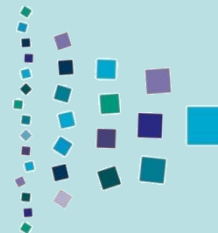


# PROTECT

## May 2021

### GI Product Governance, Reviews, Value and now - a Consumer Duty

Malcolm  
Padgett  
LEGAL  
REGULATORY  
COMPLIANCE  
TRAINING



# A 16-year regulatory journey



2005



# We can still recognise where the journey began . . . .

The screenshot shows the FCA Handbook website. At the top, the FCA logo is on the left, and navigation links for 'FCA Website', 'PRA Rulebook', 'Glossary', 'Useful Links', and 'Contact Us' are on the right. A search bar labeled 'Search the Handbook' is also present. Below this is a horizontal menu with links: 'Home', 'FCA Handbook' (highlighted), 'What's New', 'Instruments', 'Forms', 'Guides', 'Technical Standards', 'Level 3 Materials', 'Join Up', and 'MyFCA'. A breadcrumb trail shows 'Home >> FCA Handbook'. The main content area has a 'Table of Contents' and 'Content' tab. A status message notes Brexit changes. On the left, there are filters for 'Latest', 'Browse by topics', 'Level 3 Materials', and 'Show timeline'. A promotional banner for the 'FCA Handbook in print' is also visible. The main list of handbook sections includes 'High Level Standards', 'Prudential Standards', 'Business Standards', 'Regulatory Processes', 'Redress', 'Specialist sourcebooks', 'Listing, Prospectus and Disclosure', 'Handbook Guides', 'Regulatory Guides', and 'Glossary', each with an 'Expand +' button. A footer contains links for 'Contact us', 'Accessibility', 'Help', 'Terms & Conditions', 'Legal Information', and 'Privacy Policy'.

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**Status:** Please note you should read all Brexit changes to the FCA Handbook and BTS alongside the main [FCA transitional directions](#). Where these directions apply the 'standstill', firms have the choice between complying with the pre-IP completion day rules, or the post-IP completion day rules. To see a full list of Handbook modules affected, please see Annex B to the main [FCA transitional directions](#).

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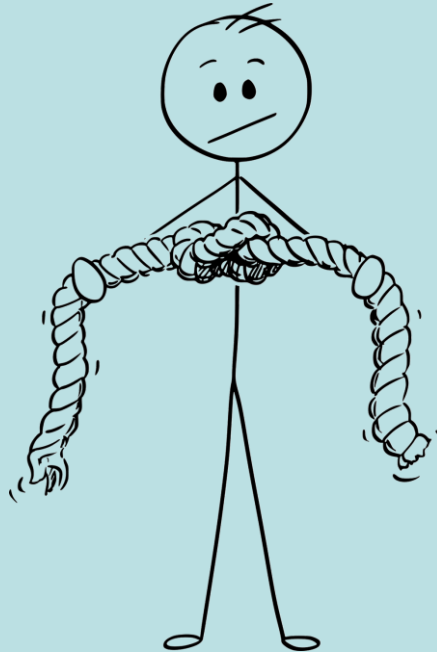
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# But then . . . .

- Regulation based on TCF . . .
- Then regulation based on TCF Outcomes
- Then “Principles-based regulation”

# Each basis for regulation was . . .

Moving away from the certainty of rules, to give “wriggle room” to the regulator – and take “wriggle room” away from firms



# But firms still saw Principles-based regulation as. . .

- primarily focused on their conduct of business . . .
- “Is each transaction with our customers meeting those expectations”?
- So, even today, most firms still see their operational conduct of business as the focus for their compliance

# Can you do a compliance audit Malcolm?





“I can . . . .



. . . if you want to spend a lot of money, but any audit will fail to address any shortcomings which are particularly likely to pose a significant risk of regulatory enforcement being taken against your firm



Serious regulatory breaches of regulation  
do not happen here . . .



# They happen here . . . .



# The FCA realised this when it commenced its regulatory “journey”

- Regulation of the sales process “alone is ineffective” . . . .
- Because it had “failed to prevent waves of consumer detriment”
- The FCA (from 2013) instead would monitor the risks to consumers by “focusing higher up the value chain” . . . .

# An so it has . . . .

- First with a focus on firms' “conduct risk” and “culture”
- Then (helped by the IDD) a focus on product oversight & governance and customer best interests
- And now huge focus on “value”:-
  - value measures,
  - value in the distribution chain; and
  - “fair value”

# And, even more recently – “doing the right thing”

“In order to regulate in this world, we need to be more agile and confident in using our Principles for Business to take action against those firms which are not doing *the right thing*”

Charles Randell, FCA Chairman April 2021

# Why does he want a focus on firms “doing the right thing”?

“In order to pivot to a greater focus on outcomes, in a rapidly changing world, the approach of regulators and legislators needs to change. Both financial services legislation and financial regulation are full of complex detail, with statutes, statutory instruments and rulebooks that fill countless shelves. But complexity produces loopholes and opportunities for regulatory arbitrage”

Charles Randell, FCA Chairman April 2021

# So, the FCA Chairman is telling us that . . .

- The law, rulebooks and detailed compliance checks are not what will deliver the “outcomes” which the regulatory is seeking . . . .
- Certainty creates “loopholes” - aka “wriggle room”
- So, he asks, what regulatory approach will deliver the “outcomes” which the regulator is seeking – and can enforce”?
- The Chairman suggests the answer lies in “greater confidence in using the Principles for Business” . . . .



# The Principles for Business?

1 Integrity	A <i>firm</i> must conduct its business with integrity.
2 Skill, care and diligence	A <i>firm</i> must conduct its business with due skill, care and diligence.
3 Management and control	A <i>firm</i> must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4 Financial prudence	A <i>firm</i> must maintain adequate financial resources.
5 Market conduct	A <i>firm</i> must observe proper standards of market conduct.
6 Customers' interests	A <i>firm</i> must pay due regard to the interests of its <i>customers</i> and treat them fairly.
7 Communications with clients	A <i>firm</i> must pay due regard to the information needs of its <i>clients</i> , and communicate information to them in a way which is clear, fair and not misleading.
8 Conflicts of interest	A <i>firm</i> must manage conflicts of interest fairly, both between itself and its <i>customers</i> and between a <i>customer</i> and another <i>client</i> .
9 Customers: relationships of trust	A <i>firm</i> must take reasonable care to ensure the suitability of its advice and discretionary decisions for any <i>customer</i> who is entitled to rely upon its judgment.
10 Clients' assets	A <i>firm</i> must arrange adequate protection for <i>clients'</i> assets when it is responsible for them.
11 Relations with regulators	A <i>firm</i> must deal with its regulators in an open and cooperative way, and must disclose to the <i>appropriate regulator</i> appropriately anything relating to the <i>firm</i> of which that regulator would reasonably expect notice. <sup>1</sup>

# Principles-based regulation. . .

- All significant enforcements, which have been made by the FCA against firms since 2013, have been solely based on the breach of one or more of those Principles for Business – not for any breach of any other FCA rules
- So, checking that the outcomes of your business model meet all the Principles for Business is a very good idea . .
- So is checking that you are (across the board) delivering on the TCF outcomes . .

# The TCF Outcomes

- **Outcome 1:** Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the **corporate culture**
- **Outcome 2:** Products and services marketed and sold in the retail market are **designed to meet the needs** of **identified consumer groups** and are **targeted** accordingly
- **Outcome 3:** Consumers are provided with **clear information** and are **kept** appropriately **informed** before, during and after the point of sale
- **Outcome 5:** Consumers are provided with products that **perform** as firms have **led them to expect**, and the associated service is of an acceptable standard and as they have been led to expect

# But . . . .

- The Principles for Business have been in place since 2005!!!!
- The TCF Outcomes have been required “as business as usual” since 2008!!!!
- And these, the FCA recognised in 2013 had “failed to prevent waves of consumer detriment”
- So why, in 2021, is the Chairman of the FCA still focusing, now, on the Principles for Business and their outcomes?

# Prepare to be inspired - because . . .

“There is determination to transform the FCA to produce better outcomes for the post-COVID-19 world”



# Or maybe not . . .

“much of what the FCA wants to do has been tried before but has not produced the outcomes needed. It is therefore important to consider if it will be different this time? If you want different outcomes, but don’t change what you are doing, your actions become the very definition of insanity; doing the same thing, over and over again, and expecting different results”

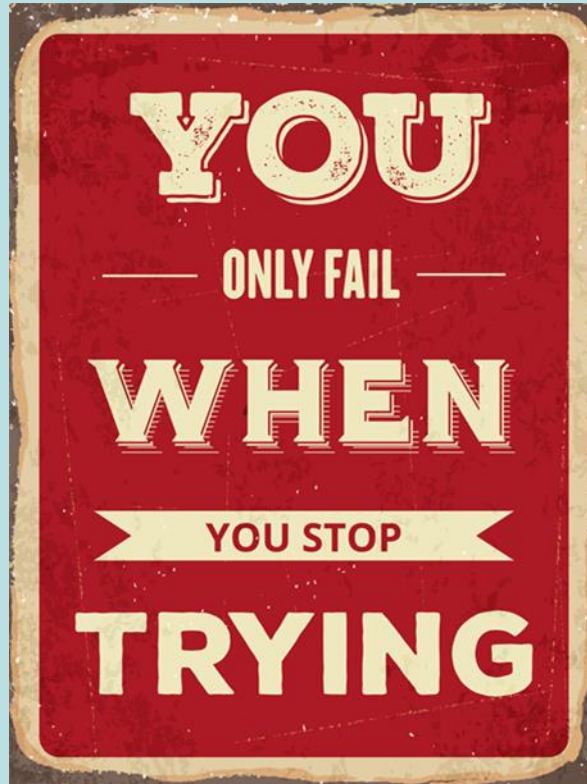
Charles Randell, FCA Chairman April 2021

# Insanity?



- So, it appears that the FCA wants to “deliver transformation” in its supervision of firms, by getting firms to do “the right thing” via a focus on principles and outcomes
- But this is the very focus which has been, in the Chairman’s own words, “tried before but has not produced the outcomes needed”

Is the FCA simply saying . . .





# The FCA Chairman answers this charge . .



“I don’t think so. We need to keep going. We need to focus, even more, on defining the right outcomes, **we need to measure them even more** and we need to act on the results even faster. That way we will be able to prioritise where we focus our resources even more effectively against the sources of harm that need the greatest attention”

# Measuring outcomes . . .



# Notoriously difficult to do!!

- The FCA has attempted to do this via Market Studies over many years
- Often it finds that one set of data disproves another – and by the time the FCA has the data it needs, the market has moved on
- The Chairman knows this . . .

# The solution

“One of the key strands of our transformation programme is a **data strategy** which identifies data gaps in our everyday supervision of firms and markets and remedies those gaps, so that we can turn data about outcomes into prompt, agile and more preventative action. Therefore, one of the key strands of our transformation programme is a **data strategy** which identifies data gaps in our everyday supervision of firms and markets, and remedies those gaps, so that we can turn data about outcomes into prompt, agile and more preventative action”

# Be ready for change

- The amount and the frequency of information which the FCA will require you to routinely (or on demand) provide to it will increase significantly
- Make sure that your senior management systems and controls are up to the task
- That is part of a bigger, and even more significant picture . . .

# The Picture

The  
SM&CR

Product  
Oversight &  
Governance



Customers'  
Best  
Interests

Value and  
Value  
Measures

# The need to be on top of what your data tells you (and will tell the FCA) . .

- Is a crucial element of the individual responsibility which is respectively held by each senior manager of your firm, to the FCA
- Meaningful product reviews which drive and then evidence improved outcomes must be at the center of your business to comply with PROD
- The FCA will expect you to be able to demonstrate that the customer's best interests are at the heart of your business
- Your ability to measure outcomes and to be able to share this with the FCA must improve

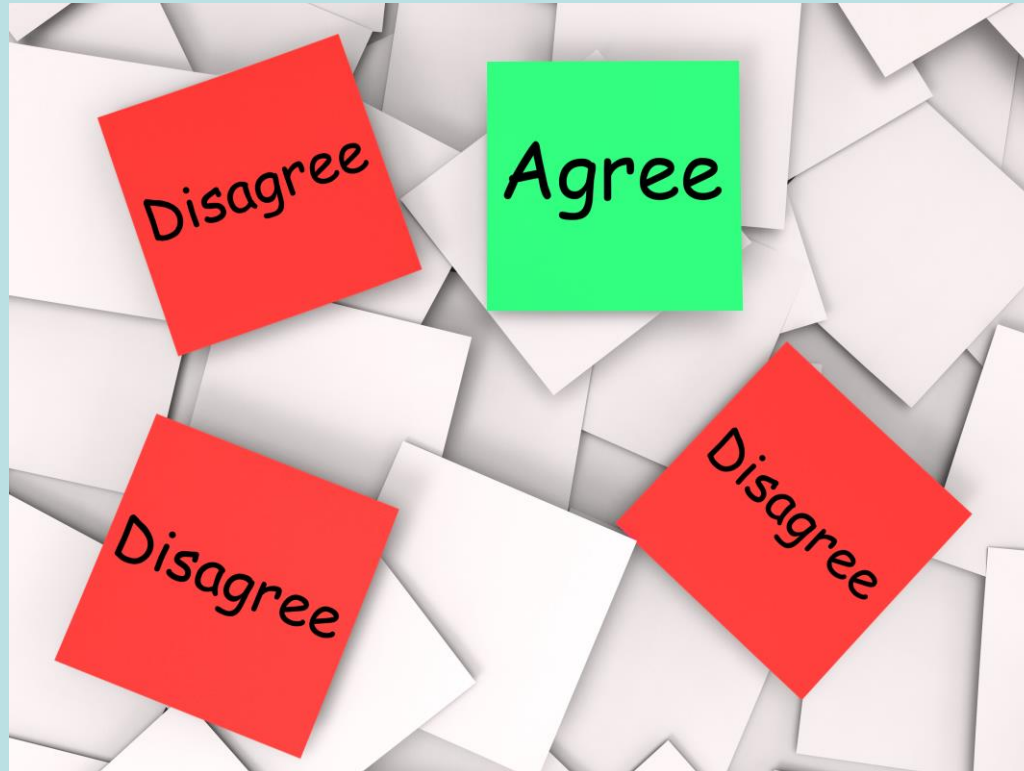
# Is that it?



Is better data and better use of data at firm and regulatory levels the new way by which, alone, the financial services market will all avoid “doing the same thing over and over again” and be the approach which will “deliver different results”



# The FCA (and HMG) think not!



# Be prepared for more insanity



# If the unmeasurable regulatory concepts of

- TCF
- TCF Outcomes
- Principles-based regulation; and
- Customers' Best interests . . . . .

# Have become . . .

“ the very definition of insanity; doing the same thing over and over again and expecting different results”

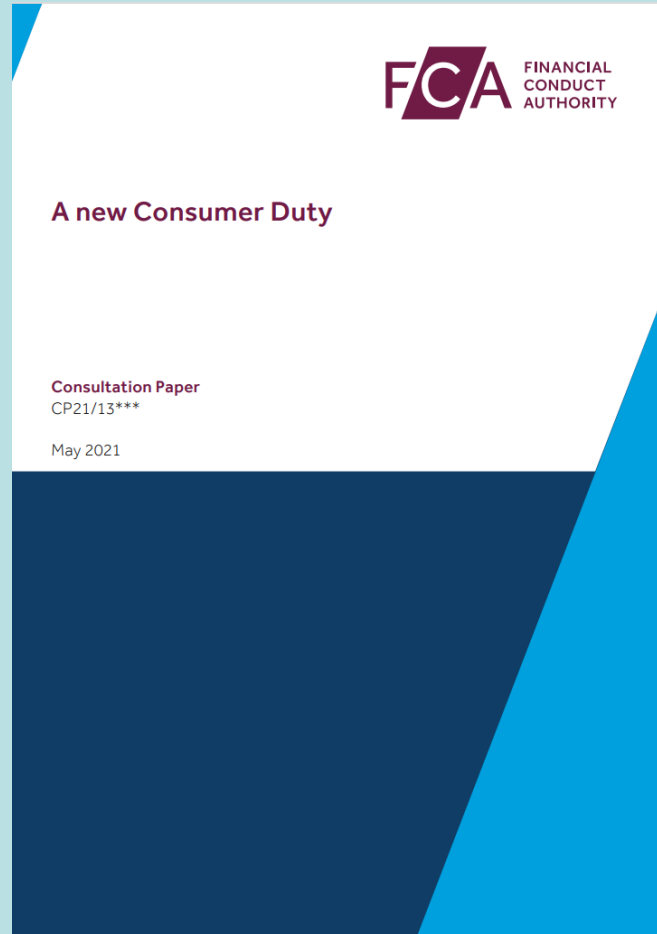
What do we need from the regulator now?

# Another regulatory concept!!



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# A Consumer Duty



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# What is the FCA doing - is this more insanity?

- The idea of a Consumer Duty has been rumbling around since the FCA Business Plan of 2017
- There was a CP in 2018 – Covid then intervened
- The Government is applying huge pressure for the Duty to be imposed
- So - we better look at what the FCA is proposing?

# It is not very sure!!

- This is probably a more genuine “consultation” than most
- The FCA wants to avoid “insanity”, but is aware that the reputation and culture of financial services remains very low, and it needs to be seen to be addressing this
- It knows that the problems which the government wants it to address are found . . .



# Here . . . .



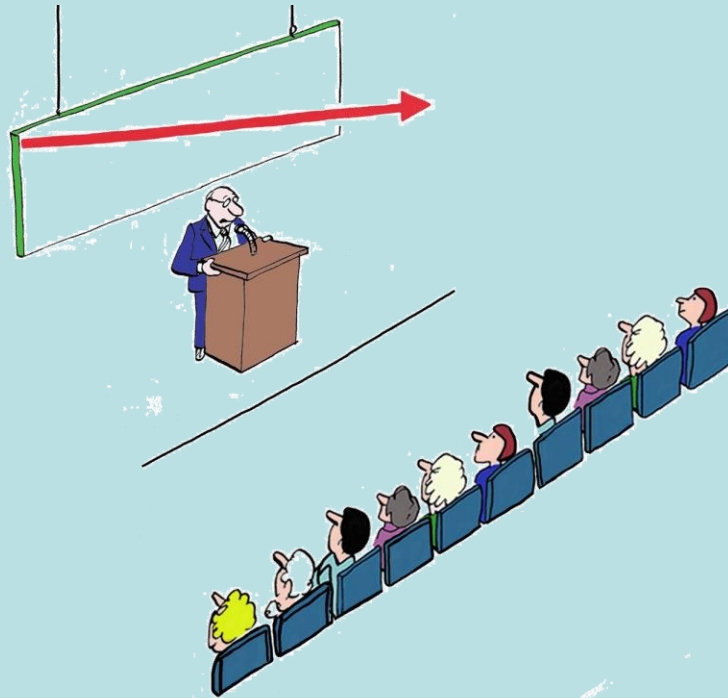
# Not here



# The FCA want firms to focus on

- “The right outcomes”
- “doing the right things”
- And it knows why firms (very often) fail to do this . . .

# Boardroom conflict of interest - between

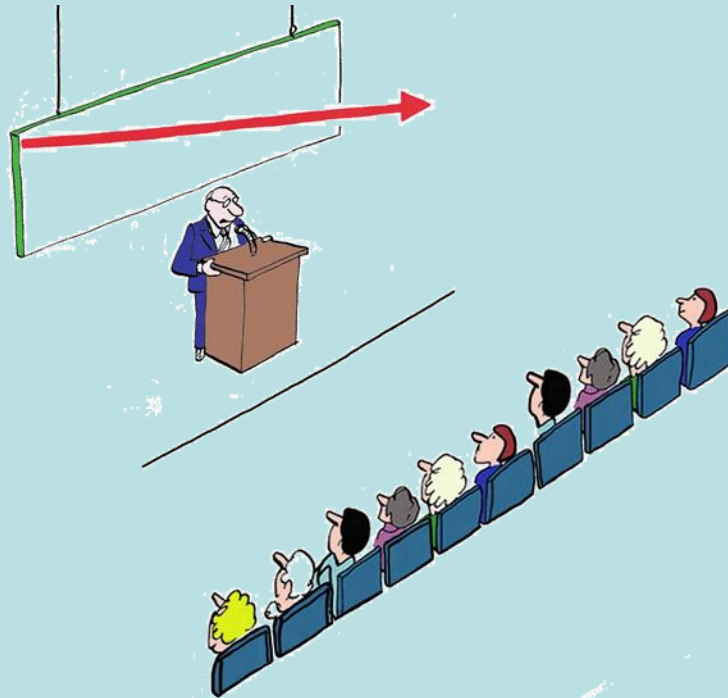


**“If you look at it just so  
you will notice the upward trend.”**

# And here



In the great majority of case this wins . .



**“If you look at it just so  
you will notice the upward trend.”**

# And the “insanity” continues



# This is what lies behind the proposal for a consumer duty





# What is proposed?

- A new “Consumer Principle” that provides “an overarching standard of conduct”
- a set of “Cross-cutting Rules and Outcomes that support the Consumer Principle” by setting “clear expectations for firms’ cultures and behaviours”
- “We want all firms to be putting consumers at the heart of their businesses, offering products and services that are fit for purpose and which they know represent fair value”
- Consultation until 31 July – then “We expect to publish a second consultation by 31 December 2021 and will make any new rules by 31 July 2022”

# What will the new “Consumer Principle” be?

- It will be a new ‘Consumer Duty’
- It will form “part of our range of regulatory tools”
- The Consumer Duty will be a new Principle for Business
- The FCA says that the Duty would set “a new and higher expectation of the standards of conduct that we expect from firms, putting consumers in a better position to take responsibility for meeting their financial needs and objectives”

# What will the new Consumer Duty be?

- Option 1

“A firm must act to deliver good outcomes for retail clients”

- Option 2

“A firm must act in the best interests of retail clients”

# Hang on . . . .



# Isn't this all rather familiar?

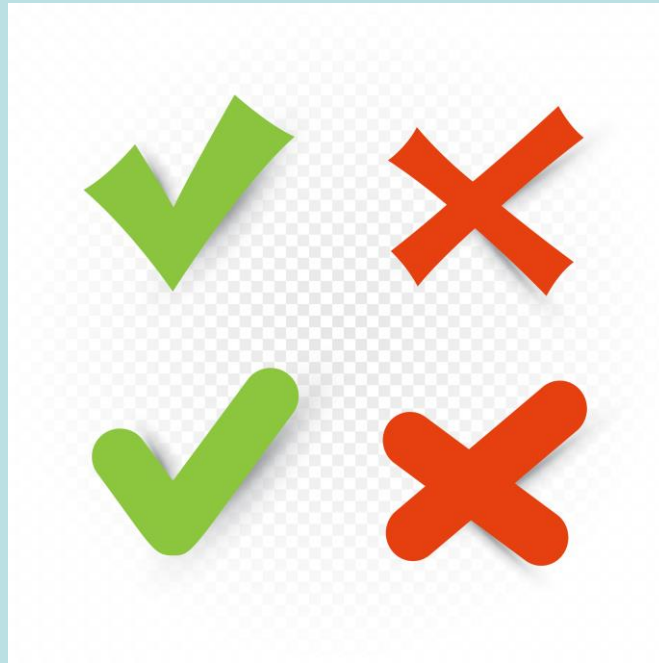
- We already have the Principle of Treating Customers fairly
- We already have the need for good consumer outcomes
- We are already obliged to operate, under ICOBS, to meet the customer's best interests
- Isn't this just . . . . .

# The very definition of insanity . . .



“doing the same thing over  
and over again and expecting  
different results”

# Well – Yes and No

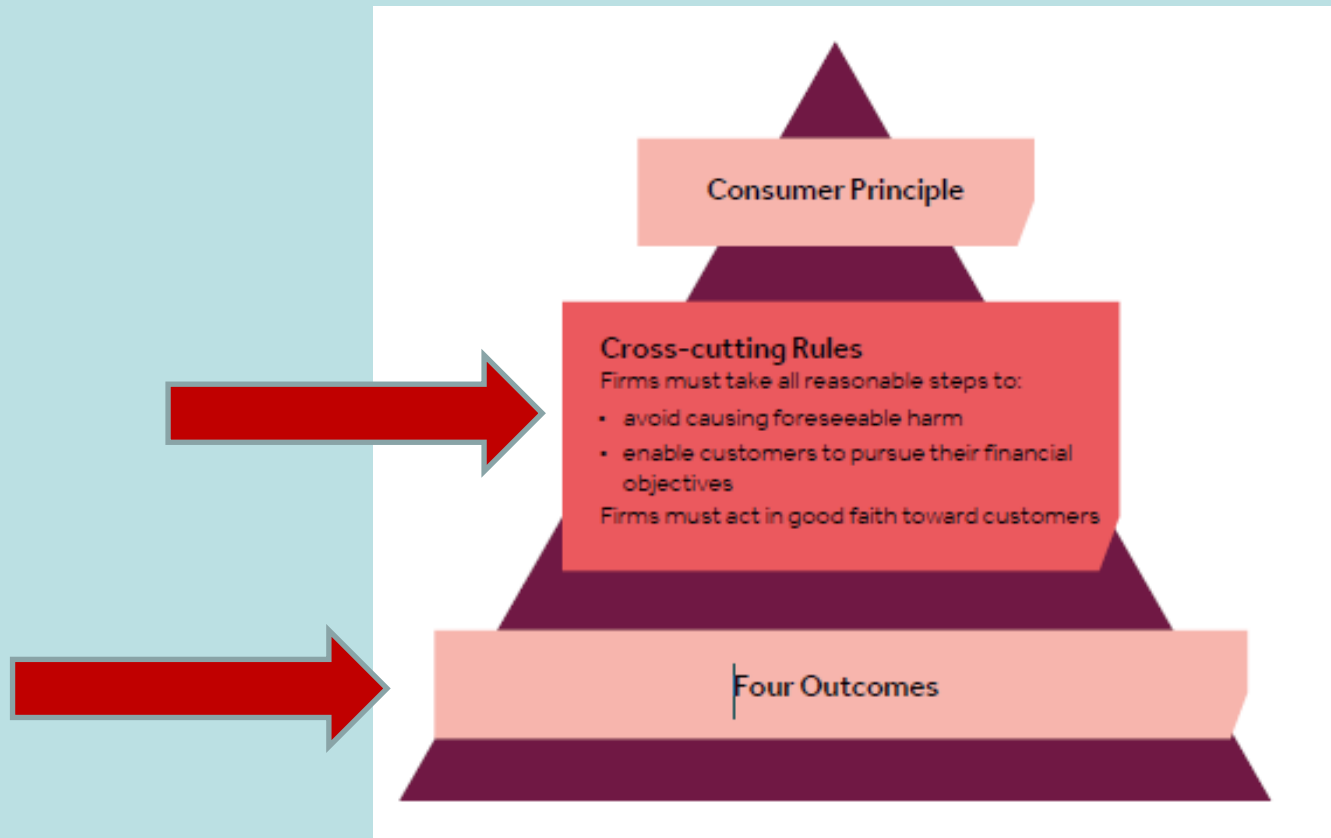


# The FCA would say “no” . . .

- “Although we have previously offered guidance on the outcomes that should result from ‘Treating Customers Fairly’ under Principle 6, (the TCF Outcomes) framing the Consumer Principle as ‘outcomes based’ would take this a step further. It would underline that firms should not focus simply on processes, but on the impact of their actions on consumers”
- “Firms should not only “pay due regard” to customer interests, but act to deliver good outcomes to them” and
- “The concept of a ‘good outcome’ does not have an established legal meaning. The rules and guidance in the wider Consumer Duty would give firms greater clarity *on what ‘good’ looks like*” . . .



So, it is more of the same – but with greater  
“clarity as to what good looks like” . . .



# The (proposed) three “Cross Cutting Rules”

- Take all reasonable steps to avoid causing foreseeable harm to customers
- Take all reasonable steps to enable customers to pursue their financial objectives
- Act in good faith

# The FCA say . . .

The Consumer Duty would apply across **all of a firm's activities**  
– from high-level strategic planning to individual customer interactions

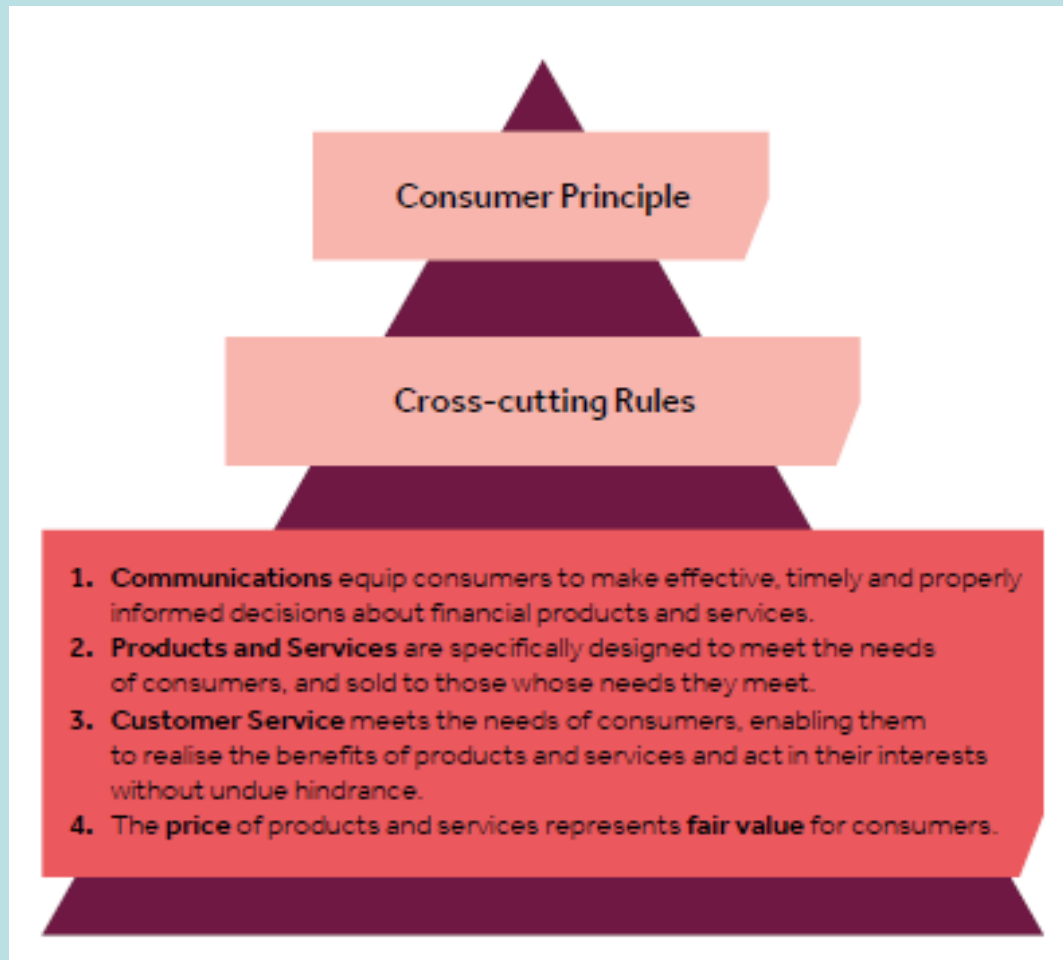
# But does this really add anything?

- For many firms - yes
- But for insurance firms no – because:-
  - The ICOBS requirement to operate to the customer's best interests
  - PROD 4 – product governance and oversight
  - The FCA focus on value, fair value and value in distribution

should already be driving behaviours, within insurance firms, which would meet the proposed Consumer Duty

- What the proposals may add for insurance firms . .

# Some greater clarity – “the Four Outcomes”



# The Four Outcomes

- **Communications** – firms must equip consumers to make effective, timely and properly informed decisions about financial products and services
- **Products and Services** must be specifically designed to meet the needs of consumers, and sold to those whose needs they meet
- **Customer Service** meets the needs of consumers, enabling them to realise the benefits of products and services and act in their interests without undue hindrance
- The **price** of products and services represents fair value for consumers

# Where does the “clarity” come from?

- Over 20 pages in the Consultation Paper of “narrative” as what the FCA will expect from firms as outcomes under the four headings **Communications, Products and Services, Customer Service and price**
- The FCA propose another consultation on how it will convert this “narrative” into Handbook Rules and Guidance to support firms in delivering on the Consumer Duty

# So as the FCA grapples with “insanity”

- It risks deluging you with even more (and possibly overwhelming) materials on how it thinks you must “do the right thing”
- But these may provide you with some greater clarity of those expectations (see e.g., the material on “value”)
- We don’t know yet – because, as we have seen, the FCA is not consulting on the detail of any Cross Cutting Rules or how it will guide you to deliver on the Four Outcomes
- This give you a chance to engage with the FCA to help it avoid insanity



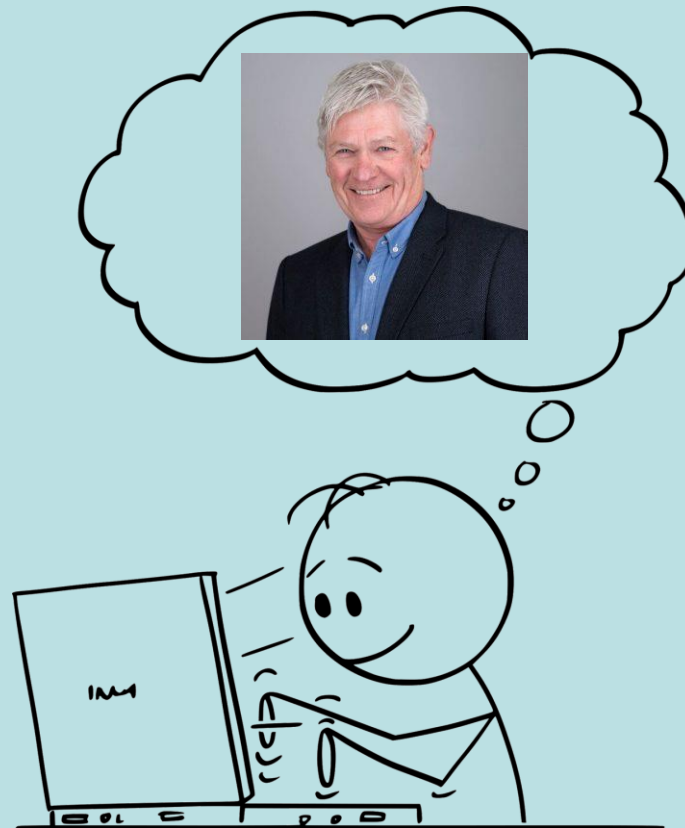
One other thing the FCA is not consulting on  
(for now)



# A Private Right of Action (PROA)

- Should a breach of the Consumer Duty give rise to a “private right of action”?
- This would be a right for consumers (no doubt via CMCs) to sue your firm directly for failing to meet the Consumer Duty
- I think the FCA is not keen – it sees the Consumer Duty as a regulatory tool with which to dig deeper into your culture
- “We are not making any specific proposals on a PROA at this stage”
- But – do respond to the Consultation on this and do keep an eye on further Parliamentary pressure for a PROA

# I planned . . . .



. . . . to talk to you today about . .

- “Product Governance, Reviews and Value”
- Events overtook the title – but not the message I would have given
- If you review and evaluate (measure) your products and distribution, not from a corporate perspective but from a consumer perspective; and
- If you have the data to demonstrate that you are firm with the culture and values which evidence an overriding duty to your customers . . .

# Then . . . .

- Any “Consumer Duty” should not hold any significant fear for you (save a PROA) - provided that you do . . .
  - review and evaluate (measure) your products and distribution (as required by PROD), not from a corporate perspective but from a consumer perspective; and
  - you have the data to demonstrate that you are firm with the culture and values which will consistently deliver the outcomes which your customers should reasonably expect
- And if you are doing this . . .

You will not be over-focused on conduct of business audits . . .



# Instead . . .

- you will be developing PROD compliant, consumer centric, product reviews . .
- which will force you to fully focus on fair value to your customers, which will in turn . . .
- force (and this is the difficult bit) the review of your business models and all the historic drivers which will would, otherwise, breach the proposed Consumer Duty
- Until you have all done all that work . . .

# I can't retire!!



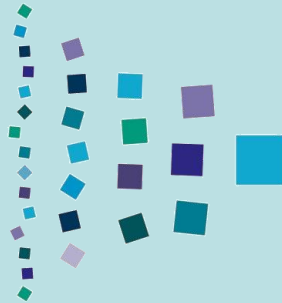
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