity, this overlay of "something more" on the existing framework of principles, rules and guidance that apply to UK retail financial services markets risks causing confusion for firms and consumers alike; a duplication of effort on the part of firms, and poorer outcomes for consumers. That would clearly frustrate the very intention of the Consumer Duty and needs to be avoided.

15. That said, it is not clear from CP21/13 what specific harms would be addressed by the introduction of the Consumer Duty that cannot already be addressed by existing regulation. The FCA should explain these clearly through detailed guidance and non-exhaustive, but specific examples, so firms can understand the enhanced requirements that the Consumer Duty will introduce. We note, in this regard, the "examples of harm and disadvantage that firms should be alert to" in the FCA's guidance for firms on the fair treatment of vulnerable customers.[4]

16. By clarifying how the current TCF framework, principles, rules and guidance are insufficient to address those harms, the FCA will help firms best focus their attention and resources. It would also be useful to firms if the FCA could make clear what currently acceptable practices will not be considered compatible with the Consumer Duty once implemented. The FCA, too, should benefit by being better able to focus its supervision and enforcement activity where this will make the most difference.

Question 2. What are your views on the proposed structure of the Consumer Duty, with its high-level Principle, Cross-cutting Rules and the Four Outcomes?

17. We agree with the structural architecture that the FCA proposes, with a Consumer Principle underpinned by three Cross-cutting Rules and further rules and guidance setting expectations for firms' conduct against specific outcomes. It will nonetheless be important to adopt the simplest possible approach that strikes the right balance between principles, outcomes, rules and guidance.

18. The scope of the FCA's requirements must be unambiguous, and firms must be as clear as possible about what is expected of them while having the fullest flexibility to meet their regulatory obligations as they see fit, taking into account the nature, complexity and

[4] https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf.

scale of their regulated activities and customer base. Too much prescription would serve to cause the very harm the Consumer Duty seeks to prevent. For example, in the case of impaired credit and higher-cost, non-standard markets, prescription could limit firms' ability to tailor their approach to support a consumer's particular situation, which may differ significantly from the mainstream and be more susceptible to harms. As was the case with the repeat-use remedies for overdrafts under the FCA's high-cost credit review: clarity about the objective—supporting customers who were repeatedly borrowing too much through their overdraft—and enabling firms to build a strategy to engage with consumers was more effective than requiring them to work within a rigid set of rules. Such flexibility is especially important in the context of the Consumer Duty, given the wide range of products and services to which it is intended to apply.

19. Equally, where prescription is required, too little would result in misinterpretation and present firms with an impossible compliance task. As was illustrated with persistent debt in the FCA's credit-card market study, poorer outcomes for consumers can result from the absence of clear guidance with good- and bad-practice examples.

20. While the consultation sets out some high-level statements of what the Consumer Duty will mean for firms and their senior managers, no practical advice about how firms could meet those standards has yet been provided. Firms want the FCA to provide clear examples and case studies of what good and bad looks like for all aspects of the Consumer Duty and how these differ from, and interact with, other aspects of the existing regulatory regime (where requirements are not otherwise removed or disapplied—see our response to questions 9 and 10 below). Clear guidance (e.g., as provided for covid-19 forbearance requirements or repeat use of overdrafts, resulting in a consistent approach across all firms) is inherently useful for firms and consumers alike, and the Consumer Duty will be no different.

21. The FCA's intention to embed a concept of reasonableness in the Consumer Duty is critical. Factors that influence what is reasonable must be set out to allow firms to understand the FCA's meaning and to assist the FOS in making decisions on complaints under the Consumer Duty. In addition to the factors listed in paragraph 3.28 of the consultation that will influence what is reasonable, the FCA should include guidance developing its statements in paragraph 2.37 about what the Consumer Duty would not do, in particular "require that all consumers of a product or service obtain the same terms or outcome" or "impose an open ended duty that goes beyond the scope of the firm's role and its ability to determine or influence consumer outcomes, or protect consumers from all potential harms."

22. Providing guidance in this way will address the fact that customer outcomes depend on many factors, including firm behaviour, customer behaviour and external factors outside the control of both. On that basis, whilst firms work to achieve good, or fair outcomes, they are not always able to control the end result due to those numerous external factors, that can detrimentally affect or impact an otherwise good, or fair outcome being achieved. In providing guidance on what is and is not reasonable, the FCA should take care not to provide sweeping generalisations that could result in unintended consequences (e.g., firms not supplying products due to perceived risk from blanket guidance that covers only mainstream consumers). Instead, the examples provided by the FCA should cover areas that raise doubt (e.g., to clarify that there will not be a requirement on firms to automatically switch consumers to new or better products).

23. In sum, the FCA must address the National Audit Office's finding in 2019 that:

> ***Regulators have not been specific enough in defining the overall outcomes they want to achieve for consumers.*** *Clear success criteria such as outcomes-based targets are vital so that industry, consumers and consumer representatives are clear on regulators' expectations and priorities and how these address consumers' key areas of concern. Regulators set broad high-level aims, such as achieving high-quality and good-value services for consumers. However, apart from targets in some specific areas, they have not defined what these high-level aims mean in practical terms . . .*[5]

Question 3. Do you agree or have any comments about our intention to apply the Consumer Duty to firms' dealings with retail clients as defined in the FCA Handbook? In the context of regulated activities, are there any other consumers to whom the Duty should relate?

24. Whatever the final scope of the Consumer Duty, the FCA should expressly define what it means by "retail clients," clarifying who is, and is not, included and whether there are particular characteristics that could push a consumer outside its scope. In particular, the proposed definition is not appropriate for products and services not relating to designated investment/MiFID business.

25. In particular, the FCA should recognise that firms have limited influence over outcomes for business customers where business decisions are being made. As such, it is important that firms can use a proportionate approach to applying the Consumer Duty based on the nature, size and relative sophistication of their customers and the nature and complexity of the products and services provided to them. There cannot be a "one-size fits all" approach, especially when dealing with business customers that ultimately fall within the scope of the Consumer Duty.

Application to regulated activities only

26. While our members typically do not differentiate the way in which they treat customers of regulated and unregulated products, they are concerned by the possibility of scope creep in the consultation. An extension of the Consumer Duty to cover unregulated activities of authorised firms would increase inconsistencies across the industry as a whole and create potentially unfair market conditions, where authorised firms are required to meet higher standards with respect to their unregulated activities than unauthorised firms providing only unregulated activities. This, in itself, could cause consumers harm and unnecessary confusion.

27. It is also important that the Consumer Duty is not extended to unregulated business by virtue of the Senior Managers & Certification Regime (SM&CR). The FCA should make clear that senior managers are not required to take into account the Consumer Duty in respect of unregulated business.

28. Similar concerns arise in respect of the FOS extending the scope of the Consumer Duty to unregulated products through its consideration of complaints. The FCA should give clear guidance to the FOS (as is permitted) in respect not only of the Consumer Duty

[5] https://www.nao.org.uk/wp-content/uploads/2019/03/Regulating-to-protect-consumers-in-utilities-communications-and-financial-service-markets.pdf.

generally, but also in respect of unregulated business (and, in light of our comments below, regulated business above any Consumer Duty threshold) falling within the FOS's jurisdiction to which the Consumer Duty does not apply.

Application to SMEs

29. The use of "retail clients" appears to be intentional, on the basis that it is broader than "consumers" and captures SMEs. We consider this to be too wide. Except for the very smallest businesses, SMEs are typically much more sophisticated customers—many having their own finance director or controller, legal advisors, accountants and/or other financial advisors—so they do not need the level of protection that the Consumer Duty seeks to provide.

30. Indeed, applying the Consumer Duty to SMEs where it is not needed would be counterproductive, for the following reasons.

- Larger SMEs must be allowed to pursue their own commercial strategy without interference from firms trying to achieve the Consumer Duty outcomes.

- If there is a risk that it becomes commercially unviable to serve SMEs (due to the friction caused by the Consumer Duty), firms may exit the market and/or certain customer segments may be excluded. This would harm competition and be bad for customers.

- The Consumer Duty would likely introduce unnecessary frictions into the customer journey and result in customers being asked for much more information than they have time or are willing to provide, which, as well as being bad for business customers for whom speed and ease of access are often paramount, could also be in contravention of existing legislation such as the Retail Banking Market Investigation Order 2017.

31. Instead, our view, and the view of our members, is that the scope of the Consumer Duty should be defined by reference to the current application of the conduct rules, rather than the full regulatory perimeter of the specific activities.

32. The FCA's view in 2018 was that these rules broadly strike the right balance for SMEs. They are applied on a proportionate basis, based on the harm of a particular product or service to customers and the characteristics of those customers. For example:

- more protections are afforded to "retail clients" under COBS;

- BCOBS only applies to "banking customers," which includes micro-enterprises and charities with an annual income of less than £1 million but not small businesses, and the Consumer Duty should be limited accordingly;

- MCOB applies where the business is not a "large business customer" (i.e., with an annual turnover of £1 million or more), and the Consumer Duty should be limited accordingly. Firms may also tailor the provisions of MCOB where the regulated mortgage is for a business purpose;

- Customers who are not consumers, micro-enterprises or charities with an annual income of less than £1 million are able to opt-out of certain provisions of the Payment

Services Regulations 2017 (the "corporate opt-out"). For consistency across banking and payments, the Consumer Duty should not apply to customers eligible for the corporate opt-out;

- the consumer credit regime as established and set out in the Consumer Credit Act, subordinate legislation and CONC extends the same protections to sole trader and small partnership loans (amongst others) across the product lifecycle, for loans up to £25,000, beyond which businesses may agree to a "corporate opt-out", noting that CONC 3 (financial promotions and communications with customers relating to consumer credit) does not apply to business loans. We assume the FCA's intent is that the Consumer Duty would not apply to customers eligible for the corporate opt-out and we would support this approach; and

- however, debt collection from sole traders (etc) is regulated irrespective of the amount of indebtedness and we would welcome clarification from the FCA as to how (if at all) the Consumer Duty is intended to apply, particularly if some or all of the indebtedness relates to unregulated lending. In this regard, we would propose that debt collection under the Bounce Back Loan Scheme be carved out of the scope of the Consumer Duty given that this is subject to its own set of scheme rules and guidance as well as CONC 7, and aspects of the scheme rules may conflict with the Consumer Duty, such as the obligation to offer Pay As You Grow where requested by the customer even if the firm has told the customer it does not consider PAYG to be the most suitable option.

33. Moreover, the costs of bringing all SMEs within the scope of the Consumer Duty are likely to outweigh the benefits. Larger SMEs should be capable of assessing and negotiating contract terms and may not want the extra costs that increased regulation can bring. Such businesses are also not necessarily in weaker bargaining positions, and asymmetries of information are less likely. Larger SMEs are likely to have significant internal expertise and are deemed capable of negotiating favourable contract terms for financial products, often negotiating with more than one financial services firm at once. In addition, many of our members comply with the Lending Standards Board's Standards of Lending Practice for business customers, [6] which apply to businesses with consolidated turnover up to £25 million. These set a benchmark for good SME lending practice and are recognised by the FCA as an indication that senior managers are observing proper standards of market practice. They provide a more flexible and proportionate regime for lending to a wide range of SMEs with differing needs than would result from the Consumer Duty, while achieving many of the same outcomes.

34. In a similar vein, firms need clear guidance on the extent to which the Consumer Duty would apply to high net-worth individuals and sophisticated investors. We strongly believe that the FCA should provide an opt-out from the Consumer Duty for all sophisticated investors, similar to that for unregulated collective investment schemes. Without an opt-out, such customers would likely see their ability to aggressively manage their interests stifled (e.g., because promoting higher-risk products to them would not necessarily comply with the Consumer Duty).

[6] https://www.lendingstandardsboard.org.uk/wp-content/uploads/2020/08/Standards-of-Lending-Practice-for-business-customers-August-2020-Covid-update.pdf.

35. The FCA also needs to provide clear guidance on how the Consumer Duty would interact with the existing concept of proportionality used by firms when servicing high net-worth or sophisticated individuals, or larger SMEs. In doing so, the FCA should remove any room for confusion.

36. The FCA should provide specific guidance on how it envisages the Consumer Duty will apply to business customers. The guidance should acknowledge that business customers, in the main, are very different from consumers, and it is right that they are treated differently by firms. The guidance should also recognise and distinguish between the wide range of businesses of varying sophistication falling within the Consumer Duty. It would also be helpful for the guidance to reflect that setting up and running a business involves a high degree of risk in return for financial gain or other material benefits and the Consumer Duty does not negate or supersede business owners' own responsibility for their business decisions and legal/contractual obligations, especially when they benefit from limited liability. Many SMEs enter into contracts and agreements as part of their everyday activities as well as being responsible for compliance with numerous business-related regulations. Businesses are also more experienced than individuals in assessing the implications of contracts, making businesses decisions, considering pricing implications and negotiating.

37. We note that the term "retail clients" used in this consultation is also used to denote the scope of application of the FCA's Guidance for firms on the fair treatment of vulnerable customers. However, in the case of the latter, "retail customers" is taken to consist of individuals and unincorporated businesses[7]—narrower than the scope implied by "retail clients" in the Consumer Duty, which the FCA has indicated includes all clients other than professional clients and eligible counterparties. Notwithstanding our recommendations above on the appropriate scope of the Consumer Duty, if the scope of the Vulnerability Guidance and the Consumer Duty are indeed intended to be different, we would ask that the FCA employ different terminology to avoid confusion for firms and customers.

Question 4. Do you agree or have any comments about our intention to apply the Consumer Duty to all firms engaging in regulated activities across the retail distribution chain, including where they do not have a direct customer relationship with the 'end-user' of their product or service?

38. The FCA must clearly define and explain the scope of the Consumer Duty so that firms across the retail-distribution chain know whether, and to what extent, it applies to them. It cannot be the case that all firms engaging in regulated activities are in scope. There must come a point where the indirectness of any customer relationship with the end-user of their products or services precludes this. There are already rules under the MiFID regime and PROD for some of the more complicated or risky products, but it seems disproportionate to apply similar responsibility on a blanket basis. Rather, any application of the Consumer Duty where there is only an indirect customer relationship needs to be proportionate.

[7]See https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf, 1.12

39. It would be unfair for all firms within scope to have the same level of responsibility, particularly for the conduct of third parties with which they are required to engage, but whose conduct is not within their control. For example, under the Bank Referral Scheme, nine major lenders are required to pass on details of small businesses they have turned down for finance to three referral platforms that will share them in anonymous form with alternative finance providers. If the platforms and/or alternative finance providers are caught by the Consumer Duty, can the FCA confirm that the firm making the referral is responsible only for its own compliance and not that of these third parties? A similar example, relevant to both consumers and SMEs, arises under Open Banking, where banks are required to provide customer data to third parties. We suggest the FCA confirm that existing Handbook due-diligence requirements for third-party and outsourced functions (especially SYSC 8) are sufficient. At the same time, we assume that the Consumer Duty leaves firms' existing responsibilities under the outsourcing requirements of SYSC 8 unchanged. It would be helpful if the FCA confirmed this and provided clear guidance regarding hand-offs between firms in supply chains and how the Consumer Duty affects the responsibility of each firm. In particular, the FCA should provide clear guidance on how intermediary sales should be dealt with under the Consumer Duty. This would be helpful to both consumers and firms alike. Furthermore, the FCA is not clear about the position of unregulated firms in a regulated product's supply chain.

40. While it has "not branded the Consumer Duty as a 'duty of care'" in the ordinary common-law sense, the FCA has made clear that its proposals will assume firms owe a duty of care to consumers purchasing products and services. It cannot be fair or reasonable that a firm within the supply chain of a product or service owes a duty of care to an individual or corporation with which it has no direct relationship whatsoever. We assume the FCA does not intend this and ask that it confirm the Consumer Duty applies only where there is a direct relationship with consumers and not, for example, to other entities in the chain. Rather, the Duty should be owed primarily to whomever the firm ultimately contracts with and will extend to others only where harm is reasonably foreseeable, there is sufficient proximity and it is fair, just and reasonable for the Consumer Duty to be imposed, as is the case when considering duties of care as a matter of English law.

41. If the FCA considers that end-firms in a supply chain should have oversight of third-party operations, the focus should be on a reasonable breadth and depth of due diligence, ongoing oversight and communicating key points about the third party and their services in a way that is clear, fair and not misleading. In this instance, the FCA should make clear that there will be no requirement to take on the third party's full disclosure and product-suitability requirements for regulated products.

42. The FCA cannot address these concerns by providing guidance alone. It needs to be explicit about the precise scope of the Consumer Duty, ensuring it is obvious which firms fall within its boundaries and which do not.

43. Firms also need clear guidance on the extent to which the Consumer Duty applies to dealings with the estates of deceased customers and the extent to which it is intended to have extraterritorial effect. As currently drafted, it seems that it could apply wherever a UK firm is the issuer of a product, irrespective of where the manufacturing activity takes place or whether the target market is non-UK retail customers. This could unintentionally put firms at a competitive disadvantage, so we suggest that the Consumer Duty be clarified to cover products available to UK retail markets only.

Question 5. What are your views on the options proposed for the drafting of the Consumer Principle? Do you consider there are alternative formulations that would better reflect the strong proactive focus on consumer interests and consumer outcomes we want to achieve?

44. We do not consider that either of the proposed formulations of the Consumer Principle is quite right. There is no perfect consensus—some members have argued that the "best interests" approach may be preferable—but the overwhelming majority of our members agree in principle with an outcomes-focused approach. However, we believe the formulation of option 1 should be amended: "a firm must act to deliver ***fair*** outcomes for retail clients." The reasons for this are threefold.

- The use of the word "good" in relation to outcomes, particularly in relation to consumer lending, is difficult to correlate. Some lending will inevitably result in the customer being unable to make repayments, even if the original lending was appropriate. It could therefore be argued that this is not a good outcome, even if it is fair. Equally, a customer could be declined lending, which is an entirely fair outcome but not necessarily a good one for the customer.

- The need to achieve "good" outcomes could stifle risk-based decision-making. This in and of itself could result in poorer outcomes for clients, either via the overly risky provision of products to try to achieve good outcomes for clients (where those products might not, in fact, be suitable), or a reduction in the availability of products to certain target markets due to the high likelihood of being unable to achieve good outcomes for a wider range of consumers.

- What is objectively good for one party is not necessarily good for another, whereas what is fair is relatable to the Four Consumer Duty Outcomes and would also build on the principles of TCF which firms are familiar with.

45. Our members are concerned that any potential for FOS overreach be addressed before the new Consumer Duty can safely be introduced, whether by specific instruction to FOS regarding their approach to applying the new Principle or by a more root and branch correction of the overreach issue. The FOS may decide consumer complaints by considering what is a good outcome, rather than based on the relevant regulation. This provides further support for why firms should have to deliver "fair", rather than "good", outcomes. The FOS also has a track record of applying current standards of fairness retrospectively, which would be unfair to firms and could result in class actions by Claims Management Companies for conduct which, at the time it took place, was entirely compliant with the applicable conduct rules and principles at that time. Furthermore, there is a concern that, in applying "fairness", the FOS might conclude that the new Consumer Duty is effectively a fiduciary duty—contrary to the FCA's express intention—or alternatively that as a matter of fairness, firms should be deemed to have an obligation of trust and confidence to act in the interests of the consumer. This would create a two-tiered system of regulation, and would render the Consumer Duty obsolete, with the need to adhere to a higher FOS-initiated standard. The FCA should make clear that the FOS' role is to apply the regulatory rules and guidance to complaints, nothing further.

Question 6. Do you agree that these rules are the right areas of focus for Cross-cutting Rules which develop and amplify the Consumer Principle's high-level expectations?

Question 7. Do you agree with these early-stage indications of what the Cross-cutting Rules should require?

All reasonable steps

46. We consider that the use of "all reasonable steps" in Cross-cutting Rules one and two is incompatible with the concept of reasonableness that the FCA intends to embed in the Consumer Duty, as it is overly burdensome for firms and, as a consequence, would result in poorer outcomes for consumers overall.

47. While the FCA has not defined the meaning of "all reasonable steps," it is clearly a significantly higher threshold than "reasonable steps" and one to which firms would be required to devote excessive time and cost to ensure compliance. "All reasonable steps" is likely to be interpreted entirely subjectively from firm to firm, and by the FOS when dealing with complaints, in the absence of thoroughly considered and complete guidance from the FCA. This will create an undesirable level of inconsistency and uncertainty for firms and consumers alike.

48. Firms will face challenges in evidencing that they have considered "all reasonable steps", given the complexity and subjectivity of that requirement, including when there is no detriment or harm to customers. For example, it could be reasonable to send a customer an annual suggestion to switch to a better-rate product from, say, a standard variable-rate mortgage. However, would "all reasonable steps" require more regular disclosure on a monthly or even daily basis, or require a firm to provide the customer with all potential product options across the market that are available and suitable for the customer?

49. The implementation of Cross-cutting Rules one and two with the wording "all reasonable steps" risks driving a tick-box approach whereby firms focus on evidencing compliance rather than achieving the right outcomes for customers (e.g., through an overly burdensome sales process and governance). This will likely drive up costs for customers, which we do not believe is the FCA's desired outcome.

50. In turn, this is likely to result in firms reducing the range of existing products and services and disincentivise them from bringing new, innovative products and services to market, particularly where they are targeted at small or high-risk consumer populations. This will typically affect markets that are already underserved, including near-prime and high-cost credit. These markets already have highly prescriptive requirements under the Consumer Credit Act 1974, and further disproportionately high-threshold regulation will serve only to ensure poorer outcomes for consumers as the cost burden simply becomes too high for firms to continue to bear. We do not believe this is the FCA's intention.

51. The FCA should instead require firms to take "reasonable steps", which better reflects what the Consumer Duty appears to be seeking to achieve and is better understood by firms in light of the implementation of SM&CR. This wording better describes the steps that ought to be taken by firms in achieving the right outcomes for consumers. That said,

the FCA should still provide clear guidance, with examples of good- and bad-practice as well as what would, and would not, be reasonable for firms to do in the context of the Cross-cutting Rules. This guidance should be reviewed and updated on an ongoing basis, in light of the FCA's supervisory and enforcement experience.

Consumer responsibility

52. The framing of Cross-cutting Rules one and two is also concerning due to the lack of reference to consumer responsibility. The FCA needs to be clear that these Cross-cutting Rules do not remove the need for consumers to act responsibly in making decisions about their finances (see our response to question 11 below). The FCA needs to be clear about how far firms need to go and, more importantly, what they do not need to do as there is a danger that this creates a quasi-advisory/fiduciary relationship, despite the statements saying this is not the intention. For example, greater clarity is required with regard to what a firm is expected to do if a customer has poor numeracy or literacy skills.

Cross-cutting Rule one

53. The proposal that firms act "to avoid causing foreseeable harm to customers" is something our members try to achieve in their day-to-day dealings with consumers. Subject to our comment above on "all reasonable steps," we agree with both the substance and intention behind Cross-cutting Rule one.

54. The FCA should nonetheless make clear what it regards as "foreseeable harm" so firms can better determine how to avoid it. For example, if an investment product falls in value, that results in foreseeable harm to the client, albeit the risks will have been fully explained and understood. It cannot be the intention of the Consumer Duty that a firm is in breach simply because an investment performs poorly.

55. The FCA needs to make clear what conduct firms are entitled to expect of customers, and where the line will be drawn where customers choose to take steps that might be harmful to them. We note that the FCA has already provided some guidance, in particular that firms do not need to protect customers from risks that they understood and accepted at the point of sale (see paragraph 3.25.2 of the consultation). However, firms would like to see more explanation, guidance and examples about their responsibility, if any, to prevent consumers making decisions that harm them.

56. Firms also want to understand, through explicit guidance from the FCA, to what extent they can rely on customer disclosure for credit decisions and affordability checks, where a consumer may not provide full or accurate disclosure or may subsequently experience a life or business event that changes their circumstances, but does not provide the firm with any details. Customers should expect to be accountable where their action, or inaction, has contributed to them experiencing poor outcomes.

Cross-cutting Rule two

57. The proposal that firms act "to enable customers to pursue their financial objectives" is one they already strive to achieve. Subject to our comment above on "all reasonable steps" and to the FCA making clear how far firms need to go in terms of "enabling" customers (see below), we agree with the intention behind Cross-cutting Rule two.

However, we do not consider that the language of the rule works in practice and think the FCA needs to consider it further, for the following reasons.

- The wording may lead to the expectation that firms need to explore those financial objectives with each and every customer (again, see below), which cannot be the intention, especially in a mass-market setting.

- Enabling customers to pursue their financial objectives may not lead to the right outcomes, so there is a potential conflict between this rule, Cross-cutting Rule one and the Consumer Principle.

- The examples given by the FCA concern behavioural biases and vulnerability, which implies the intention behind Cross-cutting Rule two is actually related to removing sludge practices.

58. The FCA should instead consider language such as “to make it easy for customers to act.”

59. To the extent it is intended, and as noted above, we do not agree that firms need to explore each consumer’s individual financial objectives. Such an approach would be unworkable and wholly disproportionate in practice. Many clients do not have any form of financial plan, and even if they do, it is not necessarily properly informed, but it is one for which the consumer is responsible where no advisory relationship exists. The FCA should make clear what it means here, especially in the context of mass-market products and services (where firms do not always have direct contact with consumers) and products that are capable of being purchased online. The FCA needs to provide straightforward guidance on what investigations firms across the financial sectors, e.g., banking products, lending, mortgages and payment services, need to undertake to ensure they can demonstrate they are enabling customers to pursue their financial objectives. The FCA also needs to bear in mind that customers increasingly prefer self-direction and self-fulfilment enabled by digital technologies.

Cross-cutting Rule three

60. The proposal that firms “act in good faith” is another example of conduct that firms already take seriously. Nonetheless, in theory, Cross-cutting Rule three poses difficulties. Good faith is not always well-defined as a matter of English law. Assessments are inherently dependent on context, but something is generally said to be done in good faith if it is done honestly, with integrity and without ulterior motive, whether or not it is done negligently.

61. If the FCA agrees with this interpretation in the context of the Consumer Duty, we are generally happy with the wording of Cross-cutting Rule three. We nonetheless ask that this be expressly clarified in guidance, with examples of good- and poor-behaviours. There is a real need to avoid excessive subjectivity in the wording of the Consumer Duty that risks inconsistent application by firms in their treatment of customers but also in the interpretation and application by the FOS.

Question 8. To what extent would these proposals, in conjunction with our Vulnerability Guidance, enhance firms' focus on appropriate levels of care for vulnerable consumers?

62. The FCA Vulnerable Customer Guidance sets out the high-level expectations for the treatment of vulnerable customers and firms are fully focused and making significant investment to ensure that they can deliver these standards. Subject to the comments below, we think the proposed Consumer Duty will make a positive contribution to increasing the levels of care for vulnerable consumers.

63. The FCA should provide guidance on the expected interaction between the Consumer Duty and the Vulnerability Guidance, given that the latter is already raising the bar. It is not entirely clear how the two initiatives interact with each other, and some firms are concerned that the Consumer Duty is framed in such a way as to lead them to default to an assumption that all customers are vulnerable as there is too significant a risk in trying to differentiate otherwise. This approach could drive a reduced and/or simplified range of products and services and result in far poorer outcomes than are intended for a large proportion of consumers who have the capability to understand financial information or prefer a greater range of products to achieve their financial objectives.

64. We also note that the scope of the Vulnerability Guidance, which applies to the supply of products or services to retail customers who are natural persons including unincorporated persons, differs from the proposed scope of the Consumer Duty. The FCA should clarify that the Consumer Duty will not change the scope of the Vulnerability Guidance. Nor should the Consumer Duty necessitate changes to the recent Vulnerability requirements – particularly with respect to Product Design, Customer Service and Communications.

65. However, firms cannot be expected to be responsible for all the ways in which vulnerable consumers might engage, and make decisions, on the basis of the information they provide, where the engagement and any harm suffered is not foreseeable. Therefore, as set out in our responses above, and particularly (but not exclusively) so in relation to vulnerable consumers, the FCA needs to provide guidance that clearly delineates firms' responsibilities, with good- and bad-practice examples. The FCA should also make clear to what extent firms can rely on data that is gathered about a customer's vulnerabilities and how far that investigation should go.

66. We also note that, as with the Vulnerability Guidance, there could be interactions with firms' obligations under the UK General Data Protection Regulation (GDPR) and the Data Protection Act 2018. To the extent the Consumer Duty necessitates greater collection of customer data, greater monitoring of customers or other intrusive actions (e.g., profiling to analyse individual customer circumstances), the FCA should consider how firms could balance their obligations under the Consumer Duty and relevant data-protection laws (e.g., whether it is proportionate to collect additional data about customers and the extent to which data already held must be repurposed). It is not necessarily the case, nor should it be assumed, that existing data is readily available for use in connection with the Consumer Duty (e.g., because of technical restrictions or compliance measures taken to ensure "data protection by design and default").

67. The use of personal data is particularly complex in the context of special-category (e.g., health, race, ethnicity and sexuality information – see Article 9) and potentially criminal-

offence data (Article 10). By law, there are narrow criteria that must be met before firms are permitted to process such data without the consent of the individual concerned. If the FCA moves in this direction, clear guidance would be needed on how to meet these criteria. If consent is needed, it would be helpful to have an explicit recognition that firms will not be in breach of the Consumer Duty as a direct consequence of an individual refusing to give consent to process the relevant data. Guidance on the interaction and differences between the Consumer Duty and the Vulnerability Guidance will also be needed so that firms can apply them coherently and consistently. It should be noted that the Data Protection Act 2018 contains a specific provision in Schedule 1 enabling the processing of health data without consent to support vulnerable customers in certain situations, which would not necessarily apply in broader "consumer support" scenarios. The FCA should discuss these matters with the Information Commissioner's Office (ICO), the Centre for Data Ethics and Innovation (CDEI) and the Equalities and Human Rights Commission (EHRC). (See also our response to question 15 below.)

Question 9. What are your views on whether Principles 6 or 7, and/or the TCF Outcomes should be disapplied where the Consumer Duty applies? Do you foresee any practical difficulties with either retaining these, or with disapplying them?

Question 10. Do you have views on how we should treat existing Handbook material that relates to Principles 6 or 7, in the event that we introduce a Consumer Duty?

Overlap with, and duplication of, existing regulation

68. Where the Consumer Duty is intended to set a higher standard than existing regulation, it is incumbent on the FCA as a matter of good administration to remove or disapply the principles, rules and guidance that it supersedes, even if they remain where the Duty does not apply. Guidance alone cannot resolve the overlaps and duplication that would otherwise result, nor is it enough to merely assert that the Consumer Duty should prevail where there is a conflict. It is wholly disproportionate to require firms to comply with redundant regulation, and is not in the interests of the consumers who will ultimately bear the costs.

69. The FCA must provide this clarity where it can, prior to the implementation of the Consumer Duty, and it must undertake to review the Handbook to remove or disapply other redundant regulation. We suggest this be undertaken over the next 18 months, during which time the FCA should be very clear about how firms should interpret the Handbook if duplication is discovered.

70. We acknowledge the scale of such a task and we therefore:

- identify below initial requirements that we believe should be considered for removal or partial disapplication;
- offer to work with the FCA to identify further such provisions to inform its second consultation; and

- recognise some duplication may only come to light with experience of applying the Consumer Duty, although we would expect the FCA to address these as quickly as possible through its quarterly consultations on proposed miscellaneous amendments to the Handbook.

71. Clear guidance is required from the FCA which considers the interaction with the detailed rules, such as COBS. Firms would like clarity as to whether the FCA will regard compliance with COBS etc., for example, as compliance with the Consumer Duty, or vice versa. If compliance with COBS etc. is not sufficient to comply with the Consumer Duty the FCA needs to make clear, with working examples, what else is required of firms in order for them to adhere to the Consumer Duty.

Initial proposals for removal or partial disapplication

Principles 6 and 7 and the TCF Outcomes

72. We understand the FCA expects the Consumer Duty to set a higher standard than the requirements for firms to "pay due regard" to their customers' interests and "treat them fairly" under Principle 6 and to "pay due regard" to their clients' information needs and "communicate information to them in a way which is clear, fair and not misleading" under Principle 7.

73. We are less clear how the Communications and Customer Service Outcomes under the Consumer Duty differ from the TCF Outcomes. However, logically, they cannot be less significant.

74. We therefore recommend both Principles 6 and 7 and the TCF Outcomes be disapplied in favour of the Consumer Duty when firms are dealing with retail clients as ultimately defined.

Mortgages

75. There are prescriptive rules determining what needs to be communicated to customers before, during and after a sales process and if a customer goes into arrears. These clearly overlap with the Communications Outcome.

76. We suggest that the FCA's thematic review TR15/4 on governance over mortgage lending strategies, published in March 2015, be superseded by the Products and Services Outcome.[8]

Financial promotions

77. Relevant rules are set out in COBS, ICOBS, MCOB, BCOBS, CMCOB 3 and CONC 3 depending on the nature of the product or service to which the promotion relates. At the same time, HMT has announced it intends to bring forward legislation to implement a regulatory gateway for approving the financial promotions of unauthorised persons,[9] while the FCA is separately consulting on strengthening its financial-promotion rules for

[8] https://www.fca.org.uk/publication/thematic-reviews/tr15-04.pdf.
[9] https://www.gov.uk/government/consultations/regulatory-framework-for-approval-of-financial-promotions.

high-risk investments and firms approving financial promotions,[10] so there is a risk that more confusion than clarity will result.

The client best-interest rule

78. This is set out in COBS 2.1.1 and has equivalents in other conduct-of-business sourcebooks, for example MCOB 2.5A.1.

Product-governance rules

79. These derive from MiFID II (see, in particular, the Product Intervention and Product Governance Sourcebook) and the residual provisions of the Responsibilities of Providers and Distributors for the Fair Treatment of Customers. While these provisions only apply to certain firms, there is likely to be a significant overlap and potential for confusion and conflicting guidance.

80. The FCA has previously raised concerns that the Consumer Duty might conflict with some requirements in the Consumer Credit Act, Accountability of Senior Managers, FSCS documentation, consumer credit regulatory framework, insurance pricing practices, Banking Conduct of Business Sourcebook, and PRIIPs. As the regulator, it is the FCA's responsibility to ensure that where a conflict arises, it provides guidance to firms as to what takes precedence, and/or how to resolve any such conflict.

Question 11. What are your views on the extent to which these proposals, as a whole, would advance the FCA's consumer protection and competition objectives?

81. Without clarity from the FCA about the balance between firms' responsibility for helping consumers and consumers' responsibility for their decisions, the Consumer Duty is unlikely to fully achieve its desired outcomes or advance the FCA's consumer protection and competition objectives by assisting consumers to act and make decisions in their interests.

82. The lack of clarity on the bounds of firms' responsibility when executing consumer decisions that are taken against advice and/or are contrary to their best interests (e.g., executing a suspected fraudulent payment request) is likely to result in firms reducing the range of existing products and services and disincentivise them from bringing new, innovative products and services to market, particularly where they are targeted at small or high-risk consumer populations. This could result in firms offering products and services according to the lowest common denominator, thus reducing consumer choice and causing poor outcomes for consumers who are capable of understanding financial products or using a wider range of products to achieve their financial objectives.

83. A similar unintended consequence in a regulatory initiative to improve transparency and communications of financial products arose after the implementation of the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation. The introduction of Key Information Documents for products sold to retail clients discouraged manufacturers from providing these products and ultimately led to a substantial

[10] https://www.fca.org.uk/publications/discussion-papers/dp21-1-strengthening-financial-promotion-rules-high-risk-investments-firms-approving-financial-promotions.

reduction in the availability of bonds for retail clients. Vanilla bonds represented safe, liquid and simple products that can play an important role within a diversified portfolio, yet they are no longer easily available for consumers.

84. In particular, the Consumer Duty needs to make clear precisely how far firms are required to go to assist consumers in achieving the consumer-focused outcomes. This is particularly important for digital channels. Careful consideration should be given to circumstances in which a firm's behaviour has assisted the attainment of the right outcomes as far as possible, but where the actions of consumers mean those outcomes are not in fact achieved. We are particularly concerned about dealing with authorised-push-payment fraud and request clarity from the FCA about whether the FOS will engage with and accept evidence of firms trying to help consumers, or whether it will simply look at the outcome in those cases.

85. The FCA should also clarify what responsibility consumers retain for decision-making. It should develop its statement that the Consumer Duty would not "remove consumers' responsibility for decision-making or, in itself, prevent consumers from making decisions that are not in their interests," in line with its duty to have regard to the general principle that consumers should take responsibility for their decisions under section 1C(2)(d) of the Financial Services and Markets Act 2000 (FSMA)[11] and consistent with the principles that apply for the purposes of the Mental Capacity Act 2005.[12] The FCA should make this clear in its proposed new rules and guidance. This is an area where firms would benefit from additional certainty about how much the FCA expects them to know about consumers' intentions, financial objectives and plans. This should not go beyond what a firm can reasonably be expected to do to enable customers to meet their objectives, especially when accessing products online and without advice. The FCA should consider the roles of reasonableness and proportionality. Clarity on these points would help firms to understand the extent to which their actions should serve to help customers meet their financial objectives and where the balance of responsibility lies. There should also be regard for the fact that a customer's financial objectives can change over the lifetime of a product and that most consumers will have different, short-, medium- and long-term financial objectives.

86. It appears to us that the situation is one of responsibility on the part of consumers to understand their own financial objectives and on the part of firms to provide consumers with appropriate information to make good decisions in respect of their own objectives (thus relating to the Communication Outcome). As such, the FCA should make clear that responsibility does not lie solely with firms, but that both consumers and firms have responsibility and important parts to play in consumers' decision-making.

87. Finally, as set out below in our response to questions 19 and 20, we believe that the FCA would better advance its objectives by focusing the proposed Price and Value Outcome on individual firm conduct that delivers poor value through market-wide pricing practices. It should rely on its concurrent competition powers to address concerns about pricing that results from ineffective competition, rather than seeking to impose new obligations on firms across the board in the absence of any wrongdoing or conclusions on the state of competition in individual markets.

[11] https://www.legislation.gov.uk/ukpga/2000/8/section/1C.
[12] https://www.legislation.gov.uk/ukpga/2005/9/section/1.

Question 12. Do you agree that what we have proposed amounts to a duty of care? If not, what further measures would be needed? Do you think it should be labelled as a duty of care, and might there be upsides or downsides in doing so?

88. We agree that the FCA has met its duty under section 29(1) of the Financial Services Act 2021 to "carry out a public consultation about whether it should make general rules providing that authorised persons owe a duty of care to consumers."[13]

89. We do not believe the FCA should label the Consumer Duty as a duty of care. Doing so will only cause confusion about whether it is a fiduciary duty, something the FCA has sought to dispel by stating that, "Outside our Handbook, 'best interests' is sometimes used in the context of fiduciary relationships, such as the duties owed by trustees to their beneficiaries. In line with how 'best interests' is used elsewhere in our Handbook, it is not our intent that the Consumer Principle would give rise to such a relationship," and, "The Consumer Duty would not change the nature of a firm's relationship with its customers. For example, it would not introduce a fiduciary duty or require an advisory service where they do not already exist."

90. We ask the FCA to confirm categorically that the Consumer Duty, if introduced, will not impose a fiduciary duty where one does not already exist in the context of an advisory relationship.

Question 13. What are your views on our proposals for the Communications Outcome?

91. We agree with the proposed Communications Outcome and the objective behind its introduction to ensure consumers are equipped to make informed decisions about financial products and services. Many firms already have very effective communications channels in place for the products and services they provide.

92. However, the FCA should be precise about what a firm's new obligations under the Communications Outcome are and where those obligations end. There needs to be a limit on firms' exposure where, notwithstanding firms' adherence to the Communications Outcome, consumers take steps and make choices that are not in their own best interests. Furthermore, to the extent that the Communications Outcome applies where firms are not acting in an advisory capacity, it should not alter the client relationship. Firms also need to understand how success in achieving the Communications Outcome will be measured. Is it sufficient to know that there is good customer satisfaction and/or low complaints, or is there some other intended assessment of success?

93. The FCA should provide guidance to help firms achieve the Communications Outcome. In particular, it is unclear how good is good enough, how much information needs to be provided, how that information should be segmented and what methods of communication are most acceptable. For example, firms should have appropriate processes in place to deal with the situation where English is not a consumer's first language, but they cannot be expected to provide every communication in every language (as was recognised in Clause 2.75 of the FCA Vulnerability Guidance

[13] https://www.legislation.gov.uk/ukpga/2021/22/section/29/enacted.

Feedback Statement). If firms are acting in accordance with the law of a UK jurisdiction it should be entirely acceptable for them to communicate in English, otherwise there arises a risk of misleading consumers through poor translation. Consumers who speak another language will face this challenge in every aspect of their lives, so the solution should be at the customer level except in circumstances where engagement with banking and finance is not planned (e.g., in instances of bereavement, where firms should necessarily make appropriate arrangements).

94. There is a risk that, in seeking to achieve the Communications Outcome for all customers, particularly of mass-market products and services and products that are capable of being purchased online, firms may attempt to take account of every possible issue for every possible customer. This could well result in unhelpful and lengthy communications that defeat the purpose of the intended Outcome.

95. There is a concern that overcommunication can result in communication fatigue, which produces poorer outcomes. The FCA should confirm where the balance lies between informing customers and overcommunicating. Regulatory requirements can often be too rigid, leading to communications that customers never read (e.g., Consumer Credit Act agreements and terms and conditions). While the FCA wants firms to help customers make informed decisions, it needs to provide firms with more flexibility to communicate in ways that will work for customers and trial new communication types including digital methods, on which significant numbers of vulnerable consumers depend.

96. Firms also require clarity on their obligations to gather data from customers and apply that knowledge each time they interact with a different business line, recognising there may be GDPR considerations with such processing.

97. The FCA should provide guidance on the overlap between current requirements which specify the way in which certain communications may be provided and the Communication Outcome, and should remove those rules where duplication or overlap exist, in line with the FCA's global review of the handbook. For example: MCOB requires a firm to provide an illustration of the costs and features of a regulated mortgage contract or home reversion plan to a customer using specified templates; BCOBS requires that a direct offer financial promotion in relation to a savings account include a summary box in the form set out in BCOBS 2 Annex 1R; COBS 13 sets out detailed requirements on form and content of product information and additional requirements for non-PRIIP packaged products; and statements for high net-worth individuals etc. are prescribed in secondary legislation/FCA Rules. It would be useful for consumers and firms alike, if the FCA could make clear whether such requirements are rendered obsolete by the Communications Outcome and, more generally, whether industry-generated guidance (whether communications related or otherwise) would be redundant under the Consumer Duty.

98. There is also an argument that some current requirements may not be fair, clear or transparent (so do not meet the objectives of the Communications Outcome, e.g., the term APR does not mean a lot to a typical customer and is not clear or transparent in terms of the potential pounds and pence cost). Existing information requirements warrant review as to whether they are helpful in delivering good Communications Outcomes and how firms can better provide information in a way that is understood by customers without resorting to jargon.

99. As a separate issue, we also recommend that the FCA discuss with the ICO how the Consumer Duty rules, guidance and associated expectations should interact with the direct-marketing rules under the relevant privacy laws. In particular, the Privacy and Electronic Communications Regulations (PECR) constrain firms' ability to send unsolicited electronic marketing to individuals, generally requiring customers to actively opt-in to marketing (consent). The UK GDPR also gives individuals a right to object to the processing of personal data for marketing purposes. The Consumer Duty risks being in tension with the ICO's draft Direct Marketing Code of Practice.[14] In particular, the draft Code sets out only very narrow situations in which "regulatory communications" are unlikely to be "marketing", including that communications must be solely for the benefit of the individual. This could be in tension with the FCA's expectations that firms send "the right information at the right time" and the goal that consumers be able to realise the benefits of the products and services they buy. It might be in the consumers' interests to receive certain information, or to be reminded of the benefits and features of their product, but it might also be in the firm's interests (e.g., it might promote goodwill or increase profits). The draft Code might also prevent firms from informing customers of alternative products in situations where a product applied for by the customer has been declined, in tension with Outcome 2. The FCA and the ICO should collaborate to ensure that the two regulatory frameworks are applied such that they dovetail effectively and do not leave firms having to choose between complying with one set of rules or the other. This should include, in particular, a mutual understanding of what kinds of communication amount to "marketing" and therefore require customer consent.[15]

Question 14. What impact do you think the proposals would have on consumer outcomes in this area?

100. Where firms are not already meeting the standards we expect the Communications Outcome to impose, we believe that it could have a positive impact on consumer outcomes generally and better enable consumers to make informed decisions about financial products and services, which will assist them to achieve their financial objectives.

101. However, there is a risk of unintended consequences in the absence of guidance about what the FCA expects to see from firms, beyond what many are already doing. Our concerns fall predominantly into three categories.

Consumer confusion

102. We are concerned that the enhanced communication requirements will result in a perception that firms are required to take account of every possible eventuality, which could result in unhelpfully long and more frequent communications that cause more confusion and thereby defeat the purpose of the Communications Outcome. The Consumer Duty could increase the levels of friction in the customer journey, notably through communications, which at times may not result in the right outcomes for consumers. This runs counter to regulatory initiatives (e.g., the revised Payment

[14] https://ico.org.uk/media/about-the-ico/consultations/2616882/direct-marketing-code-draft-guidance.pdf

[15] The FCA should note also that Regulation 21B of PECR, although it relates to marketing phone calls, implies that electronic communications about withdrawal of funds from pension schemes, and related topics, are necessarily undesirable marketing.

Services Directive) that encourage a seamless customer journey and recognise customer preferences for lower levels of friction.

103. Regulatorily prescribed communications could become sizeable where explanations beyond the required (standard) wording need to be included under the Consumer Duty, which could add to confusion or result in documents being entirely unread. Product descriptions may vary between firms, adding to that confusion.

104. The FCA needs to strike a balance between what must be communicated to consumers as absolutely necessary and what might be helpful but could be disproportionate or confusing in certain circumstances. Consumers ultimately bear the responsibility for their decisions, and firms cannot be expected to cater for all eventualities in their communications or be found in breach where consumers fail to read communications, as is often the case. Not all consumers are the same, and therefore what is helpful for one consumer may not be helpful for another. Testing communications will no doubt assist firms, but firms need to know when they can say that their communications meet the requirements as a sufficiently high percentage of customers understand them. Firms need to be able to rely on customers confirming whether they have understood information if asked to do so and not to have to second-guess customers.

105. Much material that has to be provided (e.g., to adhere to the complaints-handling regulation, for pre-contract mortgage applications and unsecured credit) already causes consumer confusion on some level. The FCA should encourage standardised communications across markets using an inclusive design, where appropriate, to avoid such harm.

Firm confusion

106. Firms require clear guidance about what the Communications Outcome expects over and above what they are already doing under existing regulation (e.g., the TCF Outcomes, Principle 7 and the Consumer Credit Act) and taking into account the other requirements in MCOB, BCOBS, COBS, those for non-PRIIP packaged products and statements prescribed in secondary legislation/FCA Rules.

107. There is a lack of clarity as to how good is good enough, how much information needs to be provided and what methods of communication are most acceptable. Additionally, firms are concerned that the Consumer Outcome may push communications into the realms of legal or financial advice when they are not acting in an advisory capacity, exposing them to increased liability. Such risks will inevitably translate into costs for firms that continue to market such products and services, to the detriment of competition in the market. It would be helpful if the FCA could clarify what is acceptable now but would not be if the Consumer Duty is implemented.

108. Firms are also concerned about ongoing monitoring and assessment of customers' understanding of the features, benefits and risks of products and services. Such a subjective assessment, unique to each individual customer, would be overly burdensome. In particular, it is not clear how firms can reconcile the statements that firms can rely on summaries of their terms and conditions, including provisions not in those summaries, and on consumers having read those summaries. For example, many consumers only truly understand the benefit of insurance in the "moment of truth" when it is needed and they either do or do not have relevant cover. The Communications Outcome needs to take this into account. In some instances, no matter how acceptable

a firm's communications have been, some consumers will still not read or understand the product and may continue to make suboptimal choices that do not result in the right outcomes.

Time and costs

109. It is difficult to say with any certainty the likely costs to firms in implementing the Communications Outcome, as it is not clear how far firms need to go in order to achieve it. However, additional costs are inevitable as the Communications Outcome is embedded in firms' activities, including through more prescriptive governance, monitoring and consumer testing. It is unclear whether these would be justified by the benefits for consumers. Firms have confirmed that whatever the end formulation of the Communications Outcome, it will require a significant amount of work (e.g., every customer journey and customer communication will need to be reviewed and potentially amended channel by channel).

110. Large-scale changes to processes and training could reduce firms' ability to service consumers effectively during their implementation. Furthermore, depending on the level of resource required to be deployed, other priorities and deliverables may be significantly delayed or set aside. This would not improve outcomes for consumers.

Question 15. What are your views on our proposals for the Products and Services outcome?

111. While it is not yet clear what additional requirements the Products and Services Outcome would introduce, we agree that products and services should be fit for purpose and sold to consumers for whom they are intended within their target market, as proposed. The FCA should nonetheless explain what is acceptable now that would not be acceptable if the Consumer Duty is introduced.

112. In any event, the FCA should recognise that there is a limit to the steps firms can take to ensure the suitability of products or services produced for the mass market or capable of being purchased online to individual customers, where no advisory relationship exists. Even where firms have adhered to the Consumer Principle and the Cross-cutting Rules, consumers will sometimes make choices that are not in their best interests or that cannot reasonably have been expected and are beyond firms' control. The FCA needs to clearly delineate the balance between firms' responsibilities to enable consumers to meet their aspirations and consumers' responsibility for their decisions. There has to be a limit on how far firms have to go in assessing whether a product has met customer needs as this outcome cannot require a customer-by-customer assessment for all products and services. Furthermore, it would be unreasonable for firms to shoulder 100 per cent of the risk of harm befalling customers. Firms could do extensive research to ensure that a product is suited to its target customer demographic, but cannot guarantee that some individuals would not be outliers who bucked demographic models.

113. With regard to larger SMEs, where products may be bespoke, customers are more sophisticated and may be better placed than the firm to understand their needs. In addition their needs might vary more widely than for consumers and even if on paper they do not appear to result in the right outcomes in the traditional sense, they may well be the right outcome, on a commercial basis, for that customer. In those circumstances, firms may be considered to be in breach of the Consumer Duty, despite having delivered

what the customer wanted and considered to be suitable for themselves. That is a further reason for excluding larger SMEs from the Consumer Duty's scope more generally.

114. The guidance for the Products and Services Outcome needs to make clear what responsibility firms have for products and services provided by third parties, including the need to clarify any change in the current balance/expectation of the split of responsibilities between product providers and distributors for ensuring customers purchase suitable products.

115. Finally, the FCA refers to ensuring firms' communications, products and services do not discriminate or otherwise breach the statutory protections set out in the Equality Act 2010. We agree that this is an important principle but note that any obligation to assess differential impacts on different demographic groups, if taken to the extreme, could oblige firms to collect large amounts of personal information about customers (e.g., race, ethnicity and sexuality). This data might not be held or easily obtained and might need to be acquired, inferred or generated. This would risk invading customers' right to privacy. The FCA should ensure that its expectations would not put firms at risk of breaching the UK GDPR, the Equality Act or other laws of general applicability. The FCA should ensure that its expectations do not introduce ambiguity such that firms are faced with making difficult trade-offs, and it should issue detailed guidance on this if necessary. We assume the FCA is discussing this issue with the ICO, the CDEI and the EHRC, as well as with colleagues in the FCA Innovate team that are considering model governance issues. (See also our response to question 8 above.)

Question 16. What impact do you think the proposals would have on consumer outcomes in this area?

116. We believe the Products and Service Outcome could have a positive impact on consumer outcomes generally and incentivise firms to put in place procedures to consider the appropriateness of products and services for consumer groups within target markets where such procedures are not already in place.

117. Again, there is a risk of unintended consequences in the absence of guidance about what the FCA expects to see from firms beyond what many firms are already doing. Our concerns fall predominantly into three categories.

Conflict with Cross-cutting Rules

118. While the focus on target markets will enable product and service suitability to be assessed more generally, that approach does not account for consumers who might not fall within the target market but for whom those products and services are nonetheless suitable. The global approach to assessments—particularly for mass-market products and services and products that are capable of being purchased online, where no advisory relationship exists—gives rise to the risk that consumers may be prevented from achieving their financial goals due to the Products and Services Outcome. It seems likely that some firms will consider limiting access to certain financial services in light of this outcome if, for example, mortgages or loans are only capable of being available on an advised basis. That would not be the right outcome.

119. Ultimately, consumers are best placed to understand and make decisions about their financial situation. The FCA needs to address the subjectivity and context-specific

issues that the Products and Services Outcome raises, as applying a blanket approach to suitability may cause unintended harm to consumers and increase firms' liability.

Ongoing monitoring and automatic switching

120. It is not clear from the consultation the extent to which firms will be required to undertake ongoing monitoring throughout the lifecycle of a product or service to consider whether it remains suitable for that particular consumer or group of consumers. Any such monitoring will take significant time to implement and will incur significant costs, not only on an implementation basis, but also on an ongoing basis across all target markets and products. The FCA needs to provide clarity about the ongoing assessment and suitability of products and at which level those assessments need to be undertaken in order to ensure adherence with the Products and Services Outcome.

121. Firms could also find themselves in breach of the Products and Services Outcome where they have taken reasonable steps but consumers have intentionally avoided providing up-to-date financial information (e.g., where a lender is not kept informed that the circumstances of one of two customers on a joint mortgage product have fundamentally changed). This will affect firms' ability to properly assess product suitability on an ongoing basis. The FCA should clarify that the firm would not be in breach in this circumstance.

122. If the FCA intends that additional ongoing monitoring will be required, it needs to clarify what additional steps firms need to take, whether there have to be firm-initiated switches in circumstances where a firm finds a product or service is no longer suitable, and the possible effects on competition and consumers. In particular, the FCA needs to provide guidance on its expectations of firms in circumstances where a firm is now closed to new business or an open firm does not have a suitable product in its range. The difference in expectations of firms able to give advice and of those not permitted to do so also needs to be clarified.

123. The FCA should also make clear at what level ongoing monitoring should be carried out (e.g., at a macro level across target market groups, checking that products are generally working as intended vs. individual ongoing monitoring of, say, whether a particular customer's circumstances have changed or how they are using a product.) While firms already have processes in place to undertake such monitoring, the FCA needs to make any further requirements explicitly clear.

Time and costs

124. If the Products and Services Outcome results in an increased risk of liability to firms, this will inevitably translate into costs for firms that continue to market such products and services, to the detriment of competition in the market and therefore consumers as a whole.

125. It is difficult to say with any certainty what costs ongoing monitoring will impose as it is not clear how far firms need to go to achieve the Products and Services Outcome beyond what they are already doing, during the lifetime of their products and services. Significant implementation and ongoing costs are nonetheless likely, and it is unclear whether these would be justified by the benefits ultimately experienced by consumers. Furthermore, monitoring products and their suitability could be problematic, as assessing what is "fair" at any point in time, for both a product and a customer's

circumstances, is a very difficult exercise. An interest-rate tracker product might be considered fair at the moment at which it is taken out, but if there are future significant increases in rates, does that make it unfair? Is a firm expected to exit customers to stop the unfairness or just apply the Consumer Duty to any forbearance measures to assist a customer? It is possible that firms will pull back from designing more innovative/niche products if the associated monitoring and evidential requirements are disproportionate. This could lead to some customer groups being excluded from a product or service.

126. Large-scale changes to processes and training could reduce firms' ability to service consumers effectively during their implementation. Furthermore, depending on the level of resource required to be deployed, other priorities and deliverables may be significantly delayed or set aside.

Question 17. What are your views on our proposals for the Customer Service outcome?

127. We agree that consumers should be able to act in their own interests without undue hindrance, as proposed by the Customer Service Outcome. What is considered to be undue hindrance would depend on the circumstances and particular characteristics of each consumer, and detailed guidance is needed from the FCA on the standard expected as this could have significant operational impacts for firms.

128. However, as with the other Outcomes, we are concerned about the reach of the Customer Service Outcome. Even where firms have adhered to the Consumer Principle and the Cross-cutting Rules, consumers will nevertheless sometimes make choices that are not in their best interests or that cannot reasonably have been expected and are beyond firms' control. The FCA needs to clearly delineate the balance between firms' responsibilities to enable consumers to meet their aspirations and consumers' responsibility for their own decisions.

129. Moreover, firms should not be penalised for genuinely unforeseeable hindrance (e.g., caused by an extraordinary external event that causes excess demand for a telephony operation that leads to a consumer waiting longer than expected, or where unilateral steps have had to be taken by a bank in an attempt to reasonably prevent financial crime). The FCA needs to take a common-sense approach in the guidance accompanying the Customer Service Outcome that focuses on eliminating sludge practices. Firms occasionally suffer outages, and the Customer Service Outcome should take this into account and allow for extraordinary scenarios that are out of a firm's control and which should not attract sanctions.

130. Furthermore, there needs to be clarity about the line that the FCA would draw between a service issue that is demonstrably causing customer harm (e.g., impacts in addressing a financial problem, incurring unnecessary charges and costs etc.) versus a one off inconvenience (e.g., requiring the use of a certain channel may not be undue hindrance where a customer who only uses digital channels is asked to call a telephone number in the case of suspected fraud).

Question 18. What impact do you think the proposals would have on consumer outcomes in this area?

131. We believe the Customer Service Outcome could have a positive impact on consumer outcomes generally and incentivise firms to consider their policies and procedures so they enable, rather than hinder, consumers to realise the benefits of the products and services they buy.

132. Again, there is a risk of unintended consequences in the absence of guidance about what the FCA expects to see from firms beyond what many are already doing. In particular, firms should continue to be able to compete on the standard of the customer service that they provide, not least as higher standards are likely to come at a higher price that not all customers will wish to pay. Raising minimum standards too high will lead to firms removing products and services from certain channels, negatively affecting consumer choice. What matters most is transparency about the standard that customers should expect, subject to which firms should be able to manage products and service delivery in a timely and efficient manner.

Question 19. What are your views on our proposals for the Price and Value outcome?

133. Firms already compete hard with one another to win and retain consumers, not least by providing good value. We therefore agree with the objective of the Price and Value Outcome, but we have concerns that the way in which the FCA proposes to apply it risks stifling competition and innovation. In particular, the emergence of a two-tier financial services market, exacerbating issues suffered by vulnerable or non-standard consumers, would not be a good outcome in the spirit of the proposed Consumer Duty.

134. Fair value cannot be assessed through a prescriptive tick-box exercise. There is considerable variation in consumer needs and circumstances that influences whether products and services represent fair value. Customers take account of a range of factors, not just price, when choosing a product or service, and a higher price in a competitive market is not necessarily an unfair one. Moreover, pricing decisions, like wider activity in retail financial services markets, are typically taken in a competitive environment, such that wider market conditions including risk, liquidity, capital positions, cost of servicing and default rates will have a degree of influence over outcomes overall. The FCA is therefore right to rule out using the Price and Value Outcome to introduce price interventions and must make this explicit in its ultimate formulation to ensure that it is not pursued implicitly through supervisory practices.

135. There are two distinct cases to consider when thinking about the scope of the Price and Value Outcome:

    - where a firm-specific conduct issue has been identified or evidence suggests one. The Price and Value Outcome is most useful for targeting unfair pricing decisions that arise from poor conduct by individual firms, particularly sludge practices. Taking advantage of consumers' behavioural biases is likely to be inherently inconsistent with acting in good faith. In these circumstances, it is right that the FCA intervene to remove such practices from the market, prioritising those that result in consumers losing out in absolute material terms. Understanding what is "reasonable" would still

be a core consideration, one that the FCA could assist by providing greater clarity about the types of behaviour and evidential standards it expects to see (e.g., mass-market products priced at book rather than individual customer level, unless products are those which are priced on an individual customer level within certain parameters, for example, rewarding loyalty) and not see. However, we believe that focusing the Price and Value Outcome in this way would reduce the subjectivity of many judgements; and

- where a firm-specific or market-wide competition issue has been identified or evidence suggests one. Concerns about the effectiveness of competition in a market should remain the preserve of the FCA's sectoral (FSMA) or concurrent (Competition Act 1998 and Enterprise Act 2002) competition powers, which are better suited to dealing with such issues. (For example, the Consumer Duty would not be the appropriate lens through which to consider claims that a firm is not consistently offering the lowest rate on mortgages or the highest rate on savings. Instead, the appropriate response absent abuse by that firm of a dominant position is for consumers to switch to an alternative provider.) In particular, the FCA should not seek to resolve market-wide problems through supervision, which, by its nature, is not comprehensive, misses out many consumers (especially those of smaller firms with less-active supervision) and can lead to an unlevel playing field that distorts competition.

136. Focusing the application of the Price and Value Outcome on conduct issues will help to ensure that it does not pervert competition and innovation. This is particularly important in markets (e.g., impaired credit, non-standard and higher-cost credit) where the number of firms operating is already low and further exits occasioned by excessive risk aversion would leave many consumers underserved and more vulnerable. The recent merger of the FCA's supervision, policy and competition functions means that it is well placed to ensure conduct and competition regulation dovetail efficiently and work together to ensure the right outcomes for consumers.

137. Importantly, it is not only those most marginalised who are at risk of being underserved in essential banking and finance products and services if the application of this Outcome is too broad. Firms are concerned that it might hinder their ability to cater, on a commercially viable basis, to the needs of customers who, for example, are self-employed, have multiple incomes or are on zero-hours contracts. There is a real risk of financial exclusion to these significant and (in light of trends in modern working arrangements) growing customer demographics.

138. Even then, if the FCA retains the proposed scope of the Consumer Duty, we do not believe that the Price and Value Outcome is pertinent to larger SMEs or to sophisticated investors, two groups which are significantly less prone to information asymmetries, and for whom the risks that the outcome seeks to avoid are relatively low.

139. We note the FCA's suggestion (especially in paragraph 4.95 of the consultation paper) that firms should minimise intrusion into customers' lives. Whilst this is sensible, it could be in tension with other FCA expectations for greater monitoring and data collection (see our response to questions 8 and 15 above) and might also risk encroachment into the domain of the ICO. Furthermore, the interaction between privacy and competition is already an area of focus for the Digital Regulation Cooperation Forum (DRCF), comprising the Competition and Markets Authority, the ICO, the Office of

Communications and latterly the FCA. The FCA should ensure consistency with the work of the DRCF if it pursues this element of the Price and Value Outcome, and ensure it respects the ICO's role as data protection regulator.

140. Throughout, in the absence of any evidence to the contrary, it is also important that the burden of proof does not rest with firms to justify every aspect of their pricing, at all points in time, to the FCA. This would add regulatory costs overall and would not be proportionate to the benefits it would deliver to consumers.

Question 20. What impact do you think the proposals would have on consumer outcomes in this area?

141. Providing the Price and Fair Value Outcome focuses on conduct issues alone, as set out above, we believe it could have a positive impact on Consumer Outcomes generally and incentivise firms to remove damaging sludge practices.

142. Even then, a number of unintended consequences might arise. In particular, the costs to serve those who most need support may increase because of "fairer" risk-based approaches to premiums. There is a risk that the Outcome could result in reduced prices for "easy-to-serve", low-risk customers and increased prices—potentially to the point of economic unviability—for others. This could challenge the cross-subsidies that underpin the free-if-in-credit banking model, which could in turn result in the financial exclusion of those unable to afford the core banking services that are currently available free of charge.

143. We are concerned that, without sufficient clarity as to its exact expectations of firms, the Pricing and Fair Value Outcome may see firms withdrawing from certain markets due to aversion to heightened risk. This would reduce customer choice and hamper competition. In particular, if the Outcome does not accommodate the different ways in which pricing is undertaken by different firms, and across different products and services, it may penalise specialist lenders and their customers, whose specific needs are not always met by more "mainstream" providers. Such firms often have a higher cost base due to, for example, manual underwriting requirements. The consequence may be to reduce the number of products available in the market.

144. We are also concerned that firms could be disincentivised from rewarding loyalty at an individual customer level–and from using fine judgement–by the requirements of the Pricing and Fair Value Outcome. There is an obvious need for the FCA to think carefully about how this could inadvertently stifle attempts to promote a plurality of business models and the benefits which follow.

145. We note that the Retail Distribution Review introduced a fair-pricing requirement underpinned by cost-to-serve analyses. These have proven very expensive and difficult for large firms to undertake, while delivering little ultimate customer benefit.

Question 21. Do you have views on the PROA that are specific to the proposals for a Consumer Duty?

Question 22. To what extent would a future decision to provide, or not provide, a PROA for breaches of the Consumer Duty have an influence on your answers to the other questions in this consultation?

146. We do not think that there is any compelling reason to introduce a PROA specific to the Consumer Duty and there are strong arguments not to do so, including:

- the FCA losing its role as sole-arbiter of the Handbook;
- the risk of developing two conflicting interpretations and/or applications of the Handbook;
- muddying the remedies landscape;
- claim farming;
- stifling (and increasing the cost of) innovation and breadth of services/products; and
- increased costs, including of professional indemnity insurance (PII).

147. A PROA would see the FCA lose its position as sole arbiter of the Handbook and instead become one of at least two arbiters alongside the courts, which would create a real risk of conflicting interpretation of the rules and guidance. This could fundamentally alter the nature of financial services regulation and greatly increase regulatory unpredictability.

148. The introduction of a PROA also brings about significant risk of challenge to regulatory decisions based on the future outcome of cases and will inevitably result in the development of two conflicting lines of authority via past-Enforcement decisions and UK case law. Financial services litigation often takes well over a year to resolve (e.g., IRHP and PPI mis-selling cases are still running through the courts, almost a decade after those issues were made public). Such an outcome—if a PROA is introduced with the new Consumer Duty—will leave firms, consumers and the regulator in an uncertain position while the interpretation and application of Handbook rules and Principles are under consideration by the courts.

149. The UK's regulatory system is renowned worldwide for its predictability—a key factor in the UK's success as a global financial centre and its attractiveness as a destination for both domestic and foreign investment. The willingness of UK-headquartered and international firms to invest in their UK operations is partly dependent on their having a high degree of certainty as to the rules and laws to which they will be subject, and confidence that these will not change excessively or arbitrarily. Compromising this regulatory predictability through the introduction of a PROA risks undermining the sector's ability to compete with rival investment destinations. The resulting underinvestment—with its consequent negative effects on innovation and competition—would not be in the interests of consumers.

150. The introduction of a PROA will muddy the remedies-landscape for consumers. Consumers already have numerous other means of redress that are far superior to litigation:

- making a complaint to the firm;
- the FOS and the Business Banking Resolution Service;
- FCA consumer redress schemes;
- FCA supervision and enforcement activity; and
- recourse to the Financial Services Compensations Scheme.

151. The uncertainties, duration and, in many cases, cost (not least in the event of their losing) of litigation are highly unlikely to deliver the overarching outcomes that the Consumer Duty seeks to achieve. Consumers are comfortable engaging with the current methods of redress which provide a clear and simple route forward. Moreover, unless expressly disapplied, consumers will still have a PROA against firms that breach the underlying rules of any Consumer Duty under section 138D(2) of FSMA.[16] This is a position that should be maintained.

152. Additionally, there is a considerable risk of a PROA being exploited by claims-management companies (CMCs) to reopen and revisit previously settled matters and bring significant, opportunistic, class actions, including for conduct which was entirely compliant with the applicable conduct rules and principles at the time it took place. This would create costs and uncertainty for firms in relation to whether they could rely on FCA guidance and FOS precedents, and is unlikely to result in improved outcomes for consumers.

153. Overall, we believe that the introduction of a PROA would stifle innovation and reduce competition as firms attempt to mitigate the risk of legal action connected with the vast breadth and scope of the Consumer Duty. Once legal precedents were set, firms would alter their offering to consumer segments to minimise future risks. This could see them exiting particularly high-risk markets or simply not entering them at all. It is likely that any costs firms incur from litigation would be passed on to consumers by way of higher prices for products and services. The increased risk of litigation may well affect the cost and availability of required insurance coverage for firms such as PII—a further cost that consumers would ultimately bear.

154. The FCA's July 2018 discussion paper on a duty of care and potential alternative approaches considered whether breaches of the principles should give rise to a PROA for damages in court or whether breaching such a duty and/or approaches should give this right.[17] At that point it was determined that the introduction of a civil action would, overall, be detrimental to consumers.

155. The introduction of a PROA will not materially improve consumers' positions when buying financial products or services in line with the proposed Consumer Duty. Rather,

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[16] https://www.legislation.gov.uk/ukpga/2000/8/section/138D.

[17] https://www.fca.org.uk/publication/discussion/dp-18-05.pdf.

we think its introduction would cause more harm than good, seriously outweighing any small benefits it may provide to a minority of consumers.

156. Furthermore, introducing a PROA for breach of the Consumer Principle opens the possibility of a PROA for breach of the FCA's other principles. For many of the reasons outlined above, this would not be in the best interests of consumers.

Question 23. To what extent would your firm's existing culture, policies and processes enable it to meet the proposed requirements? What changes do you envisage needing to make, and do you have an early indication of the scale of the costs involved?

Question 24. [If you have indicated a likely need to make changes] Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes?

157. The consultation is silent on the reporting obligations that the FCA might impose on firms, either in substance or architecturally, in respect of the Consumer Duty. These are of fundamental importance to firms in terms of both their understanding of the Consumer Duty's scope and the likely unintended consequences to which it will give rise.

158. The FCA has said it will address reporting obligations and supervision in its second consultation later this year. As the FCA intends the process to be "data-led," it does not expect to introduce new reporting requirements, suggesting that existing ones will suffice. It also makes clear that if it sees evidence of harms occurring, it will expect firms to be able to demonstrate how they had considered and delivered the Four Outcomes.

159. The need for internal, active monitoring by firms is therefore likely. This must be proportionate, avoiding duplication of existing requirements. As Philip Hampton recommended in 2005 when asked by the Chancellor of the Exchequer to consider the scope for reducing administrative burdens by promoting more efficient approaches to regulatory inspection and enforcement without compromising regulatory standards or outcomes:

    there should be no inspections without a reason, and data requirements for less risky businesses should be lower than for riskier businesses . . .[18]

160. Such monitoring must also strike an appropriate balance between outcomes-based measures and other indicators that could be more feasible or relevant. The FCA should give more guidance on its expectations of the form and content that internal reporting and monitoring would take and the level of evidential reporting that it is likely to require "on demand."

161. If firms incur additional costs, this is likely to have an impact on the breadth of products and services that they provide to consumers. Whether this is beneficial overall depends on the Consumer Duty's ability to increase regulatory effectiveness (e.g., by directly changing firms' incentives, preventing unfair practices in the first place and/or increasing the speed at which these will be identified and addressed). It is crucially important that

[18] https://www.regulation.org.uk/library/2005_hampton_report.pdf.

the Consumer Duty not introduce significant costs simply so that firms can better evidence that they already and continue to deliver the right outcomes for consumers.

162. The FCA should follow through on its pledges of what the Consumer Duty will not do, particularly applying retrospectively to past business and judging practices with the benefit of hindsight. This must be explicitly recognised both in the Consumer Duty and in appropriate communication with the FOS to prevent claims relating to the period before the Consumer Duty comes into effect.

163. Firms will have to undertake a substantial regulatory project, with ongoing monitoring, in respect of all products and services already used and currently sold to ensure compliance with the spirit and letter of the Consumer Duty. This will include gap analyses and changes in policies, customer information and communications, websites, phone applications and job descriptions, staff training, reviews of terms and conditions, processes and procedures, ancillary collateral, customer channels, and arrears and forbearance processes.

164. The entire process is likely to take two years or more to implement properly across all firms and will be a significant undertaking in terms of the costs involved. Without sufficient detail from the FCA about what will be required, it is impossible to put a precise figure on this. However, firms have indicated that implementation of the Consumer Duty would be akin to the impact of implementing MiFID 2 or TCF.

Question 25. To what extent would the Consumer Duty bring benefits for consumers, individual firms, markets, or for the retail financial services industry as a whole?

165. We support the broad intention behind the Consumer Duty of delivering the right outcomes for consumers in retail financial services markets. It could be a useful regulatory tool for encouraging firms to play an active role in supporting customers and eradicating harms, especially those arising from sludge practices, before they arise. However, it will not do so if the FCA does not address the concerns that we set out in this response and demonstrate the additional benefits that the Consumer Duty would bring compared to better enforcement of existing requirements.

166. Also key to its success will be the concept of reasonableness that the FCA proposes to embed in the Consumer Duty. There will be a large degree of subjectivity in determining what is reasonable in different circumstances. There is also uncertainty about the type and level of evidence that will be required to demonstrate that a firm has acted reasonably. It is, of course, possible that multiple courses of action would be reasonable in any given situation and two well-informed, reasonable individuals could reach different but equally reasonable conclusions about which is the most appropriate. This is something the English courts consider regularly. We therefore look forward to seeing the FCA's proposed detailed rules and guidance, including on its intended approach to supervision. Given the nature and scale of this exercise, it is unlikely that it will resolve all our concerns. We therefore would expect the FCA to reassess its rules and guidance at regular intervals and amend them as required. That reassessment should take place 12 months after the introduction of the Consumer Duty and at 18-month intervals thereafter while avoiding the risks of retrospection.

167. We also ask the FCA to be proportionate and consistent in its future approach, including:

- relying on its competition powers to address firm-specific and market-wide competition issues;
- holding firms to the same evidential standards;
- investigating firms only where there is reason to do so, calibrating data requirements with risk and avoiding reporting "creep" over time;
- streamlining the Handbook and associated material where possible;
- taking an approach to reasonableness that recognises that reasonableness is a subjective criterion that may well differ across firms, customers and markets, and being as transparent as possible about its evolution over time so that everyone can take this information into account and adjust accordingly;
- avoiding retrospection and hindsight; and
- being comfortable with the level of subjectivity this new approach to regulating will necessarily involve and avoiding the temptation to fall back on overly prescriptive rules.

168. As argued in our response to HMT's framework-review consultation, regulators should set out how they plan to measure success. The FCA should be both transparent and realistic about the success measures that it will use to evaluate the impact of the Consumer Duty. For example, one consequence may be to reduce innovation, choice and competition in key markets. Where markets are competitive, even though prices may differ across customer groups, overall prices will be competed down, so regulatory changes to benefit one type of consumer may have detrimental consequences for others. Similarly, regulatory focal points may be created at particular pricing levels, reducing otherwise-efficient variation in the market. These effects on accessibility, competition and innovation should be considered carefully as part of the FCA's overall assessment of what is reasonable and what to do about it.

Question 26. What unintended consequences might arise from the introduction of a Consumer Duty?

169. As set out in our answers to questions 14, 16, 18 and 20, there are a number of potential unintended consequences that appear likely to flow directly from the introduction of the Consumer Duty as presently proposed. The six key areas of concern are consumer confusion, firm confusion, ongoing monitoring, time and costs, the stifling of innovation and reduction of competition, and financial exclusion and poorer outcomes. We would urge the FCA to consider these carefully.

Consumer confusion

170. Firms are concerned that the increased thresholds of the Consumer Duty, particularly as regards the Communications Outcome, require firms to take account of every possible eventuality for every customer, which could result in unhelpfully long and more frequent communications, causing consumers more confusion and thereby defeating the purpose of the Communications Outcome. Such friction within the customer journey

would not improve customer outcomes and would be contrary to regulatory initiatives that encourage a seamless customer journey.

171. As set out earlier in this response, the FCA needs to strike a balance between what must be communicated to consumers as absolutely necessary and what might be helpful but could be disproportionate or confusing in certain circumstances.

Firm confusion

172. Absent clear guidance from the FCA as to the precise requirements of the Consumer Duty as a whole, and explanation of what is currently acceptable that will not be acceptable once the Consumer Duty is implemented, there risks being confusion on the part of firms. Customers are unlikely to experience good outcomes if the vagueness of the Consumer Duty is such that firms are required to expend disproportionate time and resources trying to understand and interpret its implications.

173. Firms are concerned that, without clarity as to the FCA's expectations of firms in respect of the Consumer Duty—in particular the Communications Outcome— their obligations in respect of communications will blur into the provision of legal or financial advice when firms are not acting in an advisory capacity, exposing firms to increased liability. Such risks will inevitably translate into costs for firms that continue to market such products and services, to the detriment of competition in the market.

Ongoing monitoring

174. It is not clear from the consultation the extent to which firms will be required to undertake ongoing monitoring throughout the lifecycle of a product or service to consider whether it remains suitable for that particular consumer or group of consumers, or where the liability lies where consumers fail to provide, or intentionally avoid providing up-to-date financial information. Introducing systems to undertake any such monitoring will take time to implement and will incur substantial costs, both in implementation and on an ongoing basis.

175. In particular firms are concerned that any requirements to continuously monitor and assess individual customers' understanding of the features, benefits and risks of products and services would be overly burdensome, requiring disproportionate time and resources, to the ultimate detriment of customers both due to costs passed on and unnecessary friction in customer journeys.

Time and costs

176. Given the absence of clarity, at this stage, on key aspects of the proposals, it is difficult to say with any certainty the time and costs that will need to be dedicated by firms to embed the Consumer Duty across all products, sectors and target markets of their businesses.

177. Nonetheless, firms' overarching feedback is that the proposals are likely to entail sizeable one-off implementation costs, as well as ongoing costs associated with collecting data, monitoring and reporting. Some of our members have noted that the cost of the changes could potentially result in financial pressures on firms, due to the associated increased costs of business, and could shrink margins so significantly that some products are rendered commercially unviable, all of which could damage

competition for consumers and drive up prices, neither of which will improve outcomes for consumers.

178. Large-scale changes to processes and training could reduce firms' ability to service consumers effectively during their implementation. Furthermore, depending on the level of resource required, other priorities and deliverables may be delayed or set aside. This would not improve outcomes for consumers.

Stifling of innovation and reduction of competition

179. If the Consumer Duty significantly increases the risk of firm liability, it is possible that firms will withdraw or restrict products that they consider too risky, including, for example, where such products are targeted at high-risk, impaired credit, non-standard and/or high-cost consumers. While such behaviour would constitute a rational response to increased legal and conduct risk, it would have the undesirable effect of diminishing access, competition and stifling innovation, and could jeopardise the market's ability to meet the financial needs of certain customer demographics.

180. Furthermore, firms are likely to be cautious about introducing new, innovative products to the market, as precise customer outcomes are initially difficult to predict.

Financial exclusion and poorer outcomes

181. The relationship between firms' risk appetites and the impaired credit, non-standard, high-cost markets is such that vulnerable consumers may be among the most negatively impacted by the consequences of an overly rigid, or ambiguous Consumer Duty. However, it is not only those most marginalised who are at risk of being underserved in essential banking and finance products and services. Firms are concerned that a significant increase in conduct risk and associated costs may hinder their ability to cater, on a commercially viable basis, to the needs of customers who are, for example, self-employed, have multiple incomes or are on zero-hours contracts. There is a real risk of financial exclusion to these significant and (in light of trends in modern working arrangements) growing customer demographics.

182. Moreover, if the introduction of a Consumer Duty causes the overall cost of financial products to increase significantly, this could put at risk firms' ability to sustainably provide free services and products. This would likely have a disproportionate impact on those already most at risk of financial exclusion.

Question 27. What are your views on the amount of time that would be needed to implement a Consumer Duty following finalisation of the rules? Are there any aspects that would require a longer lead-time?

183. Without clarity on its precise scope and certainty about the additional requirements of firms to deliver the Four Outcomes, it is difficult to estimate the challenge facing firms in implementing and embedding the Consumer Duty into their business, products and services. That process is entirely dependent on the detailed nature of the final rules to be introduced.

184. Firms that already deliver the right outcomes do not necessarily have detailed monitoring processes in place. Firms typically operate through informal monitoring, customer

complaints and a positive customer-focused culture. Turning the processes and procedures that firms already have in place into explicit ongoing monitoring is a significant task with no intrinsic benefits to consumers.

185. Firms will undoubtedly need to consider funding, information-technology changes and reviews of policies and procedures and to balance those with other consumer-facing changes along with holistic product and service reviews, product design and supporting management information and controls across multiple product lines within their retail and SME businesses. For example, material changes to terms and conditions for products already on the market and about to be released might require key suppliers to implement changes and would likely require advice from external legal counsel. Furthermore, operational constraints often mean firms cannot provide products with different terms and conditions in parallel, which will require wholesale change to the terms and conditions for their back book (which likely require customer consent to the variation) and new customers, which will further affect timescales.

186. The size of a firm and the nature and variety of the products and services it offers will affect the implementation and embedding timeframe that will be required. However, it is expected that firms will need two years or more from the date the Consumer Duty is introduced.

187. If insufficient time is provided for reviewing product suites, back books, product designs and other processes related to behavioural bias and customer outcomes, it seems likely that firms will either risk being in breach of the Consumer Duty or have to suspend the offering of certain products and services to new customers, and stand-down on the development of innovative consumer solutions pending completion of the readiness work. Such an eventuality would not deliver the right outcomes for consumers overall and should be avoided.

188. As noted above, firms have described implementing the Consumer Duty as akin to MiFID 2 or TCF for retail firms. The size of the programme for all firms will be significant, affecting every aspect of their retail business and requiring extensive work to ensure compliance both prior to implementation (in terms of reviewing all products and establishing new governance, processes and standards) as well as on an ongoing basis (in terms of the extensive monitoring, testing and record keeping that will be required).

189. The FCA should also be mindful of competing pressures on firms' capacity to implement the Consumer Duty. In particular, firms anticipate significant resources will be required over the next couple of years to ensure their products, services, systems and governance meet the standards set out in the FCA's and Prudential Regulation Authority's (PRA) respective March 2021 Policy Statements on building operational resilience.[19][20] As we noted in our response[21] to HM Treasury's call for evidence on

[19] https://www.fca.org.uk/publication/policy/ps21-3-operational-resilience.pdf

[20] https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/publication/2021/building-operational-resilience-impact-tolerances-for-important-business-services.pdf?la=en&hash=D6335BA4712B414730C697DC8BEB353F3EE5A628

[21] https://www.ukfinance.org.uk/system/files/HMT%20call%20for%20evidence%20on%20regulatory%20coordination%20-%20UK%20Finance%20response.pdf

regulatory coordination[22], there is often considerable overlap in the resources and staff required to implement discrete regulatory initiatives. The cumulative cost of implementing regulatory initiatives simultaneously is therefore generally higher than the sum of the costs of implementing the same initiatives sequentially. This would necessarily constrain firms' scope for discretionary investment aimed at improving outcomes for their customers. We therefore strongly recommend that the FCA coordinate, both internally and with fellow members of the Financial Services Regulatory Initiatives Forum, in designing an appropriate timeline for implementing the Consumer Duty.

Other comments

Regulatory principles

190. We would welcome further exposition by the FCA of how it has had regard to its regulatory principles under section 3B of FSMA in formulating the Consumer Duty.[23] In particular, it should spell out the implications for:

- proportionality (section 3B(1)(b)). The FCA has said this is encapsulated in its approach to reasonableness. There is undoubtedly overlap, but they are not synonymous concepts;
- the responsibilities of senior management (section 3B(1)(b)). We welcome confirmation the FCA does not intend to change the fundamental requirements of the SM&CR; and
- plurality of supply (section 3B(1)(f)). It is important that the Consumer Duty does not constrain different approaches by differing business and operating models and sizes of firm.

Regulatory overlap

191. Firms are concerned by the potential of regulatory creep, specifically into areas shared with other regulators. As such, we would ask the FCA to clarify whether the new Consumer Duty is intended to be the mechanism through which these perimeter issues will be tested.

192. We would also welcome clarity about the application of the Consumer Duty to firms also regulated by the Bank of England and/or the Payment Systems Regulator (PSR). This is particularly relevant to the Price and Value Outcome given the PSR, as an economic regulator, can more appropriately consider price interventions.

193. We would also welcome clarity about the application of the Consumer Duty to firms that comply with the LSB's Standards of Lending Practice for business customers.

[22] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819025/Future_Regulatory_Framework_Review_Call_for_Evidence.pdf

[23] https://www.legislation.gov.uk/ukpga/2000/8/section/3B.

194. Finally, we also have concerns about the potential overlap with the data protection regulatory regime (as detailed above at paragraph 139) and would like to see clarification about how the FCA intends to deal with any conflict that might arise.

Evaluation

195. We look forward to the CBA the FCA has indicated it will publish as part of its second consultation. Given the significance of the Consumer Duty, and as articulated in our response to HMT's framework-review consultation, we look to the FCA to consider all options, with appropriate sensitivity analysis, from "do nothing" through to formal rulemaking and including options to adopt non-regulatory solutions, improve supervision and better enforce existing rules and guidance. The FCA should identify in the CBA the benefits and added protections the Consumer Duty will provide, over and above those which the regulatory requirements and coverage currently in place provide. The FCA should also assess both the incremental and the cumulative impact of its proposals and consider not only first-order impacts but also potential second- and third-order impacts as well as feedback loops.

196. The FCA should also make clear its intention to undertake a post-implementation review if it decides to introduce the Consumer Duty and indicate the timescales that it thinks are appropriate.

Role of the FOS

197. The FOS will have an important role to play in enabling consumers to seek redress for breaches of the Consumer Duty's underlying rules. It is important that the FCA's statements about what the Consumer Duty will not do (particularly applying retrospectively to past business and judging practices with the benefit of hindsight) and the concept of reasonableness it will embed in the Consumer Duty bind the FOS as much as itself. The FCA should give clear guidance to the FOS (as is permitted) in respect not only of the Consumer Duty generally, but also in respect of unregulated business (and, in light of our comments below, regulated business above any Consumer Duty threshold) falling within the FOS's jurisdiction to which the Consumer Duty does not apply.

198. Our members are concerned that any potential for FOS overreach be addressed before the new Consumer Duty is introduced. The FOS may decide consumer complaints by considering what is fair and reasonable in all the circumstances of the case, rather than based on the letter of the relevant regulation. There is concern the FOS could unduly increase the scope of the obligations on firms, leading to a two-tiered system of regulation, rendering the Consumer Duty obsolete, with the need to adhere to a higher FOS initiated standard. The FCA should make clear that the FOS' role is to apply the regulatory perimeter to complaints, nothing further.

199. There are already significant concerns that the FOS is overwhelmed and produces inconsistent decisions that do not contribute to delivering the right outcomes for consumers. The Consumer Duty is only likely to increase those pressures, and therefore a concerted approach with guidance and appropriate training for adjudicators, with input from the FCA, is required to ensure that the Consumer Duty achieves the right outcomes through complaints.

200. More broadly, we remain of the view, set out in in our response to HMT's framework-review consultation, that complaints to the FOS that have wider implications or would set precedents should be decided by an expert panel or a different decision-making body, following a more consultative and collaborative process with effective rights of appeal.