

Financial Conduct Authority

A new Consumer Duty

Feedback to CP21/13 and further
consultation CP21/36

RESPONSE FROM:

United Kingdom Shareholders' Association



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A new Consumer Duty Feedback to CP21/13 and further consultation CP21/36

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1. Introduction

1. For decades we have been concerned that the UK financial services industry earns very high profits (and is able to pay very high employee salaries) by exploiting retail customers.
2. This has been achieved by a variety of methods, some of which are listed in your consultation document, but which can all be summarised as excessive charging for products in relation to the value delivered to the customer.
3. The FCA's proposals can help to ameliorate that, but only if they are appropriately enforced.
4. In that regard, we consider that the greatest deficiency in CP21/36 is the unwillingness to include a private right of action especially in the light of the FCA choosing Option 1, 'good outcomes' than Option 2, 'A firm must act in the best interests of retail clients' as the Consumer Principle.
5. Quite apart from the exclusion of the PROA itself, it causes us to be concerned that the FCA may not have sufficient appetite to tackle the many abuses of the financial services industry.
6. The FCA's historic track record in providing and enforcing appropriate protection for retail users of financial products has been at best 'patchy' and at worst ignominious. Only strong action in the future will lead us to believe that the FCA has finally become a champion of retail customers.
7. We would be happy to discuss our consultation response with you. If you would like to take up this offer, our contact details are on the first page.

2. About UKSA (United Kingdom Shareholders' Association)

8. UKSA is the oldest shareholder campaigning organisation in the UK, with 14,000 members. We are a not-for-profit company that represents and supports shareholders who invest in the stock market.
9. There are many agents and intermediaries active in financial markets. Unlike them, we are an organisation solely representing people who are investing their own money.
10. UKSA was formed to provide private shareholders with a voice, influence and an opportunity to meet like-minded fellow investors. It is structured as a non-profit making company with annual subscriptions. An elected Chairman and Board of Directors (all volunteers and individuals with a wide range of backgrounds and experience) monitor a regional organisation. Each region benefits from oversight by an elected regional Chairman and Committee.
11. We build relations with regulators, politicians and the media to ensure that the voice of individual shareholders is reflected in the development of law, regulation, and other forms of public policy. See www.uksa.org.uk

3. Answers to your numbered questions

Q1: Do you have any comments on the proposed scope of the Consumer Duty?

12. We broadly agree with the FCA's approach to the proposed scope of the Consumer Duty.
13. In particular the proposals in the FCA's paragraph 3.10 to follow the categorisations in the sectoral sourcebooks appears to be a pragmatic way of dealing with the boundary issues.
14. We also concur with making the duty applicable to dealings with prospective customers.

Q2: Do you have any comments on the proposed application of the Consumer Duty through the distribution chain and on the related draft rules and non-Handbook guidance?

15. We agree with the approach set out in the FCA's paragraph 3.26. As well as applying to firms that deal directly with retail customers, the Consumer Duty should apply where a firm higher up the distribution chain is involved in activities which it knows, or should know, will be used with retail customers.
16. The Consumer Duty should also cover the technology used by those same firms in their dealing with customers. This is implicit in 3.26 but should be spelt out as technology is the main means in delivering and recording products and services.
17. We accept the FCA's proposal in paragraph 3.22 to not make all firms in the distribution chain responsible for consumer outcomes on a joint and several basis.
18. However, while being liable only for their own activities, it should not be enough for a firm to just withdraw from a distribution chain if it suspects misbehaviour elsewhere in the chain. Instead, there should be a positive duty to report such suspicions to the FCA, with sanctions in the case of failure to report.

Q3: Do you have any comments on the proposed application of the Consumer Duty to existing products and services, and on the related draft rules and non-Handbook guidance?

19. We support the requirement in the FCA's paragraphs 4.3 and 4.4 requiring firms to review their existing product range before those products continue to be sold or renewed.

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20. Contracts held by existing customers are more challenging. The FCA says in paragraph 4.9 *“Where a firm is taking action to comply with the Consumer Duty in respect of any product or service with existing contracts, we would not expect firms to give up any contractual rights they had a firm expectation of being able to enjoy, although they would be free to do so.”*
21. However, where those existing products have continuing charges, for example annual management fees on investment funds, then firms should be required to consider whether the existing contractual relationships satisfy the Consumer Duty. Where they do not, the firm should be required to take remedial action, such as revising the charging structure or, as paragraph 4.9 says, assisting the customer to switch to a new product.

Q4: Are there any obstacles that would prevent firms from following our proposed approach to applying the Consumer Duty to existing products and services?

22. We do not represent firms and are unable to answer this question.
23. However, if firms cite obstacles as a reason for not applying the (new) Consumer Duty to existing products and services, we would expect the FCA to challenge any such cited obstacles. We find it hard to identify any circumstances where the Consumer Duty should not be applied.

Q5: Do you have any comments on the proposed Consumer Principle and the related draft rules and non-Handbook guidance?

24. In paragraph 29 of our response to CP21/13 we wrote “We strongly prefer Option 2: ‘A firm must act in the best interests of retail clients’.” That remains our view. Accordingly, we are disappointed that the FCA has chosen to proceed with its alternative wording.
25. While we are not direct users of the Handbook, the way that the Consumer Principle and the rules are set out in the draft text included in the consultation document is clear and emphatic. The key test will be how firms behave, and how the FCA enforces these proposed rules.

Q6: Do you agree with our proposal to disapply Principles 6 & 7 where the Consumer Duty applies?

26. We do agree with the disapplication of Principles 6 & 7 where the Consumer Duty applies. The text of those Principles otherwise looks as if it might overlap with the Consumer Principle, and we regard such an overlap as potentially confusing or misleading. Once the Consumer Duty is introduced, Principles 6 & 7 should fall away for all situations where the Consumer Duty applies.

Q7: Do you agree with our proposal to retain Handbook and non-Handbook material related to Principles 6 and 7 should remain relevant to firms considering their obligations under the Consumer Duty?

27. As mentioned above, we are not direct users of the Handbook and non-Handbook material. However, we consider that having a Handbook that is clear and easy to follow is more important than any attempt at brevity, especially given that the Handbook and non-Handbook material are already very long.
28. Accordingly, we recommend proceeding as follows:
- 28.1. Material related to Principles 6 & 7 which the FCA considers relevant to the Consumer Duty should be reproduced, amended as necessary, within the Consumer Duty section. This would mean that firms subject to the Consumer Duty would have a single place of reference, all clearly under the Consumer Duty setting, setting out the rules and non-Handbook material that apply to them.
- 28.2. Firms who are not subject to the Consumer Duty, but who remain subject to Principles 6 & 7 would continue to refer to the Handbook material expressly relating to those principles.

Q8: Do you have any comments on our proposed cross-cutting rules and the related draft rules and non-Handbook guidance?

29. As we say in paragraph 25 above, while we are not Handbook users, the rules seem clear and emphatic. We would expect the non-Handbook guidance to be helpful to firms, although we do not represent firms.
30. The acid test will be how well the FCA enforces these rules when firms engage in bad behaviour. Sadly, our experience is that a significant part of the UK's financial services industry will continue to engage in bad behaviour until they are forcibly stopped and penalised by regulators or by litigation.

Q9: Do you have any comments on our proposed requirements under the products and services outcome and the related draft rules and non-Handbook guidance?

31. The text that you have written appears to us to adequately explain to firms how they should address these issues.

Q10: Do you have any comments on our proposed requirements under the price and value outcome and the related draft rules and non-Handbook guidance?

32. The text that you have written appears to us to adequately explain to firms how they should address these issues.

Q11: Do you have any comments on our proposed requirements under the consumer understanding outcome and the related draft rules and non-Handbook guidance?

33. The text that you have written appears to us to adequately explain to firms how they should address these issues.

Q12: Do you have any comments on our proposed requirements under the consumer support outcome and the related draft rules and non-Handbook guidance?

34. The text that you have written appears to us to adequately explain to firms how they should address these issues.

Q13: Do you think the draft rules and related non-Handbook guidance do enough to ensure firms consider the diverse needs of consumers?

35. This is a very difficult subject, particularly when it comes to vulnerable customers. Organisations need to provide a vast range of help and support before full equality and inclusion can be achieved. Whilst we are not able to comment meaningfully, we provide some feedback from our more marginalised members:

35.1. difficulties in accessing platforms;

35.2. made to feel stupid if they are unable to understand and apply the help offered;

35.3. unable to correct mistakes as a result of misunderstanding.

36. We hope that the FCA has consulted with organisations which represent vulnerable customers.

Q14: Do you have views on the desirability of the further potential changes outlined in paragraph 11.19?

37. No additional comment.

Q15: Do you agree with our proposal not to attach a private right of action to any aspects of the Consumer Duty at this time?

38. We disagree with the FCA's proposal to not attach a private right of action.

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39. In paragraphs 65-73 of our response to the first consultation, CP21/13, we explained why we consider a private right of action to be necessary. We have nothing to add to that.

Q16: Do you have any comments on our proposed implementation timetable?

40. We consider the proposed implementation timetable is reasonable.

Q17: Do you have any comments on our proposed approach to monitoring the Consumer Duty and the related draft rules and non-Handbook guidance?

41. We do not represent firms. However we assume that the FCA already requires firms to retain records of all the monitoring that they undertake, and that this would extend to monitoring as set out in the FCA's paragraphs 14.5-14.13.

Q18: Do you have any comments on our proposal to amend the individual conduct rules in COCON and the related draft rule and non-Handbook guidance?

42. No comment.

Q19: Do you have any comments on our cost benefit analysis?

43. We do not represent firms and cannot comment on your cost estimation.

44. While we have not attempted to quantify it, we share the FCA's expectation that the benefit to consumers from a proper implementation of the Consumer Duty would be very large. For far too long the financial services industry has been able to sell overpriced products to retain customers, with negligible correction from market competition.

Q20: Do you have any other comments on the draft non-Handbook guidance?

45. No response.

Q21: Can you suggest any other examples you consider would be useful to include in the draft non-Handbook guidance?

46. No response.