

## Response to the FCA's consultation CP21/13: A new Consumer Duty

July 2021

### About the Investment Association

The Investment Association (IA) champions UK investment management, a world-leading industry which helps millions of households save for the future while supporting businesses and economic growth in the UK and abroad. Our 250 members range from smaller, specialist UK firms to European and global investment managers with a UK base. Collectively, they manage £8.5trillion for savers and institutions, such as pension schemes and insurance companies, in the UK and beyond. 40% of this is for overseas customers. The UK asset management industry is the largest in Europe and the second largest globally.

### Executive Summary

The IA supports the intention to ensure that consumer harm is addressed and hope that the consultation on the proposals will shine a light on those firms not meeting the spirit of the existing rules. However, new rules or compensation cannot and should not replace effective authorisation, supervision and enforcement of those firms that are the cause of consumer harm.

Neither of the suggested options for wording of a new Principle are supported by the investment management industry and the IA would welcome the opportunity to develop something more suitable. The concept of "best interests" already applies to the investment management sector, but we recognise that different parts of the market have unique characteristics that effective regulation needs to take into account. Therefore, if the "good outcomes" option were to be taken forward it should at least explicitly include the concept of "reasonableness" and be amended to, for example, "a firm must act with reasonable skill, care and diligence to deliver fair outcomes for retail clients".

The FCA also need to consider more carefully the implications intended or otherwise of the introduction of a duty for firms that do not have a relationship with the underlying retail clients and of whom they have no direct knowledge.

The IA calls for more clarity on where regulated entities are falling short of the FCA's expectations in respect of the current regulatory framework. This should include the practical implementation of the new Cross-cutting Rules to avoid complicated compliance processes that will be costly for firms to implement and deliver little or no value to end consumers and will not reduce the harm that the FCA is looking to address.

A further increase in the costs of doing business will have a negative impact of the competitiveness of the UK as a global centre for investment management, which will



negatively impact retail consumers who will suffer from a diminishing number of products and services to support their financial needs if firms exit the UK market.

The IA strongly support the simplification of regulation and recommends the FCA reviews the Handbook to remove any Principle, rule or guidance that is superseded through the introduction of the Consumer Duty or very clearly acknowledges that firms complying with rules designed to achieve the same outcomes will already be in compliance with the Consumer Duty, or aspects of it. Regulatory responsibilities need to be clear, which they will not be if one layer of regulation is overlaid by another.

We would also note considerable concern at the use of the term “duty” because of the legal connotations it brings and believe a phrase such as “consumer care regime” would be more appropriate.

The IA do not support the proposals for a Private Right of Action. The existing complaints framework for consumers is clear in terms of how it operates, free for consumers and encourages two-way communication to resolve the complaint in a timely manner before a complaint is referred to the Financial Ombudsman Service (‘FOS’) for independent arbitration, if necessary. The introduction of a Private Right of Action would benefit lawyers and claims management companies at the expense of the FCA’s ability to make and interpret its own rules as well as affect the competitiveness of the UK market.



## Introduction

The IA welcomes the opportunity to provide a response to the FCA Consultation Paper (CP21/13) on a new Consumer Duty. With millions of UK citizens increasingly dependent upon financial services firms to deliver effectively for a variety of both long-term and short-term needs, it is essential to ensure that the consumer continues to be put front and centre by firms.

Various parts of the financial services industry are subject to different requirements, adapted to their business models ranging from execution-only brokers to payment providers. Their clients have widely varying needs, experiences and expectations.

The IA strongly supports good outcomes for consumers and, as a sector, we are, of course, already subject to a “best interests” requirement. The IA offers our support to work with the FCA and our members to further the aim of raising standards throughout by setting a common standard across all sectors of financial services. However, importantly, extensive regulation already exists aimed at similar or comparable objectives (e.g. the best interests rules which emanate from, for example, MiFID and UCITS) and we would ask that the FCA considers the impact of this proposal, acknowledges the existing plethora of requirements designed to achieve good consumer outcomes, not least (in the case of investment/fund managers):

- fund/product regulations;
- the Retail Distribution Review (RDR);
- target market rules;
- value assessments;
- new governance arrangements; and
- the Senior Managers and Certification Regime (SM&CR) more broadly.

Rather than providing a point of simplification in a complex regulatory landscape, the addition of further rules which aim to cover the entirety of retail financial services without reference to, or consideration of, existing rules risks creating undue complexity and bureaucracy (in terms of evidence gathering, record keeping, policy writing) for those firms which are subject to detailed rules, without changing behaviours in parts of the market where change is really needed. Furthermore, there will be increased governance requirements; including Risk Committees, Boards, etc. needing to oversee the implementation and ongoing operation of these proposals, which would add further costs and obligations on firms that would likely also increase fees to professional service firms for assurance work. The FCA should also be mindful how these proposals will interact with current obligations under the Senior Managers and Certification Regime (SM&CR). A particular concern is the lack of articulation at this stage about how the overarching consumer duty would connect with detailed regulation which might be framed differently – e.g. how would a good outcomes duty sit alongside the best interests requirements already in place for fund managers? All of these concerns should be addressed through a thorough impact analysis, including a cost-benefit analysis.

It is therefore imperative that changes resulting from this consultation go hand-in-hand with a consideration both of the FCA’s supervisory strategy and relevant parts of the existing rulebook. The challenge is to develop an approach that can accommodate both different product sets (e.g. investment products alongside insurance policies and bank accounts) and existing regulation that may already be aimed at similar or comparable objectives. Equally, it is imperative to avoid unintended consequences that could see firms that try to do the right thing concluding that the regulatory or legal risk is so high that they



exit the market. This would penalise the sort of firms the FCA wants to see in the market and thereby damaging consumer choice and the competitiveness of the UK.

In considering the impact of this proposal, the FCA should carefully assess the cumulative impact of new requirements on existing rules and to articulate more clearly the market failure it is seeking to address and what different outcomes it will achieve that are not already achievable through existing rules or through a change in the way firms are supervised. As we set out above, if a good outcomes principle were, for example, to be adopted, it will be necessary to set out clearly what the relationship might be, for example, between that good outcomes principle and existing best interest obligations.

The IA fully supports further efforts to enable robust supervision and enforcement of existing rules before proposing new ones. As FCA Chair Charles Randell observed in a speech in 2018 that: “Just as governments can tend to prioritise legislation over delivery, regulators can tend to prioritise rulemaking. So we need to make sure that we don’t reach for the rulemaking tool when it isn’t the best response.”<sup>1</sup> Further, the Chancellor in his recent Mansion House speech<sup>2</sup> made clear that we need “high-quality regulation” and to “boost our competitiveness across both regulation and tax”. It is not clear that the proposals will improve on the existing Principle 6 and the FCA’s related guidance. The IA would suppose that firms likely to operate contrary to the spirit of Principle 6 are likely to do the same with any new Consumer Duty.

It should be noted that HM Treasury has not yet concluded its work on the Financial Services Future Regulatory Framework Review and the FCA is in the midst of its Transformation Programme, designed to make the regulator more nimble and agile in responding to the needs of consumers. In particular, the FCA has yet to see the benefits of the proposed “fresh approach to tackling firms and individuals who do not meet the required standards” nor been shown to be “moving faster to identify firms and individuals who are more likely to cause harm.”<sup>3</sup> The IA strongly supports these initiatives and consider these will enable the FCA to meet its objective to drive better culture and behaviour in firms, where they consistently focus on consumers, and put customers in a position where they can act and make decisions in their interests.

We are also conscious that the FCA, PRA and BoE have recently issued a joint discussion paper DP21/2: Diversity and inclusion in the financial sector - working together to drive change<sup>4</sup>, which looks at how to accelerate change on diversity and inclusion (D&I) in the financial sector. The paper considers how inclusive cultures can improve outcomes for consumers and markets through the lifecycle of firms’ activities. It therefore has strong links to the proposals outlined in this consultation and it will be important to ensure alignment. We look forward to engaging with the FCA on this important initiative in the coming months.

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<sup>1</sup> <https://www.fca.org.uk/news/speeches/rolling-rock-cycle-deregulation-crisis-and-regulation>

<sup>2</sup> <https://www.gov.uk/government/speeches/mansion-house-speech-2021-rishi-sunak>

<sup>3</sup> <https://www.fca.org.uk/publication/correspondence/charles-randell-letter-to-est.pdf>

<sup>4</sup> [DP 21/2: Diversity and inclusion in the financial sector – working together to drive change | FCA](#)



## Wider Context

### 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?

The challenges faced in fostering an effective long-term investment culture, and the related issues of product design, disclosure, education and advice/guidance, have been the subject of repeated and significant regulatory interventions over the past twenty years, including in ongoing reviews in the case of the Retail Distribution Review (RDR), Financial Advice Market Review (FAMR), and the Asset Management Market Study (AMMS). As noted above, the investment management industry is already subject to a wide range of rules designed to achieve good outcomes for consumers highlighted in the consultation, including through detailed rules such as those found in the Product Intervention and Product Governance Sourcebook (PROD). We would welcome further clarity from the FCA on whether the existing PROD rules are sufficient and if the intention is to apply a similar level of protection across the wider industry, which the IA would support, or whether the FCA envisages the new Consumer Duty will uplift these existing regulations.

The IA supports the intention to ensure consumer harm is addressed in those parts of the financial system where the current rules and supervision are not yet able to mitigate the risks that the FCA have identified and hope that, if introduced, any Consumer Duty will shine a light on those firms not meeting the spirit of the existing rules. More rigorous interventions through the regulatory lifecycle through authorisation, supervision and enforcement against those firms that are the cause of consumer harm will be effective in improving the quality and access to financial products that meet consumer needs and removing those firms that are not able to provide them. This would also meet FCA's intent to implement proportionate rules to address the identified risks.

The IA notes that there are many issues, such as the growing prevalence of scams and the challenges of products that operate outside the FCA's regulatory perimeter, that are both an obvious source of serious or potentially serious harm and a threat to broader public confidence and trust in the financial system. The IA note that subsequent reviews of failures in financial services do not indicate that these have been as a result of deficiencies in the rules and regulations that firms are subject to. The IA stands ready to support the FCA to address the root cause of these harms, as we have done through identifying specific interventions in the Online Safety Bill, supported by the FCA.

As we noted in our response to the FCA's Call for Input: The Consumer Investments Market<sup>5</sup>, the focus on consumer harm reduction with policy tools that remain too strongly rooted in a 'rational expectations' model of consumer behaviour has the potential to inhibit development of the retail market. One can see the risks through the lens of previous retail policy initiatives in some key areas over the past decade:

- Role of disclosure. The investment management industry is wholly committed to working towards the highest standards of disclosure and significant steps have been taken particularly in the last three years. At the same time, there is also evidence that over-engineering is creating significant challenges, even for well-informed readers.
- Availability of advice and guidance. The issue of access to advice and broader support for decision-making is perhaps the most significant area where policy

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<sup>5</sup> [IA Response to FCA Call for Input: The Consumer Investments Market](#)



intentions and outcomes have been most out of sync. While the RDR has helped in certain areas, notably to drive up the quality of advice, consumer attitudes to paying explicitly for advice, and the cost of that advice, suggest that the advice market is not working as well as it could. Furthermore, the formal distinction between advice and guidance is not well understood by retail customers and firms indicate that a different approach could significantly assist decision-making.

The IA and the investment management industry are keen to work with regulators to develop a new set of approaches for the retail market that can overcome the challenges set out in the previous paragraph, measures that are effective in improving the quality and access to financial products that meet consumer needs to ultimately ensure the policy-making toolkit itself can be better geared towards facilitating good outcomes for retail savers and investors.

We welcome the initiatives set out in the FCA's Business Plan 2021/22 to address areas of concern with the FSCS levy that we have previously raised, and the announcement that the FCA will begin a review of aspects of the rules on the scope and coverage of the FSCS claims for specific regulated activities. We are also supportive of improvements around the authorisation process; the focus on firms having appropriate capital, liquidity and reserves to cover redress liabilities; and the increased sharing and gathering of intelligence, better analysis and targeted interventions. Measuring the success of regulatory interventions at reducing the over claims on the levy is also a move in the right direction. We look forward to gaining a greater understanding of how these changes will operate in practice. In addition, we would welcome clarity on the FCA's expectations regarding the FSCS levy and FOS in light of the proposed new Consumer Duty.

## **A New Consumer Duty**

### **2. What are your views on the proposed structure of the Consumer Duty, with its high level Principle, Crosscutting Rules and the Four Outcomes?**

The IA notes that the FCA is due to be influenced by the outcomes of the HM Treasury's Financial Services Future Regulatory Framework Review<sup>6</sup> (FRF Review), which has its own proposals for activity-specific principles. Therefore, the IA urges the FCA to consider the implications of this and the FCA's own Transformation Programme, including the creation of a regulatory nursery and Regulatory Scalebox in response to the recommendations of the Kalifa Review for newly authorised and high-growth firms, when considering introducing a high-level Principle, Crosscutting Rules and the Four Outcomes to ensure the FCA applies a holistic approach to addressing consumer harm. With respect to the FCA's Transformation Programme and the desire to be a more data-driven regulator, the IA would like to understand how this would be incorporated through the new Consumer Duty without creating a 'tick-box' compliance culture.

Subject to the outcome of the FRF Review and if it is deemed any intervention is required, the proposed structure seems appropriate; however, note our concerns on the potential complexity and layering impact of these proposals as set out in our response to question 5.

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<sup>6</sup> [Future Regulatory Framework \(FRF\) Review: Consultation - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/future-regulatory-framework-review)



An outcomes-led approach is more beneficial than a prescriptive rule-setting approach with a plethora of regulation that to reduce consumer harm. However, this would require the FCA to remove the existing rules originally designed to reduce consumer harm that the Consumer Duty will supersede.

The IA would suggest that the FCA should demonstrate in an impact assessment, including a cost-benefit analysis (CBA) that introducing these measures would benefit consumers over and above what is currently in existence and will drive the outcomes they are looking to achieve as well as outweigh the costs involved. If introduced, the FCA should also commit to a post-implementation review of the new Consumer Duty to demonstrate that the identified harms have been reduced through its introduction. This would align to the recommendations in the Taskforce on Innovation, Growth and Regulatory Reform (TIGRR) report<sup>7</sup> “to understand what effects their regulation is producing, and to enable proper scrutiny of proposals, all Regulatory Impact Assessments should include consideration of the wider effects of proposed policies where possible. This should include the effects of policies on innovation, competition, the environment and trade.” Performing the CBA during the consultation phase where detailed rules are considered is too late to properly assess the other options available to achieve the appropriate outcome. We acknowledge that this is made more acute by the tight statutory timetable.

## Scope

### **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?**

The FCA defines a retail client as a client who is not a professional client or eligible counterparty, which generally captures individuals and small businesses. The IA is of the view that the new Consumer Duty should only apply to retail clients and not wholesale or professional clients. Furthermore, careful consideration needs to be given to whether there should be further narrowing given the wide scope of “retail” and the very differing nature and expectations of retail clients. For example, a ‘retail’ client depositing money with a bank and a “retail” client using the services of a wealth manager. Currently, retail clients also cover local authorities and many small businesses/corporates. The IA would also like further clarity on how the FCA intends for the new Consumer Duty to apply for funds where there is a commingling of retail clients and non-retail clients (i.e. professional and wholesale investors).

The IA agrees that high standards of consumer protection are absolutely critical, and the industry is very supportive of ensuring a market which is competitive, well governed and transparent. The investment management industry is already subject to a number of regulations that ensure consumer harm is limited. Indeed, increasingly high standards are now being set by the FCA for the retail funds market, including the recently introduced value assessment exercises which contain detailed requirements.

Given there will be many firms in the investment management sector that do not have direct interaction with retail consumers, we would welcome clarity in respect of the FCA’s expectations on these firms that act at earlier stages in the distribution chain and what, if

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<sup>7</sup> [FINAL\\_TIGRR\\_REPORT\\_1\\_.pdf \(publishing.service.gov.uk\)](#)



any, additional responsibilities the FCA propose to impose on them and how these will be apportioned in the service chain. The FCA also need to consider the implications intended or otherwise of the introduction of a duty to firms that do not have a relationship with the underlying clients and of whom they have no direct knowledge.

The IA considers of greater concern is identifying the actors which cause consumers harm and the challenges of failures in firms and products that operate outside the FCA's regulatory perimeter. The IA would argue the FCA also needs to direct more resources to remove the bad actors that cause consumer harm. The IA understands the FCA's Transformation Programme should go a long way in achieving this and looks forward to seeing how these changes will improve the regulatory approach throughout the lifecycle of a firm: authorisation, supervision, and deauthorisation.

More broadly, there is also a debate that needs to take place about how to encourage and support appropriate levels of risk-taking, including an understanding of the risks of "not taking risk". This would include improving consumer engagement and understanding in their financial well-being, which would enable retail consumers to make informed decisions as referenced in the consultation. This is an area that should be incorporated into the debate around preventing consumer harm and the IA stands ready to support the government to improve consumer engagement.

**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?**

The investment management industry is one of a number of sectors in financial services that within which a large number of firms that do not have a direct customer relationship with the 'end user' of the product. Funds and investment management services are offered in the UK through a very heavily intermediated distribution landscape where IA members often do not have a relationship with the end investor and in many cases, will not know who holds the fund (because, for example, of the widespread use of omnibus accounts). Most of those along the distribution chain are themselves regulated firms so will have their own responsibilities towards end customers. It should not be the role of one authorised business to ensure compliance by another, especially when it does not have a direct client relationship and cannot know the circumstances of the underlying client.

Under existing regulatory rules to mitigate consumer harm, there are various measures in place to ensure the consumer is at the heart of product design, distribution and delivery. Not least through the product governance regime which investment managers are subject to within FCA PROD. As noted in the IA's response to the FCA Discussion Paper on promotion of high-risk investments, FCA PROD already provides a series of product governance obligations on manufacturers of investment funds including the obligation to identify a target market for the fund and to share that information through the distribution chain to enable each part of the chain to act in the best interest of the investor. There are also obligations on manufacturers to regularly review the products to assess whether the products remain compatible with the intended target market and whether the chosen distribution strategy remains appropriate. The IA would therefore like the FCA to confirm that there is no intention to further uplift the existing PROD rules, but to replicate the protection they bring to other sectors that are not subject to them.



The IA would urge the FCA to recognise the responsibilities of all firms along the value chain, especially where they are themselves regulated. While manufacturers naturally take a commercial interest in ensuring their products are sold “properly” (including for reputational reasons) they cannot be expected to second guess the judgement of another regulated entity, especially when they do not have full knowledge of the circumstances of the underlying client. We note this could be a particularly sensitive area when it comes to a question of whether “fair value” is being offered to the client. A firm cannot be expected to police the margin that another regulated entity makes. Indeed this is client sensitive data and it may breach competition law if a firm attempts to influence the price structures of other companies and firms would risk being deemed to form a cartel if price information is shared in order to bring about an outcome. It is vital that the FCA takes this into account.

In addition, the IA would like the FCA to clarify who the “end user” is deemed to be. For example, pension fund clients who are sophisticated and/or advised by professional consultants will have members who are “end users” who may be anywhere in the world. A particular investment manager may be managing only a small, specialist, part of a larger portfolio and should not be expected to look through to, or have responsibilities for, those members.

The IA would welcome further clarity on the scope of the Consumer Duty Principle as it applies to UK regulated entities to understand how it will apply to UK manufactured and/or domiciled funds, UK based clients and UK distribution chains. Also, if the proposals are applicable in the UK market only or also when UK regulated entities provide products or services to consumers that are not resident in the UK?

## **Wording of the Principle**

### **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?**

With millions of UK citizens increasingly dependent upon financial services firms to deliver effectively for a variety of both long-term and short-term needs, it is already essential to ensure the consumer is put front and centre by firms.

In this respect, given that different parts of the financial services industry are subject to different requirements, it is understandable that the regulator wishes to establish a baseline common set of standards. The challenge is to develop an approach that can accommodate both different product sets (e.g. investment products alongside insurance policies and bank accounts) and existing regulation that may already be aiming at similar or comparable objectives.

In our view, the current set of proposals from the regulator would require significant further consideration before advancing to more detailed implementation. The option to focus on “good outcomes” does not have an established legal meaning, as the consultation paper acknowledges, and therefore risks introducing ambiguity from the outset as opposed to clarity, especially where outcomes may be uncertain, such as in investment markets.



While we note that the consultation makes clear that the FCA do not propose to protect consumers from all bad outcomes, such as in unforeseeable circumstances or the crystallisation of an accepted risk, there is a concern that the introduction of “outcomes” as a Principle may allow for more ex post judgement and retrospective action on the intentions of a firm acting on behalf of consumers. Outcomes in the investment industry are generally different to the outcomes for products and services provided elsewhere to consumers; the whole nature of investment is about managed risk-taking, uncertainty and unknown outcomes so judging what may or may not have been a “good outcome” will be very different from judging the “outcome” of a banking or general insurance product. It is very important to ensure that any new approach is not seen as becoming a performance guarantee. The wording of “good outcomes” may not align to investment products where having the appropriate risk management and governance mechanisms in place is the correct outcome, but may still result, for example, in capital loss. Should the FCA decide to introduce a “good outcomes” Principle then it will be very important for the FCA to clarify the interaction of this with the current rules around “best interests”.

The concept of “best interests” already applies to the investment management sector, for example, through the UCITS directive, MiFID and AIFMD. The debate provoked within the Consultation Paper suggests that the two concepts of “good outcomes” and “best interests” are considered to be similar, but somehow different. As we understand it, there would be no intention to disapply the “best interests” rules in other parts of the rule book, which raises the question as to how they could fit together if applied alongside each other and the difficulties of applying a “one size fits all” approach to this issue.

The IA is conscious that “best interests” is not a concept that is widely used in other sectors, such as banking. We are concerned that, in the context used in the Handbook, “best interests” has a particular meaning that may not be aligned to the way the FCA may intend for the Principle to be interpreted across the whole system. This would create ambiguity and potentially a friction between supervisory and legal judgement depending on the context in which this term is used. For example, in COLL the rules are clear that schemes must “refrain from placing the interests of any group of unitholders above the interests of any other group of unitholders”<sup>8</sup>. There may be tension, therefore in separating what the best interests would be for an individual client compared to the existing clients where, as is the case for the investment management industry, retail client assets are in collective schemes. In addition, a more generalised requirement would also require clarity as to the connection between a new duty and existing law in order to avoid any unintended consequences that could lead to more legal actions and claims management actions on unfounded grounds.

In other words, both options, particularly the first as currently framed, may turn what is apparently a simple - and important - duty into a highly complex one, layering a series of new cross-cutting requirements onto a highly detailed existing framework that includes a range of significant consumer duties, including the annual assessment of value in the case of the fund management industry. The IA welcomes the opportunity to work with the FCA to agree terminology that would work for the investment management sector, particularly in light of the FRF Review and the proposals for activity-specific principles.

An additional concern is the strength of tone in both options. As a minimum the IA would expect the insertion of the term “reasonableness” in some form to ensure that the bar is

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<sup>8</sup> [COLL 6.6A Duties of AFMs in relation to UCITS schemes and EEA UCITS schemes - FCA Handbook](#)



not set at such a high level no firm may be able to demonstrate their compliance. This allows firms and the regulator to adopt a proportionate approach. It would also align to the proposal to embed the concept of reasonableness to all elements of the Consumer Duty, including the Consumer Principle.

As both of the options for wording of a Principle are problematic for the IA's members, the IA would welcome the opportunity to develop something more suitable that would work for the investment management sector and other parts of financial services. As a minimum, if the "good outcomes" option were to be taken forward, it should include the concept of "reasonableness" and be amended to, for example, "a firm must act with reasonable skill, care and diligence to deliver fair outcomes for retail clients".

## **Cross Cutting rules**

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

The IA is concerned that the articulation of the behaviours that the Cross-cutting Rules would require of firms are similar in tone and language to the proposed Principle. This is likely to create a layering of expectations, reducing clarity and adding complexity through interpretation of how these behaviours are supposed to apply to the existing Principles and more granular rules that are already in the Handbook. We would urge the FCA to acknowledge the link of any new cross-cutting rules to pre-existing rules that address the same issues as the new consumer principle, for example linking the Price and Value Outcome to the existing value assessment requirements.

The IA's view is that the introduction of Cross-cutting Rules in the manner proposed, without further clarity, will lead to complicated compliance processes that will lead to confusion both for firms and for consumers and will be costly for firms to implement and deliver little or no value to end consumers and will not reduce the harm that the FCA is looking to address. We appreciate the explanation, in the consultation, of the need to embed the concept of "reasonableness" but do not believe it appropriate that it refers to all reasonable steps. We consider that it is also important to embed the concept of proportionality, especially when it comes to those firms which do not have direct contact with clients.

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

The IA is concerned with the use of "all reasonable steps" in the Cross-cutting Rules as it sets a high threshold and overly burdensome obligation, which will create uncertainty about what precisely the Consumer Duty means in any given situation. The FCA should instead require firms to take "reasonable steps" which is more appropriate and in line with other parts of the Handbook. The IA would like more clarity on where regulated entities are falling short of the FCA's expectations in respect of the current regulatory framework and therefore the practical implementation of the new Cross-cutting Rules. Further, the FCA must ensure that the concept "consumers should take responsibility for their



decisions”<sup>9</sup> is not lost in the way the Cross-cutting Rules are written. This would not only go against current legislation but would mean that the intended outcomes of introducing the Consumer Duty would not be achieved.

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

The IA strongly supports matching services and products to customer needs. How well the Vulnerability Guidance has improved the levels of care for vulnerable consumers is yet to be determined. There is still a large amount of work ongoing, including with intermediaries, to achieve the aim within the investment sector itself, and more broadly across the FCA’s remit given the varied products and scope. The IA stands ready to support the FCA and its member firms in the application of the Vulnerability Guidance for the benefit of all customers to ensure consistency across the sector.

**Four Outcomes**

**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?**

The IA strongly support the simplification of regulation as it is currently unclear how the introduction of a new Consumer Duty would interact with the TCF Outcomes and Principles 6 and 7. To this end, the IA would request that the FCA reviews the Handbook to remove any Principle, rule or guidance that is superseded by, or seeks to achieve similar outcomes to the introduction of the Consumer Duty.

The IA notes that Principle 6 (‘A firm must pay due regard to the interests of its customers and treat them fairly’) and Principle 7 (‘A firm must pay due regard to the information needs of its clients, and communicating information to them in a way which is clear, fair and not misleading’) remain valid as they apply to all clients, not just retail consumers. The new Principle is specific to retail consumers through the lens of preventing harm through focusing on all aspects of the product and/or service lifecycle. This further illustrates how a consumer Principle, as proposed, does not fit with existing structures that have developed over time, given that existing principles have been designed to apply across all financial services businesses, not just those relating to retail investors.

Caution should be applied to ensure the application of Principles is consistent, as it is not clear this would be the case if a new Principle would mean Principles 6 or 7 are disapplied. If complying with a new Principle would be additive to Principles 6 and 7 then the need to disapply is not relevant. We consider that it would be very important to be clear as to the interaction between them, given that they are, in fact, all focused on similar outcomes. However, if it would be necessary to disapply Principles for a new Principle to effectively operate, this further supports our reservations about the lack of clarity of requirements that introducing a new Principle at this time may bring.

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<sup>9</sup> <https://www.legislation.gov.uk/ukpga/2000/8/section/1C>.



The Consumer Duty Outcomes would appear to replace the TCF Outcomes based on analysis of the metrics and measures in place. The TCF Outcomes likewise aimed to improve the outcomes for retail consumers. The exception is the first TCF Outcome which does not have a direct correlation to the proposed four Consumer Duty Outcomes as this TCF Outcome focuses on the culture of the firm and looks at metrics such as training, incidents and breaches. By introducing a Consumer Duty, the FCA should remove the TCF Outcomes if the FCA consider them to be ineffective in providing the framework for firms to provide the appropriate outcomes for retail customers.

This could be revisited if activity-specific principles are introduced as it could allow for some overlap of principles for all sectors, but introduce specific principles for sectors deemed to require them to mitigate an identified harm.

**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?**

Regulatory responsibilities are unclear if one layer of regulation is overlaid by another. Multiple regulations, all focusing on similar requirements, can complicate firms' navigation of rules in terms of producing and marketing/distributing their products and confuse end consumers. AIFs for example have to adhere to AIFMD, MIFID II, PRIIPS as well as all marketing and distribution rules at the same time, which potentially leads to box-ticking compliance as the intentions of the rules are lost to the plethora of requirements.

If new regulation is introduced, old regulations should be removed, and the new regulation should be subject to a 'fail fast' mechanism, where stakeholders can invoke a mechanism calling for an urgent review. This is in line with the recommendations of TIGRR report "to focus departments on minimising the creation of additional regulation, with the full knowledge that each new regulation creates costs and burdens for businesses, we should return to the 'one in, two out' regulatory offset principle"<sup>10</sup>

**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?**

There have been many changes implemented in the retail investment market in recent years, designed, among other things, to strengthen the investing culture across the UK population and to ensure that consumers who do invest, do so with confidence in a well-functioning market. It is important to see the Consumer Duty framework in the context of what firms already do to advance consumer protection, for example through the Assessment of Value, product governance requirements, etc.

It is not clear that the proposals will materially improve on the existing Principle 6 and the FCA's related guidance, as well as the requirements under the Senior Manager's Regime. Where the FCA finds activities that contravene the spirit of this Principle, the FCA should continue to (a) deal with that firm if it is firm specific, (b) if necessary, publish specific guidance and (c) only if absolutely necessary produce new rules. The IA would suppose that firms likely to operate contrary to the spirit of Principle 6 are likely to do the same with any new Consumer Duty. This would only be remedied through more targeted

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<sup>10</sup> [Final TIGRR Report](#)



supervision and enforcement to ensure these firms are brought in line with the FCA's expectations of firms operating in retail markets.

**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?**

The IA considers the proposals in aggregate amounts to a duty of care, but would urge the FCA to consider if they could achieve the requirements to introduce a duty of care in a more effective way than suggested by the proposals in the consultation through more effective supervision and enforcement of the existing rules.

The IA have concerns about the label of these proposals to ensure that they are not misleading for consumers, nor imply a fiduciary duty. Although the FCA is not branding the proposals explicitly as a "duty of care", which has a specific legal meaning, this may be how it will be perceived by consumers and referred to, given this is how it has been referred to since first discussed in 2017. As such, the FCA needs to be clear what the proposals do and do not mean.

The IA propose that calling the proposals a "Consumer Care" regime would be a more appropriate term than anything involving "duty".

## **The Four Outcomes**

### ***Outcome 1 – Communications***

**13. What are your views on our proposals for the Communications outcome?**

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

The IA fully supports the need for firms' communications to consistently support consumers by enabling them to make informed decisions about financial products and services. The IA has done much work in this space to help investment managers, not least in our fund communication guidance<sup>11</sup> (following FCA PS19/4), which was supported by consumer testing, to promote the use of consistent terminology in communications from fund managers about their funds to help consumers make comparisons across different funds. Furthermore, investment managers work in a highly regulated environment, including a highly regulated framework in which they have to communicate with customers (requirements to provide a prospectus, UCITS Key Investor Information Document (KIID) or PRIIPs Key Information Document (KID)). There are certainly arguments that some of these existing rules would run against the achievement of some of the outcomes in paragraph 4.9, but we have expressed our views on the ineffectiveness of existing disclosure requirements elsewhere. We think that if outcomes such as this were to be included, it would be important to acknowledge and explain how existing disclosure requirements, exist and fit with this, as well as achieve the desired outcomes or where the failing of such requirements are considered to exist which go a long way to address the practices outlined in paragraph 4.6 of the consultation. There is always opportunity for the industry to reassess the way it communicates with potential and current investors. We would argue

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<sup>11</sup> <https://www.theia.org/sites/default/files/2019-08/20190218-fundcommunicationguidance.pdf>



the investment management industry is already subject to the proposed requirements outlined in paragraph 4.9 and would welcome the similar rules be applied to communications from all firms which offer retail products to investors.

The Communications outcome should take into account the themes being addressed via the FCA's Call for Input on Consumer Investment Markets, notably on financial engagement, education and literacy. The IA notes that regulators have attempted to deal with the symptoms and not the causes of poor consumer comprehension of, and engagement with, financial products and services. The IA recognises financial education is not in the FCA's remit but consumers who are not engaged with their personal finances and have poor financial literacy will still make poor financial decisions and be more easily led by poor practice in financial firms. Better financial literacy goes a long way to counter much of the behavioural bias referred to in the consultation. Improved financial literacy and education could also help reduce harm from scams. Additionally, it is important to tackle issues with how retail consumer might obtain information about financial products as it is typically not obtained from regulators or regulated firms, but rather media outlets, online communities and websites of unregulated companies.

While rules in this space would aim to promote the use of clear and consistent language, this needs to be balanced with the need to be concise and clear and not force firms into a position whereby communication to investors becomes more lengthy due to firms' concerns of legal and regulatory risk in meeting overly prescriptive rules. There are a number of overarching key points that need to be considered as overall context when developing further rules in this space:

- *A framework for support, not prescription*; there are often no right answers in how communication should be developed and further FCA rules should not put constraints on how firms communicate. What is needed is clearer, updated and more relatable guidance. This would empower firms to capitalise on technological advances and features of digital designs that can support clear communications that cover off the risks as well as the benefits of a financial product.
- *Balance between concision and simplicity*: there is clearly a challenge in striking the right balance between being succinct and avoiding jargon – firms need to find a balance between the two and the IA is a strong advocate of consumer testing before it becomes law.

## **Outcome 2 – Products and Services**

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

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

Some of the concerns addressed in this part of the consultation are focused on high-risk product and services which are not the core activity of the investment management industry. There are already legislative measures in place for the investment management industry to ensure the products and services are developed with the target market in mind. In particular, PROD<sup>12</sup> already sets requirements on the design, approval, marketing and management of certain products and services throughout the product lifecycle. Whilst these do not have the status of rules, the industry applies them as such and supervisors

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<sup>12</sup> <https://www.handbook.fca.org.uk/handbook/PROD/>



treat them as such, therefore the IA would support these being applied to the rest of the industry where these do not already exist. Further, many of the products that retail clients interact with in this sector are themselves highly regulated, such as UCITS funds or stocks and shares ISAs with many inherent design features to ensure they are appropriate to the retail market.

### ***Outcome 3 – Customer Services***

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

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

The IA supports the intentions to ensure consumers receive high levels of customer service throughout the product lifecycle and support more targeted rules for where poor after-sales practices are found to be more useful in tackling this issue.

### ***Outcome 4 – Price and Value***

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

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

When purchasing any product or service, getting value is an important consideration. This is no different in financial services, and this is increasingly relevant as 75% of the UK's households use the services of an investment manager. Value is an ongoing and intensive area of focus for the FCA with respect to retail fund management. Following the final report of the AMMS<sup>13</sup>, the FCA introduced (among other reforms) new rules on fund governance and acting in investors' best interest rules. These FCA rules are set out in Policy Statement 18/8<sup>14</sup>, which requires authorised fund managers (AFMs) to:

- Carry out an annual value assessment and publish a statement outlining the process and outcome.
- Appoint at least two (and no less than 25%) of independent directors on their governing body.
- Assign a prescribed responsibility to the chair of their governing body for the value assessment, the representation of independent directors and acting in investors' best interests.

Earlier this year, the IA published its first analysis report<sup>15</sup> on the assessment of value reports issued in 2020. The report outlines what we have observed in industry practice in the first year. Based on this analysis, we highlight some of the approaches the IA believes have worked well in light of the FCA's objectives for the assessment of value. The FCA has also now given a strong indication of where it thinks improvements need to be made and the IA will be working closely with the industry to digest the findings and ensure that the assessment of value process and reporting delivers in line with expectations.

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<sup>13</sup> <https://www.fca.org.uk/publication/market-studies/ms15-2-3.pdf>

<sup>14</sup> <https://www.fca.org.uk/publication/policy/ps18-08.pdf>

<sup>15</sup> [Value Assessment Reports – Analysis and Initial Recommendations - April 2021](#)



It is not clear how the proposals in the consultation will go further than the existing requirements on the investment management industry. The Value Assessment process for AFMs is a detailed assessment which considers whether costs are reasonable and competitive and that the performance of a fund, after deduction of all payments, is delivering as expected. Our view is therefore that aligned with the Value Assessment that this already meets the consultation proposal statement “that the firm’s costs for manufacturing and/or distribution of the product or service should also be included in the consideration when it assesses value”. We would welcome the FCA confirming this for the investment management industry.

Fair value as an overall price for consumers in relation to the investment management sector is more complex as the total price consumers pay usually includes both product and service costs through third parties such as intermediaries and platforms and it is often not within the control of investment managers to influence platform fees or other service costs. The proposals could be interpreted that there is an expectation on product manufacturers to monitor and take action where aggregated total price would not represent fair value to retail investors in their view. As noted above, we would strongly resist the suggestion that one regulated firm should be “regulating” the price charged by another.

## **A Private Right of Action**

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

The IA do not support the introduction of a Private Right of Action as the existing complaints framework for consumers is clear in terms of how this operates, free for consumers and encourages two-way communication to resolve the complaint in a timely manner before a complaint is referred to the Financial Ombudsman Service (‘FOS’), if necessary. The IA would also like to note the conclusions by the Financial Services Consumer Panel (FSCP): “from the evidence reviewed is that were a right of action to be introduced, very few if any consumers who have grounds to exercise that right would be likely to do so.”<sup>16</sup> Neither a duty nor a Principle is necessary for individuals to bring complaints to the FOS.

The risks we see in pursuing a private right for damages in court in relation to breaches of the Principles is the potential undermining of the existing complaints framework which provides clarity for private individuals, rather than the complexity of another route to take forward complaints. Court action is also costly, likely to be a prohibitive option for many consumers and would be a lengthy resolution with uncertainty of outcome. Moreover, civil litigation could drive interpretation issues and unnecessary tensions between the Courts and the FCA, as the Principles must be viewed in the context of the overall Handbook.

It is generally much easier for consumers to use FOS to manage complaints and grievances as the primary source of recourse than through civil courts. Using the civil court system will be longer and likely to deliver more inconsistent results and is likely to result in higher up-front costs for consumers.

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<sup>16</sup> [fscp\\_report\\_final\\_version\\_23\\_july\\_20.pdf \(fs-cp.org.uk\)](#)



The IA also supports the FSCP's conclusion that "one of the principal arguments which has been made in favour of a right of action is that the threat of such action would incentivise firms to improve their culture and standards of conduct. Little evidence was found to support this argument, but conversely there is some evidence that legal forms of deterrence, such as sanctions and damages actions, may not have much impact on firms which fail to comply with the law."

The Principles are guiding principles supported and working in harmony with binding rules, guidance and evidential provision. The new proposed cross-cutting rules are behaviour based. It would therefore be more appropriate for consumers to be clearly informed of the conduct expectations of regulated firms and for consumers to following existing routes such, as the FOS, where firms have not taken reasonable steps or have failed to make good on promises in relation to products and/or services. This is particularly important given the legally ambiguous language that are inherent in the Principles that are designed to enable judgement to be used by firms and supervisors.

The role of claims management companies (CMC) is a point we raised in our response to FCA's Call for Input on the Consumer Investment Market<sup>17</sup>. We noted that where an individual uses a CMC, this may result in them paying up to 30% of their compensation to the CMC, and therefore consideration should be given to how a Private Right of Action would open up the route to allowing these firms to persuade consumers to go through court, which would potentially result in a less favourable outcome than could have been achieved through the FOS.

The IA note that in recent years there have been various initiatives to provide consumers with adequate redress for harm, including increasing the FOS limits and extending eligibility to recourse to small and medium-sized enterprises (SMEs). The IA's view, therefore, is that the FOS is the more appropriate process. If this is not deemed sufficient, it should be reviewed, but the proposals for a Private Right of Action as set out in the consultation should not be introduced.

**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?**

The introduction of a PROA would mean the FCA would lose control of how its Consumer Duty and any existing Principles are interpreted. This would lead to a regulatory environment predicated far more on case law, which will dramatically alter the financial services landscape and likely bring ever more limited availability of financial products to retail consumers due to uncertainty and a lack of legal risk appetite.

The UK needs to ensure we have a competitive, fair, predictable, customer-centric regulatory regime. The regulator must consider the appropriateness and proportionality of its decision-making, which courts will not be able to exercise.

Where other industries have a similar ability for a private right of action for consumers, such as the pharmaceutical and aviation industry, the regulator has to sign-off that a product (e.g. paracetamol or an aeroplane) is deemed safe for the public, which mitigates

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<sup>17</sup> [IA response to FCA Call for Input: The Consumer Investments Market](#)



the risk of litigation to an individual manufacturer. The IA do not propose that the FCA should be a product regulator in this sense, but note that this would, therefore, create a higher level of available litigation recourse for an investment product than a pharmaceutical drug.

The IA would like to highlight that the introduction of this Consumer Duty alongside a Private Right of Action would not strengthen the competitiveness of the UK and may stifle innovation due to the risk of litigation leading firms to not introduce new product types to market, but rather stick to those products that are already in the market. There may also be increases in costs through the product lifecycle, some of which may be borne by the consumer through reducing value.

### **Cost Benefit Analysis**

#### **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 costs involved?**

We would like to better understand why the existing Principles, Rules and guidance are not seen to be sufficient in addressing the issues with bad actors operating in retail markets and why the new Consumer Duty would be a more effective tool. There is a concern that the result of the proposals would be less a change in culture, but more a further administrative burden to document, evidence and justify. Furthermore that the result would be that well governed firms would be burdened with additional processes, checks and bureaucracy, with those that are not, not changing.

The investment management industry has, over the years, already devoted considerable time and resources implementing measures to improve consumer outcomes, as articulated in this response, including most recently the outcomes of the FCA's AMMS which identified a need for strengthening fund governance. This also has links to SM&CR designed to result in a culture change throughout the industry. Senior managers are also seen as key when it comes to setting up and maintaining the proposed changes in this consultation; in the paper it makes the point that, "as with all of the elements we propose in this consultation, our intention is that firms' senior management would be accountable'.

It is perhaps premature to seek further changes of this nature prior to a medium- term analysis of the results of the embedding of the SM&CR and AMMS.

Culture change and the maintenance of a healthy culture comes from within an organisation, it is not something another Principle is going to change. Providing additional insights about what the regulator is expecting might prove beneficial, similar to the annual feedback on the 5 Conduct Rules, which forms part of the IA's Culture Framework. The costs of implementing the new proposals will fall on those firms which already have a healthy culture, which will apply the concepts behind the Consumer Duty, while those which are the focus of the requirement will not. A better use of resources could be for the FCA to target those failing firms through the application and enforcement of existing Rules and Principles.



The Treating Customers Fairly initiatives which have been in place since 2013 may provide insights into the costs of implementation. While they did result in benefits to consumers, they also resulted in firms implementing new processes simply to satisfy the regulator that they were complying with the rules and guidance. Resources that may well have been better used elsewhere.

#### **24. Which elements of the Consumer Duty are most likely to necessitate changes in culture, policies or processes?**

As the FCA plan to say more about supervision and enforcement in the second consultation (later this year) it limits what can be said at this stage around the changes that would be required.

It is likely that firms will need to provide more documentation on the thought processes they have gone through around design, pricing, marketing and customer service. There will be a need to understand customer behaviours and review outcomes, including data to evidence this.

Consultants will look to support firms in implementing these new requirements, they are already encouraging firms to establish project teams, review their current processes and procedures and upgrade IT systems.

While the consultation says it will not be applied retrospectively, firms will need to consider existing products and services as it applies going forward and our industry has long term products. We would expect this to be costly, which consumers will ultimately bear, and will almost certainly stifle innovation.

#### **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?**

The IA supports the intentions of the FCA, but remain concerned that they will not provide further benefit to consumers of long-term savings and investment products or individual firms in the investment management sector over and above the existing rules and Principles. These should instead be more effectively supervised and enforced. The Consumer Duty would be unlikely to deter those firms that do not currently meet the standards that the regulator and public expect. The effectiveness of FCA supervision is key to bringing benefits to consumers, firms and markets, but the proposals for a Consumer Duty do not address how they would materially change the current regulatory environment where the FCA has already had prescriptive rules yet seen failures. Conversely, the FCA has successfully taken enforcement action against firms on Principle 6 and it is not clear why Principle 6 is no longer fit for purpose.

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

The issues that are discussed in the consultation should be able to be addressed through the regulatory life cycle of a firm from appropriate authorisation, and robust supervision



and enforcement action using existing Rules and Principles. Once a Principle is introduced it is applied across all firms, increasing costs across many sectors without tangible benefits in many cases. The introduction of a new Principle is not a targeted intervention, addressing specific concerns.

Regulators already have existing powers to protect consumers and arrange for redress where standards are not achieved. It is costly for retail consumer to bring private legal action through the courts, the proposals, including the PROA, would be unlikely to improve this situation. It might also result in an increased use of CMCs and therefore the potential to reduce further the financial redress that goes to consumers. We also consider that there is a likelihood that where consumers take disputes to court rather than FOS, the courts would take inconsistent views on the broad and sometimes vague wording in all the Principles, which are not written with legal certainty in mind. This in turn creates a lack of certainty for consumers and the regulated community.

We note there is a low level of complaints against the investment management industry with the FOS (fewer than 10 in most investment management categories<sup>18</sup>). At a time when there is general agreement that the FSCS needs reform, it would be premature to introduce the PROA, enabling the FSCS to widen the basis of consumer claims and increase costs on well run firms. It is better to address the issues resulting in calls for the reform of the FOS and FSCS levy than creating new means of accessing the redress.

A further increase in the costs of doing business will have a negative impact of the competitiveness of the UK as a global centre for investment management, which will negatively impact retail consumers who will suffer from a diminishing number of products and services to support their financial needs if firms exit the UK market.

**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?**

As previously noted, the IA is concerned that the introduction of the Consumer Duty risks layering expectations and adding complexity through how the rules and Principle are supposed to be interpreted across the industry, which without sufficient clarity will take time for firms to work through. The FCA should take into account that the financial services industry is going through a period of material change to how it operates and is regulated, for example as a result of Brexit. Any changes proposed should be subject to adequate implementation timelines that correlate to product lifecycles and take into account the time to introduce new governance arrangements, policies, procedures and practices.

Any changes made should take into consideration the time to implement recommendations brought about by the FRF Review and the FCA's Transformation Programme completing, and build on feedback from the SM&CR. Given that potential breadth and the number of points requiring clarification a six month window is inadequate. As a minimum, the IA would expect the FCA to allow two years for firms to implement the new Consumer Duty.

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<sup>18</sup> [Quarterly complaints data \(financial-ombudsman.org.uk\)](https://www.financial-ombudsman.org.uk/quarterly-complaints-data)