

# PROTECT ASSOCIATION

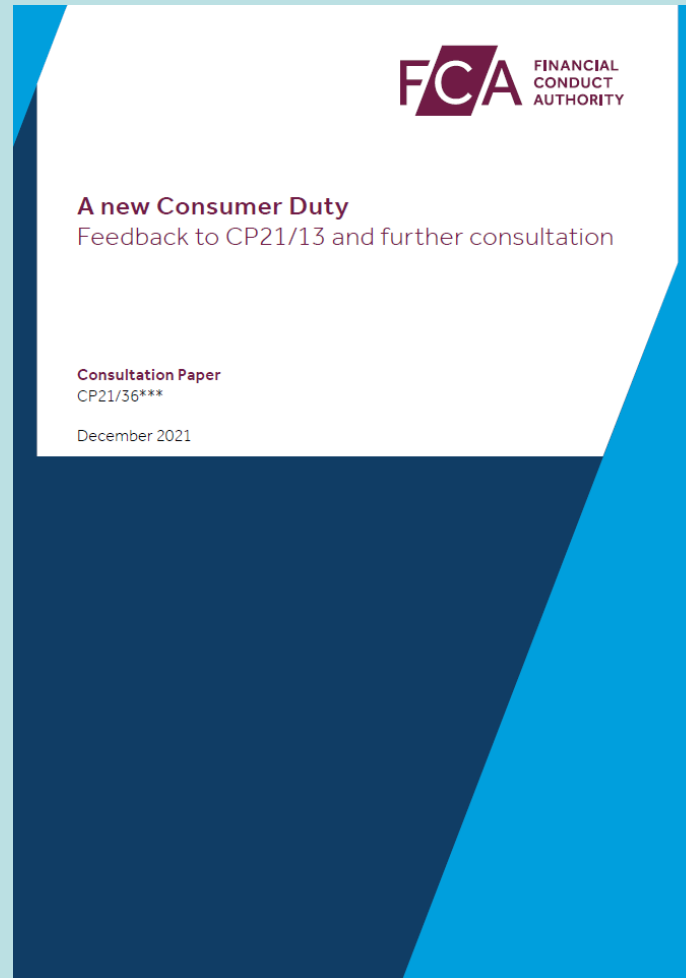
January 2022

A Consumer Duty

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REGULATORY  
COMPLIANCE  
TRAINING



# Nearly final proposals



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# What are we are looking at?

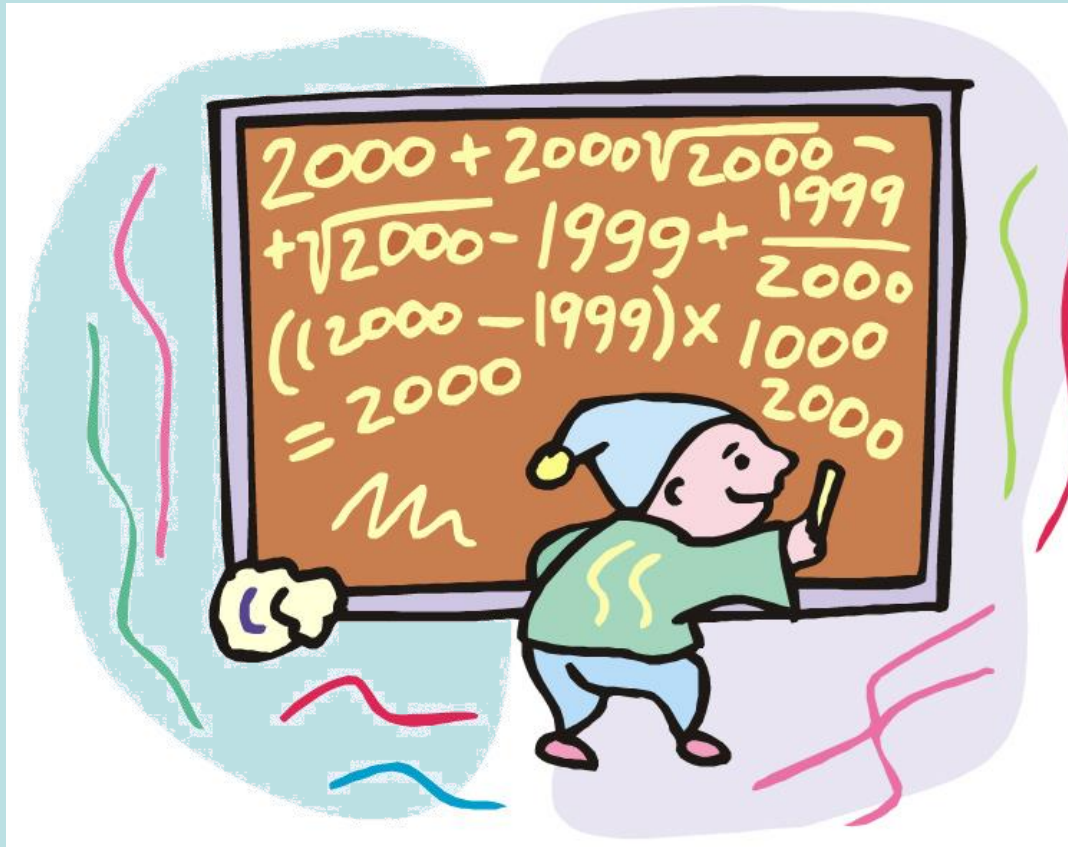
- It couldn't be simpler - a regulatory regime to be based upon firms demonstrating meeting a “Consumer Duty” – but . . .
- It could not be more complex – 257 pages to set out the proposals, rules, the expectations and justifications for that Duty
- In many ways the new Duty changes little of substance for the insurance sector – but . . .
- It will still have a massive impact on your compliance obligations

# The structure of this Webinar

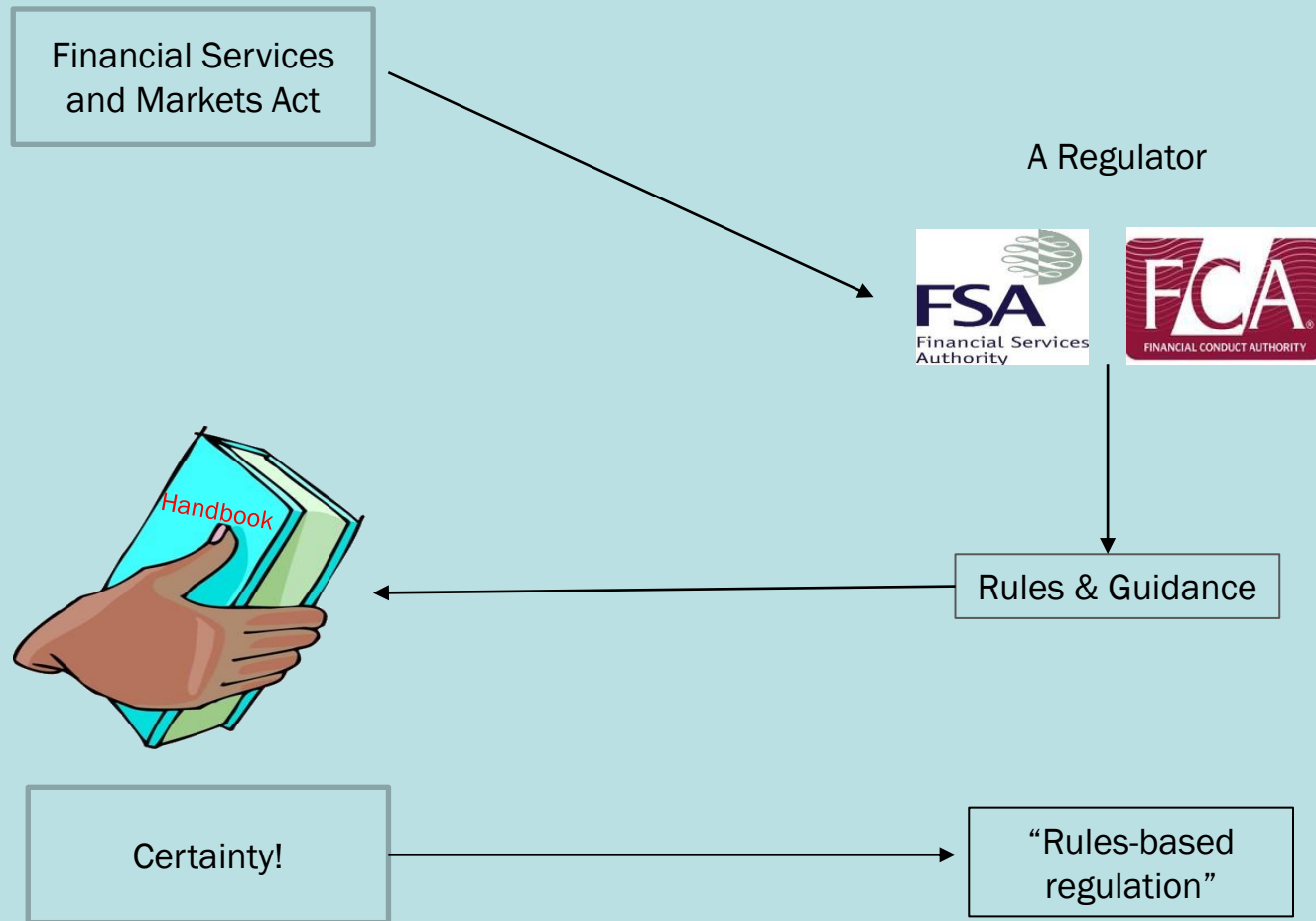


- A quick look at the regulatory background and context for the proposals
- An overview of the proposals
- My thoughts as to the implications for firms in the insurance sector

# Background and context



# Financial Services and Markets Act 2000

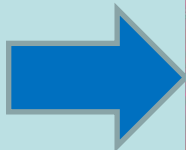


# Rules-based regulation lasted all of eight years . . .

- The “PPI scandal” made the regulator aware that firms might “follow the rules” but poor outcomes for consumers still occurred
- The reasons for these poor outcomes were more to do with culture and commercial pressures than any widespread rule breaking
- So, the FSA changed its approach – to create “Principles-based regulation”
- Even if a firm followed all the rules – did the firm also operate fully in line with “Principles for Business”?
- “Principles-based regulation” is regulation based on eleven “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>

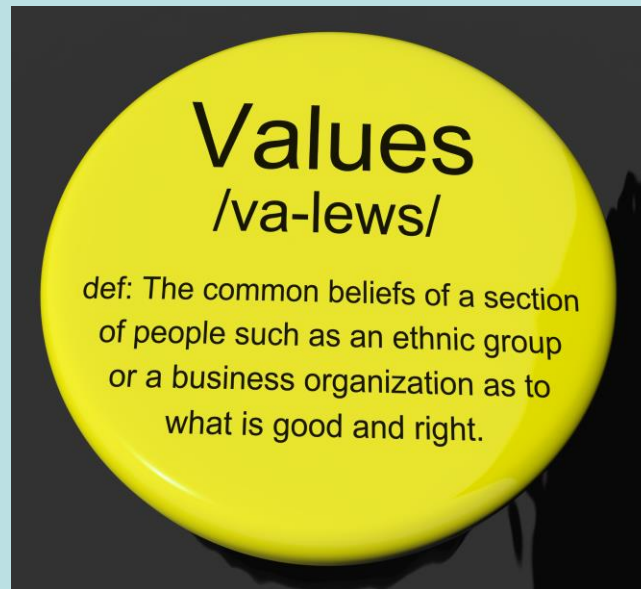




# The (“good consumer”) TCF Outcomes

- **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

# Nothing you hear today will change that



Principles (and outcomes) based regulation will remain the basis upon which the FCA will regulate all firms

# But - in the insurance sector, there are already further requirements . . .

- Because of the implementation of the IDD in 2018 . . . .
  - A “customers best interests' rule” (ICOBS 2)
  - Product Governance and Oversight regulation (PROD 4)
- Specific Guidance on “Value in the Distribution Chain
- Value measures reporting . . . .

# When looking at the new Consumer Duty

- You need to be aware that the rest of FCA regulated firms are not subject to any, or all, of these additional requirements, as placed on insurance distribution
- The Consumer Duty is (to a great extent) the FCA catching all other firms up to standards already detailed for insurance distributors
- In terms of fundamental regulatory requirements, the Consumer Duty will add little for insurance firms
- For all other regulated firms, it will be a very significant learning curve

So – nothing for us to worry about?



There is plenty to worry about



# An Overview of the Proposals



# The basic proposal couldn't be simpler

- A new Principle for Business (No 12) will be added to the eleven existing Principles
- The new Principle will read:-

**“A firm must deliver good outcomes for retail customers”**


- For all ICOBS regulated activity, Principle 12 will replace Principle 6 (TCF) and Principle 7 (clear, fair and not misleading communications)



# But - this is just the tip of a new regulatory iceberg



# Let's look at the tip of the iceberg first



## Consumer Principle

A firm must act to deliver **good outcomes** for retail customers

# The FCA's fundamental expectation . . .

- *“Under the Consumer Duty we would expect firms to consider the likely outcomes their customers will receive from product or service design - and through their full lifecycle. We would expect firms to monitor, assess, understand and be able to evidence the outcomes their customers are receiving*
- *Where firms identify that consumers are not receiving good outcomes, we would expect them to take appropriate action to rectify the causes*
- *Under the Consumer Duty, the firm's board or equivalent management body, will be responsible for assessing whether it is delivering good outcomes for its customers - which are consistent with the Consumer Duty”*

# For the insurance sector . . .

- This fundamental expectation for the delivery of good outcomes via product design should already be being delivered via compliance with PROD 4
- What is new is the **emphasis** – at this fundamental level, on:-
  - *The expectation that firms will monitor, assess, understand and be able to evidence that the outcomes their customers are receiving are in line with the Consumer Duty; and*
  - *The responsibility of the firm's board, or equivalent management body, for assessing whether it is delivering good outcomes for its customers which are consistent with the Consumer Duty*

# This is where the difficulty begins . .

The FCA says . . . .

*“it must be clear that what is reasonable under the Consumer Duty is an **objective** test and not something that firms can define for themselves. We have introduced an objective standard which firms need to comply with based on the tortious concept of how a reasonable, prudent firm would act. We know that firms are already familiar with this concept due to existing duties at common law”*

# A huge change . . .

- Rules-based regulation told you what to do
- Principles-based regulation told you what was expected of you
- The Consumer Duty is “an **objective** test” which you **must pass**

# What is the “pass mark”?

- The Consumer Duty is underpinned by a concept of **reasonableness**
- The FCA say:-

*“Our draft rules and non-Handbook guidance should all be interpreted in line with the standard that could be reasonably be expected of a prudent firm:-*

*carrying on the same activity in relation to the same product or service,*

*and*

*with the necessary understanding of the needs and characteristics of its customers”*

So - the standard to which you must operate to meet the Consumer Duty is that . . .



Your firm must do everything which a prudent firm should reasonably be expected to do in order to deliver good outcomes for retail customers



# Which begs the next question . . .



What is reasonably expected  
that a prudent firm should do  
in order to meet the  
Consumer Duty?

This is where the second part of the iceberg comes into play

### Cross-cutting Rules

Firms must

1. act in **good faith** toward retail customers
2. avoid **foreseeable harm** to retail customers
3. enable and support retail customers to pursue their **financial objectives**

# The FCA say that these Cross-cutting Rules . .

- Develop “overarching expectations for behaviour”
- Apply across all areas of firm conduct
- Set out how firms should act to deliver good outcomes, and
- Inform and help firms interpret the four Outcomes (see later)

# The Cross-cutting Rules are tests to be passed . . .



- Have you, at all times, in all areas of your conduct:-
  - acted in good faith towards retail customers?
  - avoided causing foreseeable harm to retail customers?
  - enabled and supported retail customers to pursue their financial objectives?

# Retail Customers?



For the purpose of the application of the Consumer Duty, a Retail Customer is (broadly) any policyholder/prospective policyholder to whom ICOBS applies – so this includes commercial customers

# How do you set about meeting the Cross-cutting Rules?



# Acting in good faith . . .

- The Rules say that “acting in good faith is a standard of conduct characterised by honesty, fair and open dealing and acting consistently with the reasonable expectations of retail customers”
- There is guidance as to what this would, and would not, involve
- This guidance will state that the rule does not create a fiduciary duty for your firm, where one does not otherwise exist

# Avoiding foreseeable harm . . .

- This is both a reactive, and proactive, obligation – thinking ahead and dealing with issues
- Therefore, the FCA will expect firms to “conduct regular reviews”
- If a harm were not foreseeable at the outset, but later becomes foreseeable, the FCA would expect firms to take the appropriate action to identify the risk of harm - and to mitigate it



# Enabling and supporting customers to pursue their financial objectives . . .

- The focus of this cross-cutting rule is on helping customers to make effective choices for themselves and to enjoy the use of the product and service they have purchased
- Guidance on this cross-cutting rule says that a firm providing a non-advised service can assume their customers' objective is the enjoyment and use of the product and service they have purchased
- Actions necessary to meet this Rule will include:-
  - ensuring that products (and support) are designed to meet, and not frustrate, the objectives and interests of customers;
  - making sure customers have the information and support they need, when they need it, to make and act on informed decisions; and
  - ensuring that customers can enjoy the use of their product or service without unreasonable barriers or delay (e.g. no lengthy waits on helplines)

# If . . .

- You are doing everything which a prudent firm should reasonably be expected to do in order to deliver good outcomes for retail customers; and
- You are acting at all times in good faith; and
- You are proactively ensuring that no foreseeable harm comes to your customers; and
- You are giving your customers all the support they reasonably need . . .



You will have navigated around the top two tiers of the iceberg



# And, in doing so will you have met . . .

- Five and a half pages of rules and guidance!
- The next level of the iceberg is much bigger . . . .

# The Four Outcomes

## Four Outcomes

1. Products and services
2. Price and value
3. Consumer understanding
4. Consumer support

Now we are looking at . .



A further 45 pages of Rules and  
Guidance!!!

# Rules and Guidance on the detail of . . .

- What firms must do to meet the Consumer Duty in terms of:-



- Product governance
- Price and value
- Customer understanding: and
- Customer support

# Some of this will sound familiar?

- Yes!
- Firms outside the insurance distribution sector do not, currently, have specific rules and guidance on **product governance, price and value**
- So how do the first two of the four Consumer Duty Outcomes work in the light of PROD 4 already applying to insurance distribution?



# PROD 4 overlap

- If your product is subject to the governance, value and pricing rules in PROD 4 (which insurance is) these overlap with the Products and Services and Pricing and Value Outcomes for the Consumer Duty
- You must continue to comply with PROD 4
- The FCA say meeting PROD 4 will “tend to establish compliance” with your obligations under the Products and Services and Pricing and Value Outcomes for the Consumer Duty
- Some work is going to be required, in the insurance sector, to examine where any differences lie which might “tend” to apply some differing or higher outcome required by the first two Consumer Duty Outcomes?
- In any event, the FCA says that the Consumer Duty, as a whole, is broader - and satisfying the existing rules in PROD is “unlikely to mean a firm meets all aspects of the Consumer Duty”

# The other two Consumer Duty Outcomes are “new”

- These are required Outcomes for:-
  - Consumer understanding
  - Consumer support
- Here, the insurance sector is not subject to, sector specific, overlapping rules
- So, we need to look at these in more detail

# The Consumer Understanding Outcome



# The Consumer Understanding Outcome

- Applies to:-
  - all firms involved in the production, approval or distribution of any retail customer communications,
  - all communications before, during, and after any sale of a product; and
  - interactions between retail customers and the firm that do not relate to a specific product;

and

- all communications, including verbal, visual or in writing, from a firm to a retail customer, regardless of the channel used or intended to be used for the communication

# The basic obligation

- A firm must ensure that it communicates information to retail customers in a way which is clear, fair and not misleading (that's current Principle 7)
- But there is (much) more – because a firm must further ensure that it supports retail customer understanding so that its communications:-
  - meet the information needs of retail customers;
  - are likely to be understood by the average retail customer intended to receive the communication; and
  - equip retail customers to make decisions that are effective, timely and properly informed

# Delivering “much more”

The Outcome is underpinned by a further two pages of detailed rules and guidance specifically setting the precise standards expected to deliver consumer understanding



# Testing and monitoring communications

- Firms must **test** their communications before they are issued to customers and must regularly **monitor** the impact of the communications once they are issued
- All firms are responsible – but:-
  - testing is the primary responsibility of the firm producing the communication; and
  - monitoring is the primary responsibility of the firm(s) interacting with customers receiving the communications
- If a distributor becomes aware that a communication is not delivering good outcomes (e.g. via complaints) it must act to avoid harm, including promptly informing the firm which produced it

# The Consumer Support Outcome





# The Consumer Support Outcome



- This Outcome applies to all firms who are responsible for interacting directly with, or providing support to, customers
- This includes outsourcers and all channels of interaction – whether before, during or after any sale

# The basic obligation

- A firm must ensure that it provides an appropriate standard of support to retail customers such that it:-
  - meets the needs of retail customers, including those with characteristics of vulnerability;
  - ensures that retail customers can use the product as reasonably anticipated; and
  - ensures that retail customers do not face unreasonable barriers (including unreasonable additional costs) when they make enquiries, amend or switch, submit a claim, make a complaint, or cancel

# Remember the TCF Outcome?

- “Consumers should be provided with products that perform **as firms have led them to expect**, and the associated service should be of an acceptable standard and **as they have been led to expect**”
- In consultation firms argued that customer service levels should be left to competitive pressures
- The FCA profoundly disagrees – and so do I!!!
- Communication with and support from your firm should be a pleasant and stress-free experience – as your customers expect!

# Now a bit of good news!



Despite pressure from consumer organisations the FCA is not proceeding (for now at least) with a legally enforceable consumer right of action to enforce the Consumer Duty

# Now the bad news



# The bad news

- The FCA has produced a further 72 pages of draft Non-Handbook Guidance on the Consumer Duty
- So, we will have 51 Pages of new Rules and Guidance for the Handbook
- We will have 72 pages of new Guidance outside the Handbook
- That is 123 pages of stuff for the FCA to check up on - to see whether you have reacted, as they wish and expect, to the new Duty
- And there is a further . . .

# A sting in the tail



# Toughening up the SM&CR

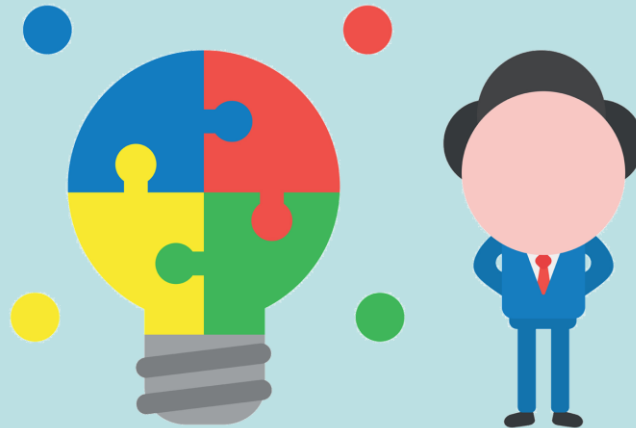
- A new Conduct Rule (6) will be added to apply to all staff
- **“You must act to deliver good consumer outcomes for retail customers”**
- The Cross-cutting Rules will apply at an individual level in support of new Conduct Rule 6
- Conduct rules staff will be personally required to:-
  - act in good faith towards retail customers;
  - avoid foreseeable harm to retail customers; and
  - enable and support retail customers to pursue their financial objective



# Proportionality

- The obligations under the new individual conduct rule would apply to the extent that is reasonable and proportionate
- This means that the scope of a person's job and their seniority may affect the scope of their duty under the new rule
- The more senior a person is, and the more relevant their role is to the Consumer Duty, the more the FCA will expect of them to deliver good outcomes for customers
- The FCA expects firms to provide relevant training to all their staff so that they understand their obligations under the Consumer Duty and the (extended) individual conduct rules

# My thoughts



# Preparing for the Consumer Duty

- For many firms outside the insurance sector this will be a mammoth task - as they grapple, for the first time, with concepts such as:-
  - an overriding responsibility to customer best interests;
  - “value”; and
  - prescriptive product governance and oversight rules
- Hopefully, insurance sector firms have already got to grips with these and are compliant with e.g. PROD 4 and the customers best interest rule
- The problem for all firms – and for the FCA – is that the standard for a Consumer Duty can still very subjective – one man’s good outcome is another man’s poor outcome
- To avoid this the FCA is clear that it sees the **process of meeting** the Duty to be objective standards – met by proving that your firm (at a senior management level) has engaged with, and can demonstrate, compliance with . . .

# What the FCA “expects” . . .



- 51 Pages of new Rules and Guidance for the Handbook
- 72 pages of new Guidance outside the Handbook
- That is 123 pages of stuff for the FCA to check up on to see whether you have reacted, as they wish and expect, to the new Duty

# As with “value” . . . .

- The FCA may agree or disagree with a subjective view of an outcome
- To enforce the Duty the FCA will seek to prove a failure by a firm to engage with the rules and the guidance - and any failure to have processes in place to deliver the Outcomes which the Duty requires
- The FCA itself will have to undertake massive internal training programmes (sector by sector) to get its people able to engage with firms on this
- Your firm, also, will have to undertake massive training – followed by massive internal projects to ensure that the FCA cannot “catch you out” on any shortcomings under those 123 pages of rules and guidance
- Therefore, we will finish with a look at . . .

# Monitoring and Supervision



# Firm Monitoring

- In Chapter 14 of CP21/36 the FCA sets out its “expectations of firms monitoring consumer outcomes”. It will expect firms to:-
  - monitor and regularly review the outcomes that their customers are experiencing;
  - ensure that the products and services they provide are delivering the outcomes that they expect in line with the Consumer Duty;
  - identify where they are leading to poor outcomes or harm to consumers;
  - have processes in place to adapt and change products/services or policies/practices to address any risks or issues which might breach the Duty; and
  - be able to demonstrate how they have identified and addressed issues leading to poor outcomes

# FCA Supervision





# The iron fist in the velvet glove . .

- “We do not propose to require firms to report on specific metrics . . . “
- “ . . . but firms need to ensure that they can demonstrate effectively how they are monitoring the outcomes that their customers receive, identifying harm or risk of harm and addressing the issues that they identify”
- If asked, we would expect firms to be able to explain how they reached a decision on the most appropriate intervention, demonstrate how it has addressed the concerns that they identified, and delivered good consumer outcomes and, if it has not, what they have done further to address the issue
- All of this under the hammer of the new increased SM&CR individual responsibilities
- That means . . .

# A fundamental expectation



The FCA says that it would “expect a firm’s board, or equivalent management body, to consider a report from the firm assessing whether it is acting to deliver good outcomes for its customers which are consistent with the Consumer Duty, **at least annually**”

# Increased governance and process

- The assessment should include:-
  - the results of any monitoring that the firm has undertaken to assess whether their products and services are delivering the outcomes that they expected;
  - new and emerging risks to good outcomes for consumers;
  - any evidence of consumers or groups of consumers who are not achieving good outcomes and an evaluation of the impact and the root cause;
  - any evidence of consumers or groups of consumers who have characteristics of vulnerability and are not achieving good outcomes;
  - actions taken to address any risks or issues, and
  - whether the firm's future business strategy is consistent with it acting to deliver good outcomes under the Consumer Duty

# And . . . .

Before signing off the assessment, the board or governing body of a firm should agree the action required to address any issues which are impacting the firm's ability to act to deliver good outcomes and agree whether any changes to the firm's future business strategy are required



# When the FCA visit (or the email, or the telephone call) comes . . .



“We have not introduced specific record keeping requirements, but we would expect firms to comply with existing rules on record-keeping which require firms to have records that are sufficient to enable us to monitor the firm’s compliance with regulatory requirements, including the Consumer Duty”

# The Consumer Duty is coming

Please send us your comments by 15 February 2022. We expect to publish the policy statement summarising responses and to make any new rules by 31 July 2022.

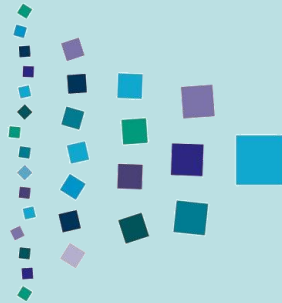


## Start getting ready now!!!!

# For more information contact

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