

Consumer and Retail Policy
Financial Conduct Authority
12 Endeavour Square
London
E20 1JN

By email to cp21-36@fca.org.uk

15 February 2022

Dear Sir/Madam,

FCA Practitioner Panel Response to CP21/36 – A new Consumer Duty

The Panel is pleased to see that following consultation in CP21/13 last year the FCA has taken on board the very serious concerns of the Panel, and the broader industry, that some of the proposals as worded could have resulted in very serious unintended consequences for consumers. We believe the focus can now move to pragmatic implementation of a significantly higher standard of conduct for firms.

Timescales

Our principal concern is the proposed timescale for implementation of what, for many firms, will be a substantial piece of work, being carried out alongside many other regulatory changes. We appreciate that the FCA is obliged by statute to publish the rules by 1 August 2022, but implementation by the following April will be extremely challenging. We need to find a practical way through which reconciles the need to deliver with the challenges of implementation for both industry and the FCA – and without unnecessarily putting significant operational risk across the whole industry. The burden on the FCA itself, as it shifts towards more outcomes-based regulation, will also be considerable, at a time when it is undergoing wider transformation. We encourage the regulator to learn from other initiatives such as the GI pricing practices work, and to set realistic timescales, potentially including a phased approach, for implementation, both for itself and for the industry, and to think very hard about the timelines for implementing internal and external change, across all sectors, at the same time. On the product review side details of the framework for a two-stage timeline are needed as soon as possible to give firms ample time to understand the implications before implementation.

Retrospection

We understand that it is not the FCA's intention to apply the new consumer duty retrospectively. The expectation, however, that firms should make an assessment of contracts held by existing customers, which might lead to the need to change terms, requires further clarification, as we are concerned that this is in effect retrospection.

Consumer responsibility

More clarity around the definition of consumer responsibility would be welcome. We appreciate that firms need to make conditions right for consumers to make informed decisions, but it would be helpful to have further examples of how this might work in practice. In our response to DP21/5 – Compensation Framework Review we make the point that, as it currently operates, the FSCS provides a perverse incentive for consumers to take a greater degree of risk knowing the fund will pick up the bill. Further

clarity in implementation of the new consumer duty about where the responsibility of the consumer lies would help to resolve this issue.

Interaction with other regulators and initiatives

Given the likely cost and impact of the changes which will result from this initiative we would like to see more insight on how it will interact with existing rules, how Supervision/Policy will work to make consistent progress, and the interaction with other areas of the regulatory family. For example, the recent consultation on improving outcomes in non-workplace pensions made explicit reference to the new consumer duty, whereas the joint consultation between the FCA and TPR on value for money in occupational pensions did not.

There are, however, references in the consultation to areas of co-operation with FOS and TPR. We recommend also involving the SRA, in order to avoid potential regulatory arbitrage. We would also like to see how the regulators intend to resolve issues where the rules are not necessarily aligned and whether there is any appetite to use the highest common denominator rather than the lowest.

Costs of implementation

We recommend that industry should be explicitly encouraged to record the costs of implementation as it proceeds, in order to keep track of costs, ensure the benefits were worthwhile and to learn for the future. The CBA put costs at between £700m and £2.4bn which is a very broad range. In comparison, implementation of Open Banking, which has taken some time, was in the middle of that range.

Innovation

The new Consumer Duty is a real change to the way regulation works. We believe the FCA should use this as an opportunity to explore how it could be used to drive innovation and change in the future, particularly given the potential for more flexibility in a post-Brexit regulatory context. For example, we recommend taking the opportunity for further scrutiny of the advice/guidance boundary and the scope to use data about clients to provide them with better outcomes without inadvertently breaching data security requirements.

The use of examples of good and poor practice in the draft guidance is welcome and we encourage the FCA to make more use of these to help firms understand better what is required of them.

We support the work on the consumer duty and look forward to engaging further as it progresses.

Yours faithfully,

[signed]

Paul Feeney
Chair, FCA Practitioner Panel