

## CONSUMER DUTY: FCA ISSUES FINAL RULES AND GUIDANCE.

On 27 July 2022, the UK's Financial Conduct Authority ("FCA") published its policy statement and final rules and guidance setting out how it intends to implement its new Consumer Duty ("the Duty") in [Policy Statement 22/9](#) and [Final Guidance 22/5](#). The Duty is described as the 'cornerstone' in the FCA's strategy of setting higher standards of consumer protection in retail financial markets. The Duty marks a return to a more outcome-focused approach by the regulator and will place the onus on firms to proactively assess and evidence the extent to which and how they deliver good consumer outcomes.

The fundamental elements of the FCA's proposals have not changed from those outlined in [Consultation Paper CP21/36](#), published in December 2021, which followed [Consultation Paper CP21/13](#), published in June 2021. Therefore, the Duty's hierarchy and its different components comprising the Consumer Principle, cross-cutting rules and four outcomes remain the same. However, there are some important clarifications on the Duty's scope of application to "retail customers", including in respect of a distribution chain and new sector-specific guidance. The implementation timeline is being phased in with a deadline of 31 July 2023 for all in-scope new and existing products and services that are open to sale or renewal and 31 July 2024 for closed products and services.

This briefing considers the final rules and guidance and is relevant to all regulated financial services firms.

### Scope

The Duty will apply to 'retail market business', a term which is defined by the FCA as the regulated activities, ancillary activities, payment services and

#### Key issues

- The FCA will apply the Duty in line with the approach in existing FCA sourcebooks, including for SMEs. Principles 6 and 7 will be disapplied for retail customers where the Duty applies.
- The application of the Duty in a distribution chain and the wholesale sector is clarified, with the Duty applying to those firms that can determine or 'materially influence' retail customer outcomes.
- The Duty will not apply retrospectively to past business or apply to firms' past actions. Instead, it will apply on a forward-looking basis to existing products or services which are either still being sold to customers, or closed products or services that are not being sold or renewed.
- A proportional application of the Duty is expected, so firms are not expected to review products and services for each customer, but to consider the product or service as a whole.
- The concept of reasonableness, which runs through the Duty, is the standard that could reasonably be expected of a prudent firm.

electronic money activities of a firm in a distribution chain which involves a retail customer. There are certain exclusions, such as for activities concerning non-retail financial instruments.

The definition of 'retail customer' will align broadly with the existing scope of the FCA's sectoral sourcebooks. This means, broadly speaking, that the scope of the Duty will follow the respective application positions (and any specific exclusions) in modules such as ICOBS, COBS, BCOBS, MCOB etc. Despite some feedback that disagreed with the approach, the FCA will apply the Duty in respect of Small and Medium Enterprises (SMEs), where the FCA already regulates and applies protections to the provision of services to those SMEs. Principles 6 and 7 will continue to apply to conduct outside the scope of the Duty, where they apply at present. Other important clarifications include:

- **Products or services bought by both retail and non-retail customers:** there is a possibility that, for the same product or service, a firm would be subject to both the Duty for their retail customers and Principles 6 and 7 for their non-retail customers. This could occur, for example, in investment funds open to all investors and payment services that can be used by both retail and non-retail customers. In such cases, the FCA will not exclude non-retail products or services from the scope of the Duty. Instead, firms are expected to apply the rules pragmatically and proportionately and may need to, for example, develop different communications or support services for retail and non-retail customers (or decide to apply the Duty to both sets of customers).
- **Firms in a distribution chain with an end retail customer:** to allay concerns of an implied general responsibility on all firms in a distribution chain for the outcomes experienced by the customer. The new non-Handbook guidance clarifies the expectations of different parties in the chain. The Duty will apply to those firms that can determine or 'materially influence' retail customer outcomes with guidance added on what the FCA means by 'material influence' and examples of where this is unlikely to apply. Firms are only expected to be responsible for their activities and do not need to oversee the actions of other firms in the distribution chain.
- **Impact on the wholesale sector:** there were concerns that wholesale firms would be caught by the Duty, for example, when providing advisory or delegated investment management services to a retail fund manager who then provides a service to the retail customer, may be subject to the Duty. Similarly, the manufacturer of wholesale products or services incorporated by a retail firm into a product or service could be seen to be subject to the Duty. To allay concerns, the FCA confirms that the Duty applies only to the extent that a firm is responsible for determining or 'materially influencing' retail customer outcomes. Where it applies, obligations on firms must be interpreted proportionately and in a manner that reflects the firm's role in the distribution chain and its ability to influence retail customer outcomes.
- **Application to manufacturers and distributors:** the terms 'manufacturer' and 'distributor' were generally defined by the FCA to help firms to understand the application of the Duty. Following feedback for precise definitions, the FCA explained that the concepts are deliberately broad to capture all aspects of the manufacturer and distribution of products and services. However, the 'manufacturer' definition for 'underwriting' will be amended to only relate to insurance and credit activities. This avoids the implication that the Duty applies to primary market activities involved in underwriting the issuance of securities.

#### Key issues

- The finalised three cross-cutting rules require firms to act in 'good faith', avoid 'foreseeable harm', and enable and support retail customers to pursue their 'financial objectives', with additional guidance on the meaning of the high-level terminology used in the rules.
- The 'four outcomes' are supported by a suite of new rules and guidance setting detailed expectations in the key elements of the firm-consumer relationship, including different requirements for manufacturers and distributors.
- There will be a new Individual Conduct Rule 6 in COCON, requiring conduct rules staff to act to deliver good outcomes for retail customers, together with guidance on the new rule.
- A firm's governing body is required to receive a report at least annually on compliance with the Duty and to agree any actions required.
- There will be no Private Right of Action, although this remains under review by the FCA.

### Existing products and services

The Duty will not apply retrospectively to past business or apply to firms' past actions. The Duty will apply on a forward-looking basis to existing products or services which are either still being sold to customers, or closed products or services

that are not being sold or renewed. The Duty will also disapply aspects of the product and service outcomes rules that could not be easily applied to closed products and services, for example, manufacturers would not need to identify a target market or develop a distribution strategy in respect of closed products and services. Other clarifications include:

- **Retrospection:** additional guidance advises firms to review the conditions that applied when products were designed and sold, with consideration of expected costs over the lifetime of the product as part of the fair value assessment. For existing and closed products and services, this includes the costs that were the basis on which customers entered the contract.
- **Proportionality:** firms are not expected to review products and services for each customer, but to consider the product or service as a whole. Firms do not need to repeat the underwriting of products or to move customers in superseded products onto the latest product version, and unilateral changes to product or service terms and conditions are not expected.

## The Consumer Principle and the disapplication of Principles 6 and 7

A new Consumer Principle (Principle 12), based on the wording option 1 in CP21/13: '*a firm must act to deliver good outcomes for retail customers*', will be introduced. The FCA believes this wording best reflects the outcomes focus of the Duty, which goes further than Principles 6 and 7, and is a clear break from existing terminology. What is required to deliver 'good outcomes' is explained by the new cross-cutting outcomes rules and is supported by the FCA's guidance. The FCA hopes that the standard achieved by this package will secure an appropriate level of protection for consumers. Other clarifications include:

- **Reasonable and proportionate application:** The Duty will require what can be reasonably expected of a prudent firm carrying on the same activity for the same product or service. This is an objective standard of conduct that firms would need to meet and is not something that they can define for themselves. The FCA does recognise that what is reasonable will also be assessed on the facts and so will involve judgements from firms at the time.
- **TCA overlap:** There is a significant overlap between the Treating Customer Fairly ("**TCF**")<sup>1</sup> outcomes and the areas covered by the Duty. The FCA confirms that firms should focus on complying with the Duty, where applicable, rather than the TCF outcomes.

## The cross-cutting rules

To help firms deliver good outcomes, the FCA has finalised the three below cross-cutting rules (also set out in PRIN 2A.2). Given the high-level wording used in the rules, the FCA has added additional guidance to assist firms to understand the limits of their obligations:

- **A firm must act in good faith towards retail customers.**

Firms should determine whether they are acting consistently with customers' reasonable expectations according to the ordinary meaning of 'good faith'. The new guidance outlines what 'reasonable expectations' would depend on, for example, the nature and quality of the product or service and the firm's previous conduct or interaction with consumers.

- **A firm must avoid causing foreseeable harm to retail customers.**

Since financial products involve the risk of adverse consumer outcomes (for example, investments may carry a risk of capital loss), this rule will not require firms to protect customers from all foreseeable harm. Firms are not therefore required to protect consumers from risks that they understood and accepted. However, where a firm can reasonably foresee harm to a retail customer, the FCA expects that it should act where it can and raise any issues with other relevant parties, for example, in the distribution chain. "Average retail customer" in the FCA's guidance has been replaced throughout with "retail customers in the target market" in the concept of foreseeable harm.

---

<sup>1</sup> A key principle of the FCA regime and one that all regulated firms must follow in all their consumer credit activities is Principle 6 "a firm must pay due regard to the interests of its customers and treat them fairly".

- A firm must enable and support retail customers to pursue their financial objectives.

This requirement does not remove customers' responsibility for decision-making or prevent customers from making decisions that are not in their interests. Instead, the expectation is for firms to take responsibility for establishing an environment in which consumers can act in their interests. Guidance is added to clarify that, in supporting customers, firms should not carry out activities or services that they are not authorised to undertake.

## The four outcomes

The 'four outcomes' are a suite of new rules and guidance setting more detailed expectations for firm conduct in areas that the FCA considers to be key elements of the firm-consumer relationship. The precise expectations under each of the outcomes will be informed by the firm's role. The four outcomes relate to:

- **The products and services outcome (PRIN 2A.3)**

This outcome involves extending product governance requirements across all retail products, with different rules for manufacturers and distributors. For example, manufacturers will be required to undertake a product approval process, identify a target market, and ensure appropriate distribution channels for their products.

The Product Intervention and Product Governance sourcebook (PROD) sets similar requirements for the design, approval, marketing and management of certain products and services throughout their lifecycle. However, PROD does not have general application across all regulated retail markets, with rules applying to investments (PROD 3), insurance (PROD 4) and (from 29 July 2022) funeral plans (PROD 7). To avoid duplication where the PROD rules apply, the rules in PRIN 2A.3 do not apply to that product or service.

To mitigate exclusion concerns resulting from targeted product development, new guidance advises firms to take account of any additional or different needs, characteristics and objectives that might be relevant for retail customers in the target market with characteristics of vulnerability (for example visual impairment, bereavement, low financial capability). Although the FCA does not require firms to follow an inclusive-design approach, the FCA's guidance suggests firms may wish to consider it.

- **The price and value outcome (PRIN 2A.4)**

The price and value rules intend to ensure a reasonable relationship between the price that a consumer pays for a product or service and the benefits that they receive from it. Guidance has been added to state that, where a product or service meets all the other elements of the Duty (for example, it is designed to meet the needs of its target market, is transparently sold, and for which consumers are properly supported), it is generally much more likely to offer fair value.

Where the product or service does not have any financial or non-financial cost to the consumer (for example, debt advice funded through other sources), the FCA would not expect firms to do a value assessment. However, manufacturers providing free products or services still need to consider whether their customers are paying in non-monetary terms and whether those costs are reasonable to the product's benefits. An example of non-monetary payment is customers paying for their current accounts in the form of foregone interest, associated fees or using their data.

In the general insurance pricing practices work recently undertaken by the FCA, it was found that price walking (i.e., the practice of increasing prices on renewal for a loyal customer) can lead to some consumers making significant overpayments which do not provide fair value. Such practices, in any retail sector, would not meet the requirements of the Duty. However, the FCA does not believe that all differential pricing between new and existing customers necessarily causes harm. Where upfront discounts are clear and transparent, and the firm can demonstrate that both groups are receiving fair value, then this could meet the standards of the Duty.

Firms are responsible only for the prices that they control and are not required to redo or challenge other firms' value assessments. However, distributors must ensure that their or other charges across the chain do not cumulatively result in the product ceasing to provide fair value. To allow for such assessments, manufacturers should provide distributors with the results of their value assessment, but they do not have to include sensitive information such as a breakdown of firms' margins or risk-based pricing. Information sharing can be a high-level summary of the benefits to

the target market, information on overall prices or fees and confirmation that the manufacturer considers that total benefits are proportionate to the total costs.

- **The consumer understanding outcome (PRIN 2A.5)**

The FCA expects firms to focus more on consumer outcomes and understanding throughout the customer journey. As well as ensuring that individual communications and disclosures are fair, clear, and not misleading, firms will need to consider their overall approach to communicating information to make sure they equip customers to make effective, timely and properly informed decisions. To achieve this result, firms will need to tailor their communications appropriately as well as monitor, test, and adapt their communications on an ongoing basis to ensure that the communications are suitable.

This outcome is broader than other legal disclosure requirements, for example, those prescribed under the Consumer Credit Act 1974, and applies to all communications provided to consumers. This includes verbally, such as during conversations with advisers, online, in letters or product terms and conditions. As firms embed the Duty, the FCA will also look to simplify prescriptive disclosure requirements, including those that stem from Europe Union regulations such as the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). Until then, firms are expected to comply with all other statutory disclosure requirements as well as the Duty.

Firms are not expected to tailor all communications to meet the individual needs of each customer. Instead, they are expected to consider the characteristics of customers more broadly, including characteristics of vulnerability. This means that firms should consider what they know about their customer base and the target market for their products and services. This could prove challenging for firms whose information capture does not provide sufficient detail about their customers and their needs.

- **The consumer support outcome (PRIN 2A.6)**

This outcome focuses on firms providing an appropriate standard of support to customers so that customers can use products as reasonably anticipated, and do not face unreasonable barriers in doing so. Firms are expected to monitor the support they provide, take relevant feedback into account, and look for signs that may indicate their channel offering is not sufficient to meet the needs of their customers. Where this is the case, firms will need to take reasonable steps to address any shortfall in the support they provide.

The FCA is not prescriptive about the channels of support, only that the channels meet customers' needs including customers dealing with non-standard issues, and customers with characteristics of vulnerability. The FCA has separate guidance on the fair treatment of vulnerable customers with examples of how different vulnerabilities can make certain channels of support unsuitable.

Where a firm only provides support mainly or only through one channel, such as digital-only, there are additional factors for it to consider to ensure it delivers good customer outcomes, including communicating the support available and ensuring the support works effectively, as well as having measures to deal with non-standard issues (such as fraud), operational resilience (for example, a cyber-attack) and identifying consumers with protected characteristics<sup>2</sup> and with changing needs (for example, a customer in financial difficulties could lose internet or mobile access meaning that a digital-only support offering exposes them to the risk of harm).

When a firm chooses to outsource elements of its consumer support to a third party, the firm will remain responsible for ensuring the support provided meets the Duty standard. The firm will also need to have systems and controls in place to monitor the quality of support provided and provide assurance that it is meeting its regulatory obligations.

## **Consumers in vulnerable circumstances**

Following calls for clarity on the characteristics on which the FCA would like firms to focus, the FCA has added guidance to state that the Duty requires firms to focus on the needs of customers in vulnerable circumstances and customers with

---

<sup>2</sup> Certain characteristics are protected by law. For example, firms have a duty to make reasonable adjustments for disabled customers under the Equality Act 2010. Firms must therefore ensure that the support they offer allows for reasonable adjustments to be made in these circumstances so they can act lawfully

protected characteristics under the Equality Act 2010. Other concepts such as neurodiversity and socio-economic background could be useful for firms as they consider how to meet customers' needs, and may overlap with the concept of vulnerability, but the FCA has not introduced new requirements relating to these groups of consumers. The FCA has retained a concept of retail customers with "characteristics of vulnerability" in the cross-cutting obligations and the concept of foreseeable harm. Helpfully, there is no longer an inter-related average retail customer concept which had caused confusion about who the average customer would be in a target market group of customers with diverse needs and characteristics.

The Duty does not require firms to collect new data about their customers' protected characteristics. Where firms hold data about customers' protected characteristics, the FCA expects firms to use this as part of outcomes monitoring, where possible, following data protection law. Since the Duty is underpinned by the concept of reasonableness, the frequency and nature of monitoring that the FCA will require will depend on circumstances such as the size of the firm and its relationship with the customer. Guidance has been included to clarify these expectations.

## **A private right of action**

The FCA has not provided a private right of action (PROA) for breaches of any part of the Duty at this time. This is to allow the industry the time to embed the Duty without the prospect of private action being brought. When firms cause customers harm, the FCA will still require them to be proactive and take action to rectify the situation, including by providing redress where appropriate. This is viewed as a crucial element of firms delivering good outcomes for their customers.

The FCA confirmed that it recognises the concern that a lack of a PROA will create asymmetry in its rules and reduce consumers' access to redress for breaches of the Duty. The possibility of a PROA is therefore being kept under review for the time being.

## **Monitoring**

The FCA expects firms to regularly review and monitor the outcomes that their customers are experiencing. This is extended to products and services being regularly reviewed and monitored to ensure they are delivering on the expected Duty outcomes, and firms are expected to be able to identify where they are responsible for poor outcomes or harm, understanding the root cause for both. The FCA clarifies that the monitoring obligation applies proportionately to a firm's role in the distribution chain, including to firms that do not have direct contact with the end retail customer (PRIN 2A.9.4G).

In line with the below monitoring and governance expectations set out by the FCA, the role of MI and data here is featured heavily, with the expectation that firms will identify the sources of data (e.g. file reviews, complaints data.) to enable them to assess whether the outcomes that their customers are experiencing are consistent with the Duty expectations and to produce and regularly review MI in this space. Regular reporting obligations have not been introduced.

In terms of data and MI, the FCA has updated the finalised guidance to give firms further information on the types of data firms can use (i.e. for the price and values outcome using profitability data, surveys, customer complaints and root cause analysis) and has confirmed that it will measure the success of the Duty by monitoring key outcomes for consumers (e.g. through monitoring Financial Ombudsman Service final decisions on complaints about fees or charges or inappropriate product or service sales). In addition, the FCA will use data from a variety of sources including supervision and authorisation activities, firm MI and complaints data. It is, therefore, clear that firms will need to ensure that they have their own clear underlying MI and data to demonstrate success.

## **Governance**

Under the Duty, the firm's board or equivalent management body will be responsible for reviewing and approving the firm's report on the outcomes being received by retail customers, confirming whether it is satisfied that the firm is complying with the Duty and assessing whether the firm's future business strategy is consistent with its obligations under the Duty.

There is a new requirement for the governing body to have agreed to the firm's Duty implementation plans and be able to evidence that they have scrutinised and challenged the plans to ensure they are deliverable and robust. This must occur

by end of October 2022. Firms should expect the FCA to ask for implementation plans, board papers and minutes and to be challenged on their contents. The FCA expects firms to have a Consumer Duty champion at the board or equivalent management body level, who should be a NED where possible.

There is a new requirement at PRIN 2A.8.1R for the firm to ensure that the Duty is embedded in its strategies, governance, leadership, and people policies, including incentives at all levels; and that retail customer outcomes are a central focus for its risk and internal audit functions.

Interacting with the above governance piece, the Duty introduces a new Individual Conduct Rule 6 in the FCA's Code of Conduct sourcebook (COCON). This will require conduct rules staff to act to deliver good outcomes for retail customers, together with guidance on the new rule. The FCA has added more detailed guidance in COCON, including clarifying individual accountability responsibility where a firm does not have an end client relationship as well as more detail around seniority, expertise and experience and commensurate expectations under COCON.

## Next steps

The new requirement for firms' boards to agree upon an implementation plan by the end of October 2022 creates a tight deadline within which firms must start their projects. Firms will need to begin working towards this deadline as soon as possible. We have produced a pack to assist firms with implementation planning. If you would like a copy of this please speak to any of the Clifford Chance contacts listed below or your usual contact.

### Implementation timetable

- **31 October 2022** - Boards (or equivalent management body) must agree on implementation plans and scrutinise and challenge the plans to ensure they are deliverable and robust.
- **31 July 2023** - New effective date for in-scope new and existing products and services that are open to sale or renewal.
- **31 July 2024** - New effective date for closed products and services.

## CONTACTS



**Ashley Prebble**  
Partner

**T** +44 207006 3058  
**E** ashley.prebble  
@cliffordchance.com



**Cheng Li Yow**  
Partner

**T** +44 207006 8940  
**E** chengli.yow  
@cliffordchance.com



**Imogen Ainsworth**  
Partner

**T** +44 207006 2184  
**E** imogen.ainsworth  
@cliffordchance.com



**Caroline Meinertz**  
Partner

**T** +44 207006 4253  
**E** caroline.meinertz  
@cliffordchance.com



**Caroline Dawson**  
Partner

**T** +44 207006 4355  
**E** caroline.dawson  
@cliffordchance.com



**Monica Sah**  
Partner

**T** +44 207006 1103  
**E** monica.sah  
@cliffordchance.com



**Simon Crown**  
Partner

**T** +44 207006 2944  
**E** simon.crown  
@cliffordchance.com



**Simon Gleeson**  
Partner

**T** +44 207006 4979  
**E** simon.gleeson  
@cliffordchance.com



**Paul Ellison**  
Partner

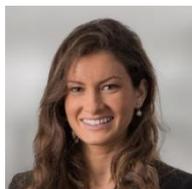
**T** +44 207006 3207  
**E** Paul.Ellison  
@cliffordchance.com

## AUTHORS



**Amera Dooley**  
Knowledge Director

**T** +44 207006 6402  
**E** amera.dooley  
@cliffordchance.com



**Charlotte Chopping**  
Senior Associate  
Knowledge Lawyer

**T** +44 207006 8327  
**E** charlotte.chopping  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, 10 Upper Bank Street,  
London, E14 5JJ

© Clifford Chance 2022

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street,  
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.